



RESEARCH REPORT

**Regulation & Repression
of Civil Society through
the Financial Action Task
Force (FATF) Recommendation 8:**

How a Restrictive Interpretation
Limits Civil Society Contributions
to Development in Africa

Author

Ruwadzano P Makumbe

www.wacsi.org

**Ford
Foundation**



Regulation and Repression of Civil Society through the Financial Action Task Force (FATF) Recommendation 8: How a Restrictive Interpretation Limits Civil Society Contributions to Development in Africa

This publication was authored by Ruwadzano .P. Makumbe while serving as a Research Fellow at WACSI. The Research Fellowship Programme was supported by the Ford Foundation.

Copyright WACSI 2023

All rights reserved. No part of this publication may be used or reproduced in any manner without written permission of the Institute except in the case of brief quotations embodied in critical articles and reviews.

Disclaimer:

The author remains responsible for any errors and omissions in this report.

For more information, write to:

West Africa Civil Society Institute (WACSI)
P.O. Box AT1956 Achimota
Accra, Ghana

Email: info@wacsi.org

Tel: (+233) 303937264

Cite as: Makumbe., R., P., (2023), Regulation and Repression of Civil Society through the Financial Action Task Force (FATF) Recommendation 8: How a Restrictive Interpretation Limits Civil Society Contributions to Development in Africa, West Africa Civil Society Institute, Accra, Ghana



I Introduction



Photo source: Unsplash

The contributions of civil society through development initiatives have been instrumental in addressing various socio-economic challenges societies face. For instance, there is evidence that community-based intervention packages have had a substantial impact on child and new-born mortality in Mozambique. On the political front, in Senegal, civil society initiatives contributed to the 'downfall of former president Abdoulaye Wade, his son and heir apparent, Karim Wade, and a number of formerly powerful members of his government' who were accused of corruption. Civil society organisations (CSOs) have also filled the gaps left by governments' failures to deliver reliable and efficient public services and address some of the challenges faced in communities.

Efforts to shrink civic space by policing the work of civil society organisations has primarily been premised on governments' efforts to evade being held accountable.

This has taken different forms, the most common being distorting the narrative on the agenda of civil society organisations. CSOs are negatively labelled as being rooted in interfering with politics and enforcing political ideations of Western institutions which make up much of the sources of funding for

civil society activities. CSOs have constantly faced backlash and in the most recent past, there has been instrumentalisation of counter-terrorist and anti-money laundering laws and regulations. The framework of the Financial Action Task Force (FATF) Recommendations is often the basis of these broad and vague laws that give governments extensive powers to investigate and prosecute suspects and also infringe on the rights of critics. Although terrorist activities around the world including in the United States of America, the United Kingdom, Kenya, Mali and Pakistan to mention a few give cause for concern, there are some governments that have put in place measures where there is no threat or real risk of terrorism. As a result, these measures are a tool used to silence and stifle fundamental freedoms including for journalists and other civil society actors.

Instances of these laws and policies in Africa can be drawn from Zimbabwe, Ghana and Eswatini. In Ghana, through the Directives for the Management of Non-Profit Organisations (NPOs) Operations, the government established the NPO Secretariat which serves a number of functions including

1. J Ricca and others, 'Community-Based Intervention Packages Facilitated by NGOs Demonstrate Plausible Evidence for Child Mortality Impact' (2014) 29 Health Policy and Planning 204.

2. André-Michel Essoungou, 'The rise of civil society groups in Africa.' United Nations, Africa Renewal, December 2013. Available at, <https://www.un.org/africarenewal/magazine/december-2013/rise-civil-society-groups-africa> Last accessed 15 August 2022.

3. 'In the Name of Security: Counterterrorism Laws Worldwide since September 11' (Human Rights Watch 2012) <<https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11>> accessed 15 September 2022.

the establishment of standards, directives and codes of practice in collaboration with the NPO sector. The secretariat is given the power to decide whether or not an organisation can be registered and whether organisations already registered are following the standards set by the secretariat. In Zimbabwe, the Parliament passed the Private Voluntary Organisations Act in December 2022, which the government has argued is meant to address 'growing concerns about money laundering and terrorist financing activities in the region.'

As in other jurisdictions where such a law has been passed, the language used in the Bill is derived from FATF Recommendation 8. Recommendation 8 requires governments to monitor the operations of CSOs with the aim of minimising money laundering and terrorism through civil society institutions.

This article reflects on three questions, (1) how have governments legitimatised civil society policing and abuse through FATF Recommendation 8? (2) how is the international human rights framework challenging a restrictive interpretation of FATF Recommendation 8? (3) what key recommendations can governments implement to ensure that civil society organisations can contribute to development in Africa? To address these pertinent questions, the study relies on a desk review of laws and policies and reports prepared by governments and civil society institutions. A socio-legal approach is adopted to conduct an in-depth-analysis of the issues influencing and consequential to a restrictive interpretation of the FATF framework.

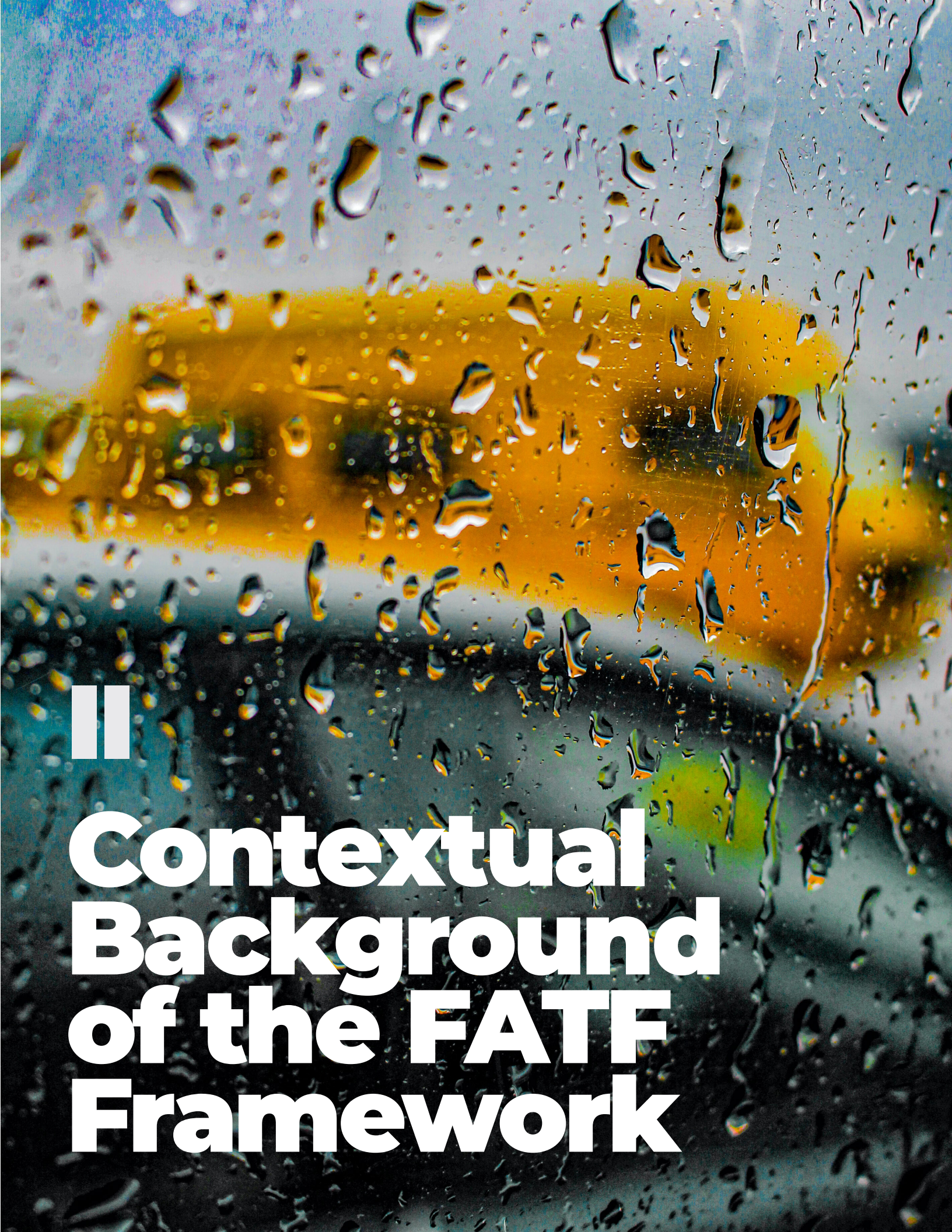
The article is divided into four parts. First, the FATF framework is explained, including how it was developed and how it is being applied. Second, the analysis is contextualized by discussing how anti-money laundering and counter-terrorism financing regimes are restricting CSOs' operations in Africa. This is done by conducting a country situational analysis of eight countries. Third, the article explores the international human rights framework on counterterrorism and how it challenges a restrictive interpretation of Recommendation 8. Finally, the article provides key recommendations to governments including the need to develop measures grounded in evidence-based proportional approaches that are relevant to the context and the challenges faced in particular countries.



Photo source: Unsplash

4. Directives for the Management of Non-Profit Organisations (NPOs) Operations in Ghana.

5. Sikhululekile Mashingaidze, 'NGOs in Zimbabwe under threat — and not for the first time.' Mail and Guardian, 22 July 2022.



II

Contextual Background of the FATF Framework

On 11 September 2001 'elaborate, precise, and destructive' attacks were carried out on the World Trade Center and the Pentagon in the United States of America. These attacks resulted in the death of more than 2,600 people at the World Trade Center, 125 people at the Pentagon and 256 people on the four planes that crashed into the buildings. These attacks were considered acts of terrorism, and one area of focus was how the terrorists were able to raise and move the money necessary to finance the attacks. The 9/11 Commission Report noted that 'To date, we have not been able to determine the origin of the money used for the 9/11 attacks. Al Qaeda, the alleged perpetrators, had many sources of funding and a pre-9/11 annual budget estimated at \$30 million.' The investigations showed that there had been many overlooked areas which made it possible for the attacks to be carried out. A key finding was that prior to 9/11, for instance, there had not been any information-sharing relationship with Saudi Arabia (one of the Taliban's only travel and financial outlets), which would have allowed for tracing and disruption of terrorist financing. The report also found that charities were a funding source for the Al Qaeda. They relied on sympathisers working in organisations with weak external oversight and ineffective internal controls. In other cases, Al Qaeda operatives controlled the organisations such that they had access to bank accounts.

Following these events, terrorism has become an overriding concern of national security influencing operations, policies and laws in the USA and globally. One of the strategic approaches has been to recognise that terrorism threats anywhere in the world are a real threat to America and other Western countries. This has resulted in initiatives and international standards being designed to identify vulnerabilities and threats related to terrorist activities. In October 2001, the Financial Action Task Force (FATF), an inter-governmental institution, broadened its mandate 'to incorporate efforts to combat terrorist financing, in addition

to money laundering.' The objectives of the FATF include to 'set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.' The FATF Recommendations precisely set these standards, and the Task Force monitors countries' progress in implementing the recommendations. The recommendations are comprehensive, providing international standards that can be contextualised to the circumstances of different domestic situations.

They also emphasise that it is important for countries to identify, assess and understand the risks and vulnerabilities to money laundering and terrorist

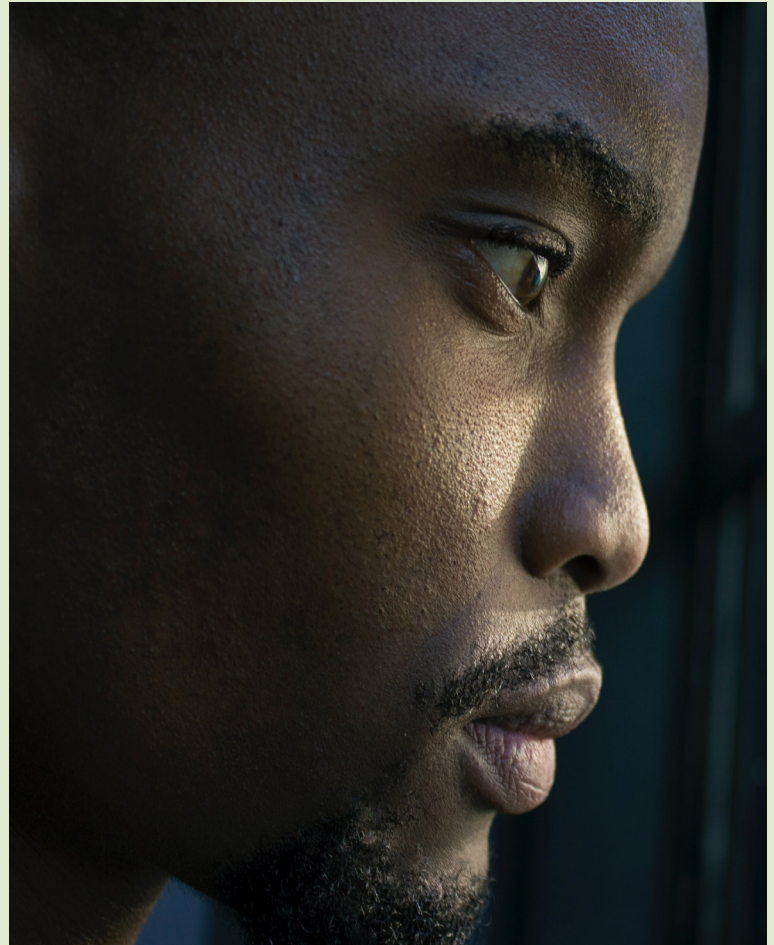


Photo source: Unsplash

6. THE 9/11 COMMISSION REPORT: Final Report of the National Commission on Terrorist Attacks Upon the United States. Available at, <https://govinfo.library.unt.edu/911/report/911Report.pdf> (Last accessed on 4 August 2022).

7. Executive Summary of the Commission Report. Available at, https://govinfo.library.unt.edu/911/report/911Report_Exec.htm

8. Ibid.

9. Commission Report at pages 170-171.

10. Commission Report at page 362.

11. FATF (2012-2022), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France, www.fatf-gafi.org/recommendations.html



Photo source: Unsplash

financing that they face and then adopt appropriate measures to mitigate these risks. This is important because, 'the risk-based approach allows countries ... to adopt a more flexible set of measures, in order to target their resources more effectively and apply preventive measures that are commensurate to the nature of risks, in order to focus their efforts in the most effective way.' This also contributes to proportionally developing measures and guarding against an overly restrictive approach that may infringe on constitutional freedoms. An important factor that the FATF raises is the importance of close collaboration between different sectors in the development and design of measures. As efforts to prevent money laundering and terrorist financing are complex, civil society contributions are essential as they also factor in the challenges that may arise as a result of restrictive approaches whilst identifying areas where accountability and transparency in their operations could be a point of focus.

Of particular importance to this article is Special recommendation 8, which places focus on the non-profit sector as highly vulnerable and a target of abuse. It requires countries to undertake a domestic review of their entire civil society sector or have the capacity to obtain timely information on the

activities and other relevant features and review the adequacy of laws and regulations that relate to the portion of the civil society sector that can be abused for the financing of terrorism. It has been the basis for restrictive policy formulations on the operations of civil society organisations globally. For instance, in 2007 the World Bank conducted a FATF mutual evaluation and found Sierra-Leone non-compliant with Recommendation 8. It recommended that the government introduce a 'legal framework for the regulation of NPOs' and 'dissuasive and proportionate' sanctions for organisations that fail to comply with the regulations. This resulted in the introduction of the Revised NGO Policy Regulations of 2009, which contribute to the shrinking civic space in Sierra-Leone. Further, in Nigeria, the government has categorised all civil society organisations as reporting entities, thus imposing restrictive measures on civil society organisations. This can fairly be described as arbitrary as there has not been an 'assessment of the nature of threats posed by terrorist entities, as well as how terrorist actors abuse those NPOs in Nigeria.'

Civic space and the freedom for CSOs to operate in various African countries is continuously being threatened by the introduction of policies and laws that restrict them. This is concerning given that the FATF recommendations is little known and understood, particularly recommendation 8 by civil society actors. The importance for civil society organisations to understand the recommendations cannot be overstated, given that many of the regulations thwarting civic space are derived from them. In the discussion below, a country situational analysis is conducted looking at how restrictive laws are being used to stifle civic space in Africa.

Civil society has evolved and transformed over the years, adopting new approaches and strategies to address the challenges arising in society. As civil society's capacity, reach, and impact has grown, the challenges it faces have also shifted. For instance, civil society organisations are increasingly being

12. Ibid at pages 7 and 8.

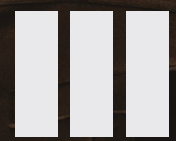
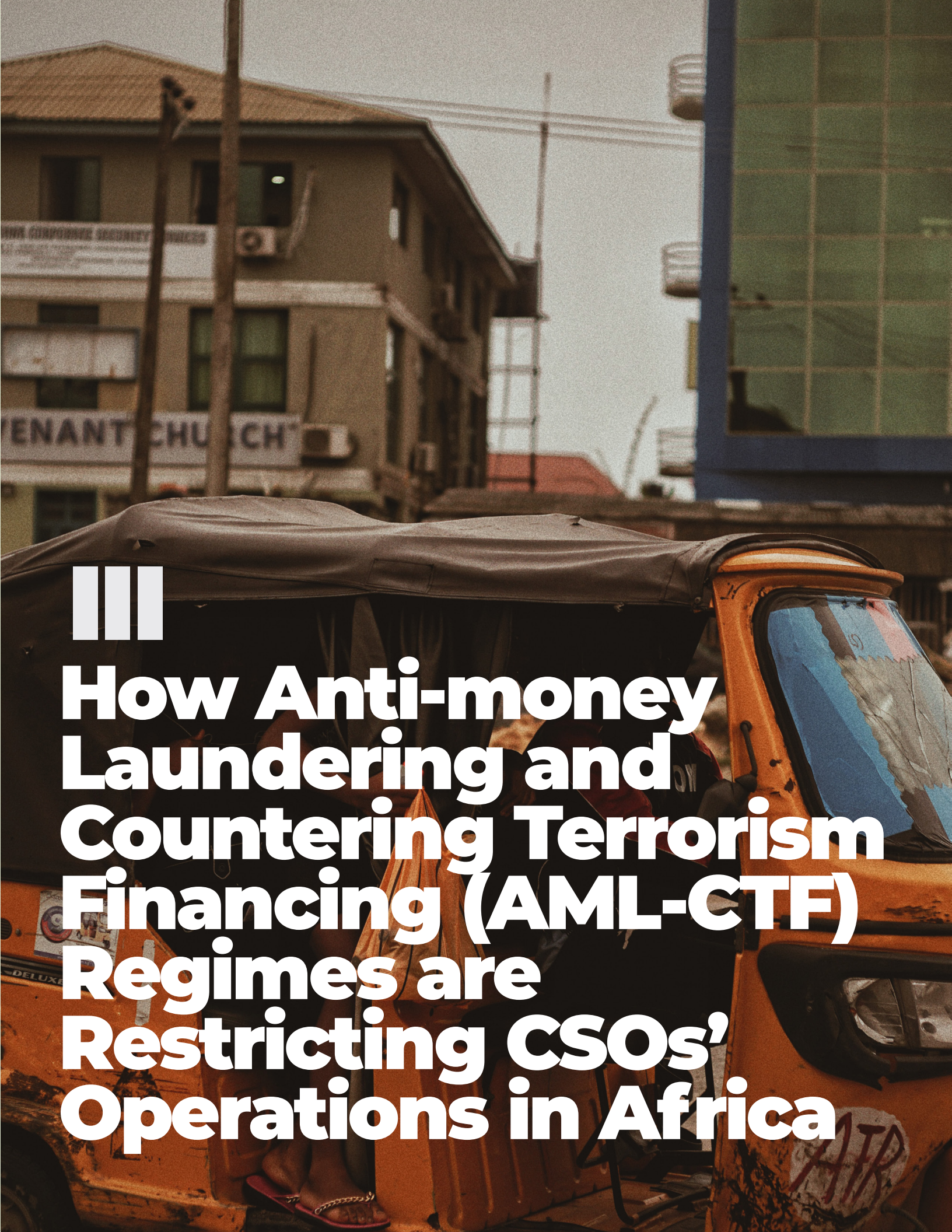
13. Ibid at page 8.

14. Ibid at page 9.

15. Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, Council of Europe: Non-Profit Organisations. See, <https://www.coe.int/en/web/moneyval/implementation/non-profit-organisations>.

16. 'Best Practices Paper on Combating the Abuse of Non-profit Organisations', Financial Action Task Force, 2015 FATF/OECD at page 11.

17. Inter-Governmental Action Group Against Money Laundering in West Africa (2007) Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism: Sierra Leone, 12th June 2007.



How Anti-money Laundering and Countering Terrorism Financing (AML-CTF) Regimes are Restricting CSOs' Operations in Africa



Photo source: Unsplash

called to respond to 'a new civic agency that expands the political dimensions of civil society, embracing its more political functions beyond traditional service delivery.' The last decade has seen many governments cracking down on civil society organisations in the name of strengthening counterterrorism. The legacy of the 9/11 attacks is reflected in the thwarting of fundamental freedoms, including freedom of expression and association. Non-governmental organisations whose work involves human rights, politics and economic activism have been targeted, and these efforts to shrink civic space have been well explored. Efforts to shrink civic space and control the work of civil society organisations by governments is not a phenomenon only present in Africa. In its 2021 report, the International Center for Not-For-Profit Law highlighted that the world over 'more than 100 countries have proposed or enacted 244 different measures that have restricted, repressed, or shut down civil society since 2013.'

African governments have responded to the Global North's call for monitoring terrorism and money laundering by effecting new anti-terrorist laws. These laws have also been a pretext to

quash criticism from civil society actors, including human rights defenders and anti-corruption activists. Terrorism is often widely and vaguely defined, making many civil society organisations susceptible to being targeted and prosecuted. The use of subtle methods to stifle civil society through "administrative crackdown," or the passage of anti-NGO laws to create barriers to NGO advocacy, entry, and funding is becoming common. In as much as these methods are subtle, they indicate governments' interest in ensuring that civil society organisations are limited in their scope of activities to challenge repression and increased human rights violations.

The task force has highlighted that it is important for governments to conduct assessments and identify the money laundering and terrorist financing risks that they may be exposed to. This will help design appropriate and responsive strategies and measures to mitigate and address the identified risks. Where this assessment process is not conducted, there is a risk that the strategies that are designed will not be contextual but based on what may be best practices in different contexts where a different set of realities exist. The task force underscores that 'the risk-based approach is central to the effective implementation of the FATF Standards and also applies to financial institutions

18. GIABA (2021), Anti-money laundering and counter-terrorist financing measures – Federal Republic of Nigeria, Second Round Mutual Evaluation Report, GIABA, Dakar at page 217. Available online at, <https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/GIABA-Mutual%20Evaluation%20Report%20of%20the%20Federal%20Republic%20of%20Nigeria.pdf>

19. Rupert Graf Strachwitz and Stefan Toepler, 'Contested Civic Spaces in Liberal Democracies.' Nonprofit Policy Forum 2022; 13(3): 179–193.

20. Carothers, T., & Brechenmacher, S. (2014). Closing space: Democracy and human rights support under fire.

Carnegie Endowment for International Peace. See also, Chaudhry, S. (2022). The assault on civil society: Explaining state crackdown on NGOs. International Organization, 1–42. doi:10.1017/S0020818321000473 and Dupuy, K., Ron, J., & Prakash, A. (2016). Hands off my regime! Governments' restrictions on foreign aid to nongovernmental organizations in poor and middle-income countries. World Development, 84, 299–311. doi: 10.1016/j.worlddev.2016.02.001.

and designated non-financial businesses and professions.’ This means that designing strategies and measures not informed by the possible risks will result in uninformed measures that may not necessarily be warranted or may be abused to thwart other freedoms. To efficiently conduct the assessments, countries have the autonomy to determine their assessment methods. The task force also provides guidelines on terrorist financing risk assessment and on national money laundering and terrorist financing risk assessment.

One of the impacts of poor or lack of adequate prior assessments in the adoption of a restrictive approach of recommendation 8 is the increased restrictions on the operations of civil society organisations. When the work of CSOs is interfered with, they fail to hold governments accountable and instead direct their efforts towards countering threats and harassment that they will be subjected to. As such, understanding how governments are using administrative measures to interfere with the work of CSOs provides a starting point for addressing them. Laws and policies imposed by governments have far-reaching effects and, in most cases, may result in NGOs closing down. For example, in 2009, the Ethiopian government adopted a law prohibiting CSOs from receiving more than 10 percent of their overall funding from foreign donors. While 2275 organisations were in operation by the end of 2009, only 1701 were still in operation by the end of 2011. Further, of the 125 organisations working on human rights that previously existed, only 12 or 13 remained operational. The next section represents a situational analysis of developments within eight African countries. It highlights government actions in relation to repression of CSOs through anti-money laundering and terrorist financing laws. It is apparent from the analysis that the impact and effects of such laws are common, and the overall recommendations provided in this study are applicable in different situations, paying attention to the contextual demands.

Niger

The situation in Niger has continued to intensify with increased administrative efforts to thwart civil society activities in the country. Civil society organisations have highly criticised the 2018 Finance Law, and the most recent, 24 February 2022 decree by President Mohamed Bazoum which supplements the 1984 ordinance on the regime for associations. Article 4 of the decree provides that **“the exercise of the activities of Non-Governmental Organisations is subject to prior authorisation or approval by the Minister of the Interior.”** It gives the state power

Photo by Mostafaft Shots via Pexels

21. International Center for Not-For-Profit Law. (2021). The civic space initiative. Retrieved December 10, 2021, from <https://www.icnl.org/our-work/global-programs/the-civic-space-initiative>

22. Chaudhry, S. (2022). The assault on civil society: Explaining state crackdown on NGOs. *International Organization*, 1–42. doi:10.1017/S0020818321000473.

23. ‘Money laundering and terrorist financing risks,’ Financial Action Task Force. Available online at, <http://www.fatf-gafi.org/publications/methodsandtrends/documents/ml-tf-risks.html> Last accessed on 9 September 2022.



Photo source: Unsplash

to control the work of civil society actors, which means that the state can inhibit CSOs from criticising it or holding governmental institutions and representatives accountable. The West Africa Civil Society Institute (WACSI) observed that the decree:

'places an overwhelming bureaucratic toll on civil societies to register as legal entities, renew their licenses, and/or carry out activities (Articles 4, 5, 8, 37 and 39), obtain funding (Article 34), activity plans and projects (Articles 40, 41 and 44), as well as the use of their assets (Article 27). What is even terrifying is the fact that the decree makes it clear that civil society projects or activities must be aligned with the national development agenda and priorities, and any organisation which acts contrary risks losing its license to operate.'

This legal instrument is intended to control the work of civil society institutions by influencing how CSO initiatives and projects are designed. This has the potential to limit the scope of the work that CSOs can do particularly in relation to contributing towards development in Niger.

Nigeria

For the last decade, Nigeria has adopted a restrictive interpretation of recommendation 8, resulting in the harassment and targeting of both individuals and organisations they represent. In September 2019, the

organisation, Action Against Hunger in Maiduguri was accused of aiding the terrorist activities of Boko Haram. They were forced to close down their offices without investigations being conducted. Similarly, in 2020 authorities froze the bank accounts of #EndSARS campaigners in Nigeria on suspicion of terrorism financing.

However, more recently there has been a turning point in Nigeria's approach. In 2020, following years of CSOs' lobbying and negotiations with the government, the Nigerian government has set an example for other countries by adopting the recommendations put forward by CSOs. This has culminated in the adoption of the Money Laundering (Prevention and Prohibition) Bill, 2022, the Terrorism (Prevention and Prohibition) Bill, 2022, and the Proceeds of Crime (Recovery and Management) Bill, 2022. These laws are progressive to the extent that they respect the independence of CSOs. Section 30 (Interpretative Section) of the Money Laundering (Prevention and Prohibition) Act, 2022, effectively removes non-profit organisations from its definition of designated non-financial institutions (DNFIs). This provides a best practice in law-reform and for actual progress to be recorded, the implementation of the laws ought to be monitored.

Ghana

Ghana's response strategy to terrorist financing and money laundering is greatly informed by its close proximity and vulnerability to terrorism-prone countries, such as Nigeria, Cote d'Ivoire, Mali, Niger and Chad. There is, therefore, no clarity on the vulnerability or risks that Ghana faces from CSOs. However, NGOs in Ghana are identified as being at a very high risk, and therefore they are required to be accountable. This implies that 'they are subject to the full implementation of the AML/CFT requirements under the AML law.' The AML/CFT legislations in Ghana include the AML Act 2008 (Act 749) and the Anti-Terrorism Act, 2008 (Act 762) as amended in 2014 to address the legal deficiencies identified in the 2009 FATF

24. Terrorist Financing Risk Assessment Guidance July 2019. Available online at, <http://www.fatf-gafi.org/media/fatf/documents/reports/Terrorist-Financing-Risk-Assessment-Guidance.pdf> Last accessed 9 September 2022.

25. National money laundering and terrorist financing risk assessment Guideline, available online at, <http://www.fatf-gafi.org/publications/methodsandtrends/documents/nationalmoneylaunderingandterroristfinancingriskassessment.html>

26. WACSI, 'WACSI Commends Nigerian Civil Society for the Major Win on New Anti-Money Laundering Law - WACSI' <<https://wacsi.org/wacsi-commends-nigerian-civil-society-for-the-major-win-on-new-anti-money-laundering-law/>> accessed 6 October 2022.

mutual evaluation, including incorporating additional requirements resulting from changes to the FATF Standards in 2012. Ghana set up the National Risk Assessment Action Plan (NRAAP) which has the responsibility to develop a national AML/CFT policy based on the risk identified in risk assessments that they conducted. The NRAAP is coordinated by the AML/CFT Inter-Ministerial Committee. There has not been an assessment of the risk that civil society actors may present in Ghana. This is similar to the situation in other countries such as Zimbabwe where the risks of terrorism have not been recorded. It is therefore important that risk assessments are conducted to ensure that interventions are developed to address actual and potential risks.

Uganda

Ugandan authorities have over-regulated terrorism as a way to stifle and limit the scope of CSO activity. There is selective application of anti-money laundering and countering the financing of terrorism (AML/CFT) laws to control the operations of CSOs. In some cases, CSOs have been forced to shut down. Authorities have frozen the accounts of two local civil society coalitions that were leading election observation activities on charges of financing terrorism. A prominent human rights lawyer, Advocate Nicholas Opiyo was also arrested and charged with money laundering. As Uganda is one of the countries that are currently under increased monitoring under the FATF framework, the government is increasingly stifling CSO activity under the guise of complying with recommendation 8. This is demonstrated by the failure of the government to conduct risk of terrorism or money laundering in the country, which would allow for more focused interventions that are not vague and broad.

Zimbabwe

The Zimbabwean government has used public order laws to thwart dissent or critics from activists and civil society organisations. For instance, the Public Order and Security Act, replaced by the Maintenance of Order and Public Order Bill, violated fundamental rights to

free expression and association. Many opposition party members, pro-democracy activists and human rights defenders were arrested and charged under the legislation. Resort to counter-terrorism laws has further exacerbated the situation and has seen civil society organisations being targeted and harassed. For instance, following the nationwide protests against the deteriorating economic and political situation in the country, the Zimbabwean National Trade Union (ZNTU) was accused of being a terrorist organisation. The Private Voluntary Organisations Amendment Act, a new legislation that was passed by Parliament in December 2022 has been criticised for threatening the existence of civil society, violating freedom of association, freedom of expression, right to administrative justice, and the right to participate in politics. The law gives the government the power to cancel the registration of any organisations operating in a manner deemed to be “political”, and arbitrarily interfere with activities. The government argues that the law is meant to combat money laundering and financing of terrorism in Zimbabwe. Civil society practitioners have highlighted that this attempt by the government to ‘rule by law’ is motivated by the upcoming 2023 elections. They recommend that the government must conduct a risk assessment of the NGO sector instead of unjustifiably undermining CSOs in the country.

Eswatini

The flagrant disregard for rule of law and fundamental human rights has become rampant in Eswatini. There have been several arrests of activists who are then charged with terrorism-related charges for legal acts such as wearing t-shirts emblazoned with pro-democracy slogans. In July 2021 Eswatini members of parliament Mduduzi Bacede Mabuza and Mthandeni Dube were jailed and charged with terrorism under the Suppression of Terrorism Act. The state has also used the Act to limit political participation of both civil society organisations and opposition political actors. For instance, the main opposition political party, the People’s United Democratic Movement (PUDEMO) and three other

27. *ibid.*

28. Kgalalelo Gaebee & David Kode, ‘9/11’s Legacy: How Anti-Terrorism Laws Have Become Anti-Human Rights Laws’ (African Arguments, 14 September 2021) <<https://africanarguments.org/2021/09/9-11s-legacy-how-anti-terrorism-laws-have-become-anti-human-rights-laws/>> accessed 15 September 2022.

29. ‘NPO ML TF Restrictions and Responses Briefer Africa.Pdf’ <<https://ecnl.org/sites/default/files/2021-10/NPO%20ML%20TF%20Restrictions%20and%20Responses%20Briefer%20Africa.pdf>> accessed 6 October 2022.

30. ‘NPOs-NO-LONGER-LISTED-AS-DESIGNATED-NON-FINANCIAL-INSTITUTIONS-IN-NIGERIA-1.Pdf’ <<https://spacesforchange.org/wp-content/uploads/2022/05/NPOs-NO-LONGER-LISTED-AS-DESIGNATED-NON-FINANCIAL-INSTITUTIONS-IN-NIGERIA-1.pdf>> accessed 6 October 2022.



Photo source: Unsplash

organisations, were designated as ‘terrorist groups’ under the Act. The authorities therefore use these laws to lower the threshold of constitutionalism under the guise of national security.

Egypt

The human rights situation in Egypt has been criticised by local and international organisations. There is repression by the state through anti-terrorism and terrorist entities law. Since 2013 human rights defenders are targeted and are arbitrarily arrested for their work and prosecuted under these broad laws. Those charged under anti-terrorist laws are not allowed a fair trial before an independent and impartial judiciary. Instead, they are subjected to stringent military courts that do not respect the rights of accused persons to legal representation or fair notice.

Algeria

Algerian authorities have also used counter-terrorism legislation to stifle fundamental freedoms such as freedom of expression and assembly. Human rights defenders, protesters and activists are subjected to harsh treatment and are often arrested for violating these regulations. A human rights defender Kaddour Chouicha and 12 others who are members of the Algerian League for the Defence of Human Rights, part of the Hirak Movement, a network that has been using protests to call for political change since 2019 were charged with participating in a terrorist organisation for taking part in a peaceful protest.

The situation in the countries highlighted above indicates persistent efforts to stifle and shrink civic space by governments. The legal and administrative nature of the laws being adopted will continue to limit the scope of work for civil society actors. This greatly impacts the communities benefiting from civil society contributions to development.



Photo source: Unsplash

31. WACSI (n 26).

32. ‘GIABA-Ghana-MER-2018.Pdf’ <<https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/GIABA-Ghana-MER-2018.pdf>> accessed 6 October 2022.

33. First Schedule (section 21) of the AML Act, 2010 (Act 749) as amended.

34. *ibid* at page 5.

35. *ibid*.

36. ‘NPO ML TF Restrictions and Responses Briefer Africa.Pdf’ (n 29).

37. ‘Arrest of Advocate Nicholas Opiyo and Four Colleagues.’ Front Line Defenders. Available at, <https://www.frontlinedefenders.org/en/case/arrest-advocate-nicholas-opiyo-and-four-colleagues#case-update-id-13002> Accessed on 29 November 2022.

38. Kode (n 28).

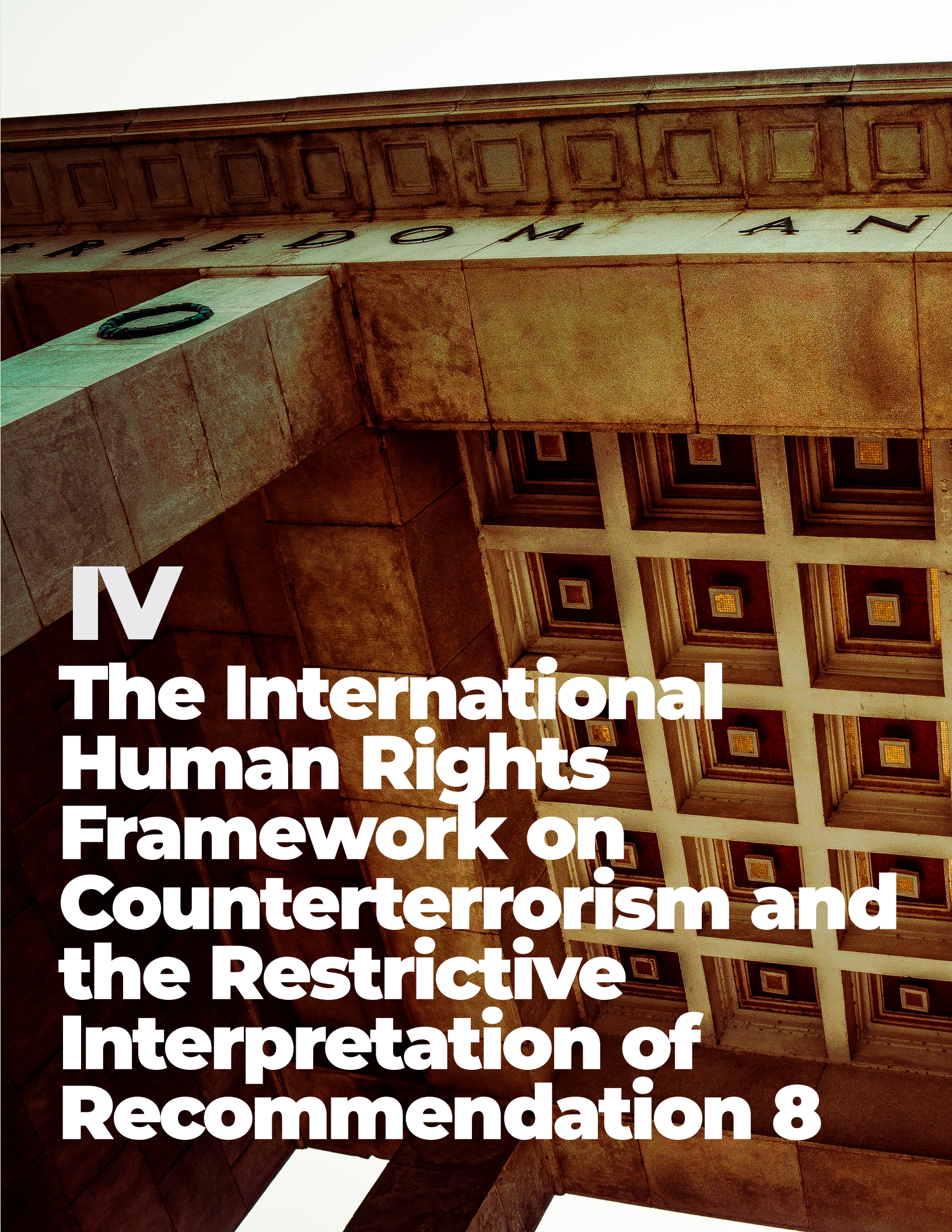
39. Tony Reeler Kika Dzikamai Bere and Musa, ‘NORTHERN EXPOSURE OP-ED: Killing off Democracy by Silencing Civil Society — the Real Implications of Zimbabwe’s PVO Bill’ (Daily Maverick, 7 August 2022) <<https://www.dailymaverick.co.za/article/2022-08-07-killing-off-democracy-by-silencing-civil-society-the-real-implications-of-zimbabwes-pvo-bill/>> accessed 3 January 2023.

40. Kode (n 28).

41. ‘9/11’s Anti-Human Rights Legacy in ESwatini’ (Vanguard Africa) <<http://www.vanguardafrica.com/africawatch/2022/9/7/911s-anti-human-rights-legacy-in-eswatini>> accessed 15 September 2022.

42. Kode (n 28).

43. *ibid*.



IV

The International Human Rights Framework on Counterterrorism and the Restrictive Interpretation of Recommendation 8



Photo source: Unsplash

It is important to note that international human rights law places a responsibility on states to protect persons under their jurisdiction against terrorism. This is particularly important because terrorism poses a great threat to the protection, promotion and realisation of human rights. The international human rights law framework is well aware of the challenges that terrorism presents, including casualties, serious humanitarian situations, political instability and violence. It also realises that there is a need for the development of a strengthened strategy to address, mitigate and prevent terrorism. The success of this strategy relies on a number of factors, a key factor being that it is premised on a human rights-based approach. This means that the human rights framework should guide responses to terrorism. As such, terrorism responses ought to be developed from a human rights-based approach, paying close attention to the importance of not violating other rights while implementing the measures.

As a point of departure, the African human rights system provides safeguards for the protection and promotion of human rights in the fight against terrorism. It recognises international standards on human rights protection and promotion as set out in the Bill of Rights. The African Commission on Human and Peoples' Rights has developed the 368 Resolution on Implementation of the

Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa. Human rights and respect for the rule of law are central to the principles and standards, and any measures taken should guarantee respect for human rights. The principles and guidelines clearly state that states should not use counter-terrorism laws as a tool to restrict fundamental rights. Instead, civil society actors should be engaged as partners in developing standards and promoting their implementation. This regional framework is clear on how states ought to approach recommendation 8. There has to be a balancing act when developing measures to address terrorism, and this act is grounded in human rights. States are disregarding this and misusing the FATF framework by developing broad and vague laws to limit scrutiny from civil society groups.

The United Nations has also noted that to address these 'precise legal definitions of terrorism and violent extremism, and adequate safeguards to ensure that counter-terrorism measures are law-based, necessary, justified, proportionate and non-discriminatory, in compliance with international law. Efforts to combat terrorism must not compromise human rights under any circumstance.' The current approach in many African countries, as highlighted above is to have broad and vague definitions that make it possible for the state to restrict civil society actors' work. This approach not only deters collaborative efforts to address and mitigate terrorism but is counterproductive as it

44. See, Resolution 88 (2005) on the Protection of Human Rights and the Rule of Law in the Fight against Terrorism and the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa adopted by the African Commission on Human and Peoples' Rights at its 56th Ordinary Session held in Banjul, The Gambia, from 21 April to 7 May 2015.

removes the bridge provided by civil society actors for the state to engage with communities. This may, in turn, contribute to instability and violence.

The United Nations General Assembly concluded the 7th Biennial Review of the United Nations Global Counter-Terrorism Strategy (7th GCTS Review) in June 2021. One of the critical priority areas was the balanced implementation of Pillar IV on human rights and the rule of law. As a follow-up to this and to engage civil society actors to contribute to the discussion in May 2022, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin held a civil society workshop. The outcome document of the workshop provides that a key finding from the Special Rapporteur's engagement is that there is a misuse of counter-terrorism measures to crack down on civil society and repress fundamental freedoms. This is contrary to the United Nations Security Council Resolution on Foreign Terrorist Fighters. The Resolution encourages states to comply with their human rights obligations when fighting terrorism and notes that a failure to do so contributes to radicalisation. The Resolution also addresses the importance of engaging and consulting local communities and empowering civil society groups as essential to addressing the threats of terrorism. This is well illustrated in the statement made by Ramy Shaath, a human rights defender, alluding to the need for policies and action plans to safeguard the work of civil society actors (see Figure 1 below).



Figure 1: Statement by Ramy Shaath, a human rights defender at the Civil Society Workshop held on 9 May 2022 in Malaga, Spain.

The UN General Assembly, through its Global Counter Terrorism Strategy and Plan of Action sets out the need for counter-terrorism responses to be context specific. It emphasises the FATF's AML/CFT policies and coordination, highlighting that countries must conduct risk assessments and apply a risk-based approach to their situations. It also recognises that civil society actors, including human rights defenders (HRDs), contribute directly to efforts in fighting terrorism and should not, by default, be designated as security threats. A focused approach should be adopted to replace a restrictive and repressive approach as it ensures that actual security threats are targeted and subjected to prosecution and safeguards are appropriately applied to mitigate and prevent counterterrorism. As the strategy and plan of action are reviewed every two years, it is crucial that the unintended consequence of the international calls for action to respond to terrorism are considered. The restrictions being actioned against civil society actors indicate the need for the United Nations to encourage states to focus on the actual risks and threats of terrorism and to do so in collaboration with civil society. In the next sections, key recommendations relating to the need for a shift in policy formulations and practices are set out.

45. 'N2102400.Pdf' <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/024/00/PDF/N2102400.pdf?OpenElement>> accessed 10 October 2022.

46. 'Concept-Note-Programme-Malaga.Pdf' <<https://www.ohchr.org/sites/default/files/2022-05/concept-note-programme-Malaga.pdf>> accessed 10 October 2022.

47. Security Council Resolution 2178 (2014).



V

Conclusion

This article argues that governments should focus on effective ways to protect the legitimate activities of civil society. This means moving away from a restrictive interpretation of recommendation 8 and shifting from the default approach of categorising civil society organisations as illegal entities involved in money laundering and terrorist activities. Development of sustainable measures to address, mitigate and prevent terrorism requires national cooperation and coordination. The framework challenges the restrictive interpretation of recommendation 8 that is being applied by states. It also highlights an important realisation, which is also reflected in the civil society workshop outcome document; ‘open civic space, effective counterterrorism and the advancement of security are complementary and mutually reinforcing.’

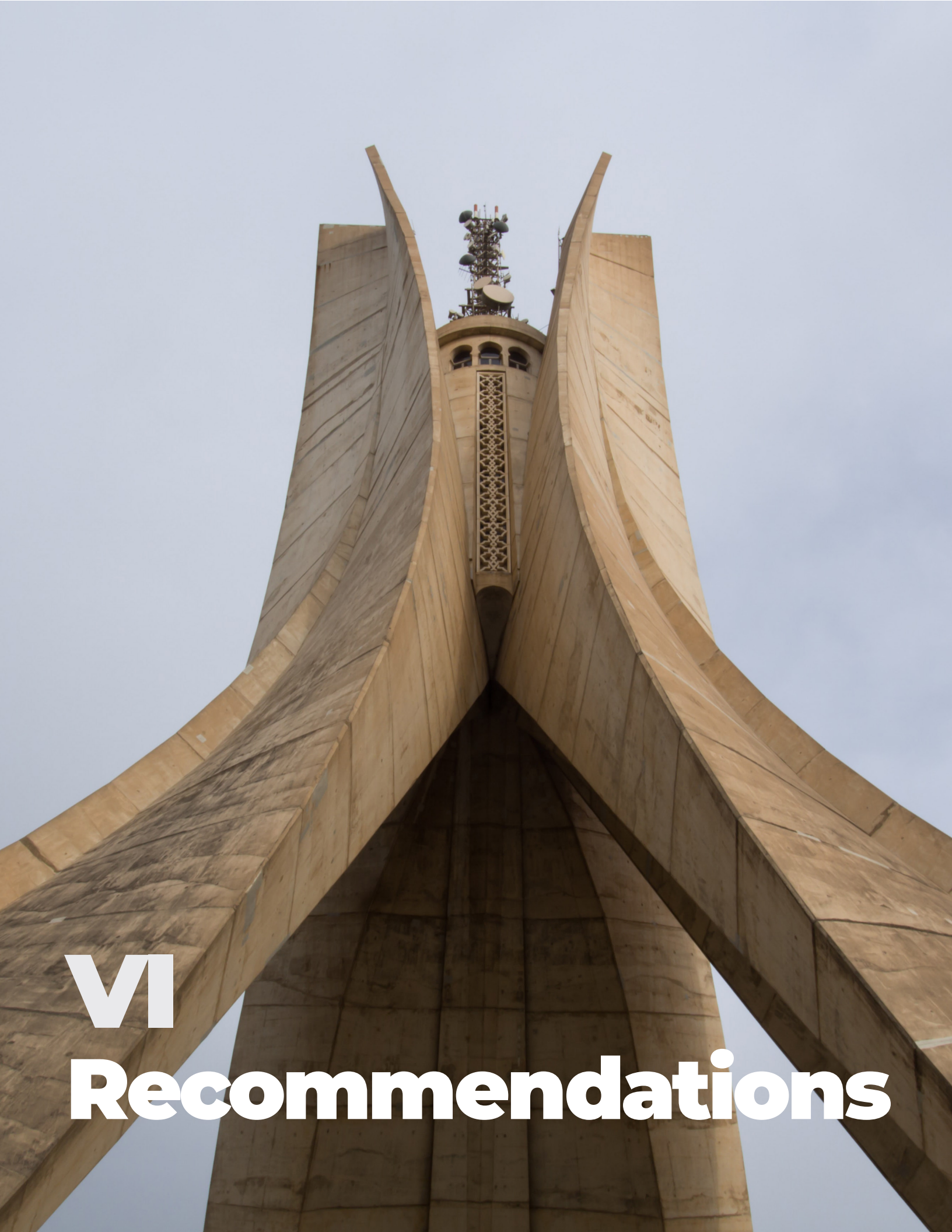
The current approach by states does not reflect an intention to address terrorism, but the focus is being placed on how civil society groups can be stifled to impede them from holding states accountable. Often, broad and vague laws regulate terrorism and money laundering without risk assessments having been conducted. In some countries, there is no risk of terrorism, but counterterrorism laws framed as legislating the risk posed by civil society continue to be the primary focus for lawmakers. The country situational analysis presented in this paper illustrated how the FATF framework continues to be misused by governments. Criminalisation of civil society is counter-productive and does not facilitate the global agenda to prevent and mitigate terrorism. To a certain extent, it encourages discord as civil society provides the discourse that challenges governments to meet their responsibilities, including promoting and protecting human rights. As highlighted in the paper, the international framework provides solid factors grounded on human rights that states must use to ensure that measures to address terrorism and money laundering are effective and do not interfere with the existence and operation of civil society.



Photo source: Unsplash

48. General Assembly resolution 60/288. See also its recent review A/RES/72/284, and note that a coalition of NGOs deplored that the review did not recognize the essential role that civil society plays in guarding against abusive counter- terrorism practices and responding to and preventing the conditions conducive to terrorism, « Global Group of NGOs Deplore Lack of Attention to Human Rights in Latest Review of UN’s Global Counterterrorism Strategy by UN Member States», Press Release, 11 July 2018.

49. ‘FATF Recommendations 2012 at page 10.Pdf’ <<https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>> accessed 10 October 2022.



VI

Recommendations

1. States must develop precise legal definitions of terrorism and violent extremism

A common approach that governments have adopted has been to introduce vague and broad definitions of what terrorism and money laundering entails. This approach departs from the international framework on countering terrorism and terrorist financing. It is also counterproductive as it fails to target resources towards actual threats and risks as set out in the FATF Recommendations. Precise legal definitions will address the criminalisation of civil society as in countries such as Zimbabwe, where all civil society organisations are being designated as terrorism entities given the broad definition that relates to activities that criticise government actions. More so, the introduction of well-drafted legislations specifically on counterterrorism and anti-money laundering is a first step to a more effective framework where there is judicial and administrative oversight.

Nigeria presents a best practice case study following the introduction of the Money Laundering (Prevention and Prohibition) Bill, 2022, the Terrorism (Prevention and Prohibition) Bill, 2022, and the Proceeds of Crime (Recovery and Management) Bill, 2022. The West Africa Civil Society Institute (WACSI) has highlighted that to ensure that these new laws are effective, they 'must be sustained through evidence-based advocacy and continuous engagement of civil society in the formulation of an inclusive and effective AML-CTF regime that does not jeopardise the ability of CSOs to deliver on their mandates.' Other countries have the opportunity to learn from the legal framework introduced by Nigeria.

2. States must prioritise legislation that protects the legitimate activities of civil society

The contributions of civil society to development



Photo source: Unsplash

cannot be understated. Civil society organisations are agents of development providing services including health, education, social protection, humanitarian assistance, livelihood interventions, emergency response, conflict resolution, democracy building, environmental management, and policy analysis and advocacy. They, therefore, play a significant role in addressing the socio-economic challenges prevalent in communities.

A recent study conducted in Zimbabwe shows that NGOs are the third biggest earners of foreign currency in the country after export proceeds and diaspora remittances. Total foreign currency receipts from NGOs rose by 50.5% from US\$647.78 million in 2020 to US\$975.16 million in 2021. This is important as it demonstrates the contributions that civil society makes to the country's economic development. It is also important because 'foreign currency is critical in sustaining the foreign currency auction system. Any disruptions in the activities of NGOs through legal and/or non-legal means could result in the country losing out massively.' An understanding of the broader contribution of civil society to the economic sustenance of many African countries is essential. Governments must understand that stifling

civic space and imposing stringent laws to close down organisations is counter-productive and detrimental to the broader economic status of the country.

3. Judicial harassment of civil society actors must be addressed

Currently, the lack of judicial oversight in many countries means that victims of harassments and human rights violations under the counter-terrorism and anti-money laundering laws are left with little or no legal recourse. This is worsened by the fact that criminalisation of civil society is being legitimised through the law. Judicial authorities have approached these cases with the required nuance that is only possible where there is judicial independence, impartiality and integrity. To achieve the level of judicial scrutiny required, there is a need for reformulation of the different countries' governance framework. This will address the problem of lack of separation of powers, which has fostered a system that allows governmental officials to influence the decisions of the courts of law.

Judicial harassment deters fairness and justice. Civil society organisations are therefore encouraged to utilise other tools to engage with governments. This includes engaging in advocacy and lobbying strategies and utilising the international and regional human rights framework. This approach will help highlight the challenges presented by the absence of an independent judiciary where criminalisation of civil society ensues.

4. Context-specific analysis of potential risks of terrorism and money laundering should be conducted using a human rights-based approach

The FATF makes it clear that governments must assess the risks and threats they may face. This allows for a more rigorous and targeted approach when developing strategies to address terrorism



Photo source: Unsplash

50. 'PUNCHING-HOLES-INTO-A-FRAGILE-ECONOMY.Pdf' <<https://www.hrforumzim.org/wp-content/uploads/2022/03/PUNCHING-HOLES-INTO-A-FRAGILE-ECON-OMY.pdf>> accessed 13 October 2022.

51. *ibid.*



Photo source: Unsplash

and money laundering. The current approach adopted by most governments indicates the intention to misuse Recommendation 8 by using it to thwart civic space. Context-specific assessments should guide the development, implementation, oversight, monitoring and evaluation of comprehensive policies and measures to prevent and address terrorism. A way for the state to adopt this approach is to collaborate with and consult civil society groups when developing measures to address terrorism and money laundering. The case of Nigeria discussed in this paper highlights how engaging civil society creates space for deliberation and has an outcome that respects and promotes human rights.

5. Civil society actors must continue to lobby governments to reform and develop effective AML-CTF laws

Civil society actors have the opportunity to provide guidance to government departments on how best to mitigate the risks of terrorism and anti-money laundering. Despite government crackdown efforts, lobbying the government on legal reform should remain a priority. There

is evidence that the persistence of civil society may result in fruitful collaboration with the government. The developments in Nigeria provide a best practice for CSOs, where the NGO Spaces for Change had constructive dialogue and sustained engagement with government departments for six years before the law on money laundering and terrorism were reformed to non-profit organisations (NPOs) in Nigeria no longer being listed among Designated Non-financial Institutions (DNFIs).

6. Civil society actors must collaborate and design effective and common strategies to counter efforts to stifle civic space

Actions to counter efforts to shrink civic space require resources and often CSOs are constrained in terms of the financial resources that they have. This may result in limited access to personnel with skills or limited implementation of strategies. It is therefore important that civil society actors collaborate and effectively utilise the limited skills, financial and human resources available to them. This may be through the designing and development of a task force or working group made up of civil society practitioners representing different organisations that focus on designing strategic interventions.

Bibliography

'9/11's Anti-Human Rights Legacy in ESwatini' (Vanguard Africa) <http://www.vanguardafrica.com/africawatch/2022/9/7/911s-anti-human-rights-legacy-in-eswatini> accessed 15 September 2022

'Concept-Note-Programme-Malaga.Pdf' <https://www.ohchr.org/sites/default/files/2022-05/concept-note-programme-Malaga.pdf> accessed 10 October 2022

'FATF Recommendations 2012.Pdf' <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 10 October 2022

'GIABA-Ghana-MER-2018.Pdf' <https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/GIABA-Ghana-MER-2018.pdf> accessed 6 October 2022

'In the Name of Security: Counterterrorism Laws Worldwide since September 11' (Human Rights Watch 2012) <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11> accessed 15 September 2022

Kika TR Dzikamai Bere and Musa, 'NORTHERN EXPOSURE OP-ED: Killing off Democracy by Silencing Civil Society — the Real Implications of Zimbabwe's PVO Bill' (Daily Maverick, 7 August 2022) <https://www.dailymaverick.co.za/article/2022-08-07-killing-off-democracy-by-silencing-civil-society-the-real-implications-of-zimbabwes-pvo-bill/> accessed 3 January 2023

Kode KG& D, '9/11's Legacy: How Anti-Terrorism Laws Have Become Anti-Human Rights Laws' (African Arguments, 14 September 2021) <https://africanarguments.org/2021/09/9-11s-legacy-how-anti-terrorism-laws-have-become-anti-human-rights-laws/> accessed 15 September 2022

'N2102400.Pdf' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/024/00/PDF/N2102400.pdf?OpenElement> accessed 10 October 2022

'NPO ML TF Restrictions and Responses Briefer Africa.Pdf' <https://ecnl.org/sites/default/files/2021-10/NPO%20ML%20TF%20Restrictions%20and%20Responses%20Briefer%20Africa.pdf> accessed 6 October 2022

'NPOs-NO-LONGER-LISTED-AS-DESIGNATED-NON-FINANCIAL-INSTITUTIONS-IN-NIGERIA-1.Pdf' <https://spacesforchange.org/wp-content/uploads/2022/05/NPOs-NO-LONGER-LISTED-AS-DESIGNATED-NON-FINANCIAL-INSTITUTIONS-IN-NIGERIA-1.pdf> accessed 6 October 2022

'PUNCHING-HOLES-INTO-A-FRAGILE-ECONOMY.Pdf' <https://www.hrforumzim.org/wp-content/uploads/2022/03/PUNCHING-HOLES-INTO-A-FRAGILE-ECONOMY.pdf> accessed 13 October 2022

Ricca J and others, 'Community-Based Intervention Packages Facilitated by NGOs Demonstrate Plausible Evidence for Child Mortality Impact' (2014) 29 Health Policy and Planning 204

WACSI, 'WACSI Commends Nigerian Civil Society for the Major Win on New Anti-Money Laundering Law – WACSI' <https://wacsi.org/wacsi-commends-nigerian-civil-society-for-the-major-win-on-new-anti-money-laundering-law/> accessed 6 October 2022



WEST AFRICA CIVIL SOCIETY INSTITUTE

All Rights Reserved COPYRIGHT WACSI © 2023

www.wacsi.org