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State Responsibility for Human Rights Violations Perpetrated in the Name of International Counter-Terrorism Financing Obligations

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ESSAY

STATE RESPONSIBILITY FOR HUMAN RIGHTS
VIOLATIONS PERPETRATED IN THE NAME OF
INTERNATIONAL COUNTER-TERRORISM
FINANCING OBLIGATIONS

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ABSTRACT

This Essay responds to the increasing adoption by States across continents of repressive, over-reaching laws, regulations, and policies aimed at countering the financing of terrorism. It documents the immense international pressure to adopt counter-terrorism financing measures, coupled with the seeming marginalization of concurrent international human rights law obligations. The Essay first sets out the applicable legal framework and rapid normative developments in international counter-terrorism financing law. Second, the Essay provides a snapshot of existing allegations of human rights violations committed in the name of international counter-terrorism financing obligations, including judicial harassment and undue surveillance of human rights defenders and civil society organization dissolutions. The Essay concludes by proposing several viable avenues for holding States responsible for such abuses, including before international human rights mechanisms, the International Court of justice, arbitral tribunals, and national courts.

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I. INTRODUCTION

Since the terrorist attacks of September 11, 2001, national laws, regulations, and policies aimed at countering the financing of terrorism (“CFT”) have proliferated across the world. While international law regulation of CFT was in place before then, including by way of the 1999 International Convention for the Suppression of the Financing of Terrorism (“Terrorist Financing Convention”),¹ its relevance accelerated as States placed a premium on regulating the sources of financing that were seen to enable egregious acts of terrorism. To that end, States have, *inter alia*, criminalized and otherwise legislated “terrorist financing” offences under domestic law, implemented targeted financial sanctions and other penalties for such offences,

1. See generally *International Convention for the Suppression of the Financing of Terrorism*, G.A. Res. 54/109, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/109 (1999), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&clang=_en [<https://perma.cc/2MG5-RRS6>] (criminalizing terrorism financing according to particular definitions and providing for enhanced international cooperation in terrorism financing prevention and suppression). See *infra* Part II.A,

adopted financial reporting and other operating restrictions for entities including non-profit organizations due to purported vulnerabilities to terrorist financing, and enhanced governmental surveillance, prosecutorial, and administrative powers, as well as inter-agency and transnational information-sharing and retention procedures—all in the name of CFT.² Many of these measures have been sweeping, overburdensome, and disproportionate in nature, often with serious international human rights law and broader international rule of law implications.³

The global expansion of CFT measures has not emerged in a vacuum. Rather, State CFT legislating and policymaking have been shaped and prodded by significant legal developments and norm-creation at the multilateral level, including the adoption of the Terrorist Financing Convention, a slew of Security Council resolutions, including Resolutions 1373 and 2462,⁴ other UN resolutions,⁵ and so-called “soft law” standards, namely the Financial Action Task Force (“FATF”) Recommendations for anti-money laundering and CFT measures.⁶ As Alejandro Rodiles has noted in a different context “the fluid rearrangement of public and private, formal and informal legal frameworks” is creating new kinds of “global law” which we argue have profound human rights consequences.⁷

2. See *infra* Part III.

3. This Essay expands upon the position paper titled *The Human Rights and Rule of Law Implications of Countering the Financing of Terrorism Measures*, which was issued in June 2022 by Professor Fionnuala Ní Aoláin in her capacity as the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (“SRCT&HR”). In particular, the Essay builds on the Oversight, Accountability, and Remedies section of the position paper, exploring the potential practicalities and intricacies of bringing suit against States for counter-terrorism financing misuse in various forums. See Fionnuala Ní Aoláin, *The Human Rights and Rule of Law Implications of Countering the Financing of Terrorism Measures*, U.N. HUM. RTS. SPECIAL PROC. (June 2022), <https://www.ohchr.org/sites/default/files/2022-06/2022-06-13-SRCT-HR-CFT-Position-Paper.pdf> [<https://perma.cc/2NW2-FEHB>] [hereinafter CFT position paper].

4. S.C. Res. 1373 (Sep. 28, 2001); S.C. Res. 2462 (June 13, 2019); see *infra*, Part II.B.

5. See, e.g., G.A. Res. 60/288 ¶¶ II.1-2, 10, III.8, IV.4 (Sept. 20, 2006), (affirming State CFT obligations and encouraging international cooperation in CFT); G.A. Res. 72/284, ¶¶ 44-47 (June 26, 2018).

6. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, updated Feb. 2023, <https://www.fatf-gafi.org/en/topics/fatf-recommendations.html> [<https://perma.cc/C5LG-WK8V>]. See *infra*, Part II.C.

7. Alejandro Rodiles, *Infrastructural Developmentalism and Its Many Types of Global Law: A Comparative Look at the UN Sustainable Development Goals and China's Belt and*

These normative developments at the international level have created intense pressure on the part of Member States to meet their CFT obligations. They have also created opportunities for States to regulate and/or delegate enforcement to the private sector in highly incentivized and applauded ways by the international community.⁸ In an effort to meet their international CFT obligations—or in some cases, under the guise of meeting such obligations—States have adopted a flurry of CFT measures and ultimately veered towards overregulation. As discussed in this Essay, in practice, some States have misapplied CFT standards and adopted CFT-related restrictions that are completely untethered from any empirically identified risk of terrorist financing.⁹

Acute human rights impacts have followed, including with regard to the fundamental rights to freedom of opinion and expression, freedom of peaceful assembly and association, freedom of religion or belief, due process rights, and the rights to privacy and family. Among other documented incidents, legitimate charitable organizations have been dissolved and disbanded, humanitarian work and its financing frozen or obstructed, human rights defenders arbitrarily detained and subject to physical and digital surveillance, judicial harassment, and family members designated, prosecuted and otherwise targeted for alleged affiliation with terrorists or terrorist financiers.¹⁰ In addressing overregulation in CFT we highlight both the persistence of overregulation and the barriers to recognizing the effects that follow.

Notably, the very international instruments that have arguably spurred this global movement towards CFT overregulation and misuse also clearly articulate that any laws, regulations, or other measures adopted by States in name of the suppression and prevention of terrorist financing must be compatible with existing, concurrent international law obligations, including under international human rights law and international humanitarian law.¹¹ In other words, while States may

Road Initiative, 10 LONDON REV. INT'L L. 367, 367 (Oct. 28, 2022); see generally *id.* (addressing the emergence and consequences of new forms of infrastructures with the implementation of the Sustainable Development Goals and a retreat from traditional international law).

8. Anne van Aken & Betül Simsek, *Rewarding in International Law*, 115 AM. J. INT'L L. 195, 202 (2021).

9. See *infra*, Part III.

10. See *infra*, section III; see also, e.g., CFT position paper, *supra* note 3, at 16 (communications chart), 29-34.

11. See *infra*, Part II, (stipulating the provisions in the Terrorist Financing Convention, Security Council Resolution 2462, and FATF Standards recognizing continuing international law obligations of States in the CFT context).

invoke international CFT obligations as the purported basis and justification for blanket, human rights deficient measures, such measures, in fact, stand in direct contravention of the underlying international CFT instruments being invoked. That contradiction is of specific interest to our analysis here, and the Essay explores ways in which to undo or expose the contradiction to advance human rights protections.

This Essay explores the requisite compatibility among international CFT obligations and other international law obligations and delineates several judicial avenues for holding States to account for alleged human rights violations perpetrated in the CFT context. The Essay proceeds in three parts. Part I enumerates the international legal framework for State CFT obligations and highlights several provisions in various CFT-specific instruments, which expressly recognize that CFT measures must align with other international law rights and obligations, particularly under international human rights law. Part II briefly summarizes the wealth of existing documentation of alleged human rights violations perpetrated by States in the name of CFT, often in purported compliance with international CFT obligations. Part III then turns to the potential judicial avenues available for strategic litigation and arbitration intended to hold States responsible for CFT-related human rights abuses. This Part specifically addresses the UN human rights treaty bodies, regional human rights courts, the European Court of Justice, International Court of Justice, arbitral tribunals, and national courts.

II. INTERFACE OF INTERNATIONAL COUNTER-TERRORISM FINANCING LAW AND INTERNATIONAL HUMAN RIGHTS LAW

Multilateral legislating, standard-setting, and norm-creation in the CFT space have taken multiple forms over the past two decades, with varying degrees and layers of binding character and enforceability—ranging from “hard” treaty law obligations to “soft,” non-binding norms.¹² The influence of this normative web of obligations has been

12. Fionnuala Ní Aoláin (Special Rapporteur), *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, U.N. Doc. A/74/335 (Aug. 29, 2019); Fionnuala Ní Aoláin, ‘Soft law,’ *Informal Lawmaking and ‘New Institutions’ in the Global Counter-Terrorism Architecture*, 32 EUR. J. INT’L L. 919, 919-32 (2021).

significant, not least that the traditional distinctions between ‘hard’ and ‘soft’ law have been reversed with ‘soft’ norms holding greater degrees of compulsion in practice for States than traditional treaty and customary international law standards in the counter-terrorism arena.¹³ This observation is, in our view, particularly salient as regards CFT legal frameworks. This Part maps out the range of CFT instruments that oblige or otherwise recommend States to adopt preventative and enforcement CFT measures. It points to the plain stipulation by lawmakers and policymakers alike that international CFT norms are not intended to displace the other applicable international law obligations, including concurrent obligations under international human rights law.

A. *Terrorist Financing Convention*

Though often overlooked for more recent, albeit “softer” international CFT instruments, the Terrorist Financing Convention is the primary international legal basis for State CFT obligations. Originally adopted on December 9, 1999, the Terrorist Financing Convention, originally only had “moderate success,” with only four States having acceded as of September 11, 2001.¹⁴ After the attacks, however, the treaty’s importance was amplified and it enjoyed new international buy-in and consensus,¹⁵ eventually entering into force on April 10, 2002.¹⁶ The treaty presently has 189 States Parties.¹⁷

The text of the Terrorist Financing Convention stems from the work of an Ad Hoc Committee, which was established pursuant to UN General Assembly Resolution 51/210. According to its preambular text, the Terrorist Financing Convention arose from a shared “convict[ion of] the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression

13. *Id.*; cf. GAVIN SULLIVAN, *THE LAW OF THE LIST: UN COUNTERTERRORISM SANCTIONS AND THE POLITICS OF GLOBAL SECURITY LAW*, 312-16 (2020) (addressing the extensive use of sanctions as listing in counter-terrorism regulation and theorizing global counter-terrorism law and practice as an assemblage).

14. Pierre Klein, *International Convention for the Suppression of Financing Terrorism*, UN AUDIOVISUAL LIBR. INT’L L. 4 (2009), https://legal.un.org/avl/pdf/ha/icsft/icsft_e.pdf [<https://perma.cc/7M6N-MCHE>].

15. *See id.*

16. *See* G.A. Res. 54/109, *supra* note 1.

17. *See id.*

through the prosecution and punishment of its perpetrators.”¹⁸ The Convention stipulates that all States Parties “shall adopt such measures as may be necessary” to criminalize terrorist financing offences under domestic law—offences that must be “punishable by appropriate penalties which take into account the grave nature of the offences.”¹⁹ Article 2 defines terrorist financing offences as the “direct[] or indirect[], unlawful[] and wilful[], provi[sion] or collect[ion of] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [terrorist acts].”²⁰ The Convention also obliges States to implement specific preventative, judicial, and remedial measures, including, *inter alia*, “appropriate measures” “for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offenses”²¹; investigation upon receipt of information on alleged terrorist-financing offences²²; and “the greatest measure of assistance [vis-à-vis other States Parties] in connection with criminal investigations or criminal or extradition proceedings.”²³

Regarding the interface of these CFT obligations with international law, and specifically international human rights law obligations, the plain language of the Terrorist Financing Convention confirms that the State obligations stemming from it do not—and cannot—displace any concurrent obligations or responsibilities of States Parties under international law.²⁴ As the Terrorist Financing Convention clarifies in Article 21: “Nothing in this Convention shall

18. See G.A. Res. 54/109, *supra* note 1, pmb1., ¶ 12, International Convention for the Suppression of the Financing of Terrorism (Dec. 9, 1999); see also Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, Judgment, 2019, I.C.J. 558 ¶ 59 (Nov. 8).

19. G.A. Res. 54/109, *supra* note 1, at 4.

20. Terrorist acts comprise any act enumerated in the UN sectoral counter-terrorism treaties listed in the accompanying Annex (the twelve relevant counter-terrorism sectoral conventions and protocols) and “[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act.” *Id.* art. 2, annexes 1-9.

21. *Id.* art. 8(1).

22. *Id.* art. 9.

23. *Id.* art. 12(1).

24. On textualism in international law, see Matthias Herdegen, *Interpretation in International Law*, in MAX PLANCK ENCYCLOPEDIAS INT’L L., sec. B.3 (Anne Peters & Rüdiger Wolfrum eds., 2020).

affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.” The UN Charter of course provides the foundational rubric for international cooperation in promoting and protecting the human rights and fundamental freedoms of all persons and the “other relevant conventions” referenced in Article 21 no doubt include core international human rights law treaties, such as the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, regional human rights treaties, and other treaties and conventions like the Geneva Conventions.

In addition to the overarching stipulation of international law compatibility in Article 21, the Terrorist Financing Convention provides for specific human rights and other safeguards and limitations to ensure compatibility with other State obligations under public international law:

Article 7 stipulates that “[w]ithout prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law”;

Article 9 recognizes the well-settled right of detainees to be informed of their right to contact a consular representative;

Article 15 recognizes that requests for extradition or mutual legal assistance may be refused where the State Party has “substantial grounds” for believing the request was made “for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons”; and

Article 17 provides that “[a]ny person who is taken into custody or regarding who any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.”²⁵

25. G.A. Res. 54/109, *supra* note 1, arts. 7, 69, 15, 17.

Notwithstanding the above-mentioned provisions, the compatibility of CFT and broader counter-terrorism norms with international human rights law norms—and indeed, the primacy of international human rights law—is a foundational principle of public international law. Where there is a conflict between international agreements, the UN Charter recognizes that the obligations under the Charter, including the “universal respect for, and observance of, human rights and fundamental freedoms,” prevail.²⁶ Indeed, it is well-settled that certain rights like the rights and fundamental freedoms, such as freedom from torture and other cruel, inhuman or degrading treatment, freedom of thought, conscience and religion, and freedom from retroactive application of penal laws, are non-derogable.²⁷ Although other rights—including the rights to freedom of expression, association and peaceful assembly, and privacy—may be subject to derogation for limited national security reasons including the legitimate aim of countering the financing of terrorism, such limitations must meet the objective criteria of proportionality, necessity, legality, and non-discrimination, as required under international law.²⁸ In reaffirming the centrality of these interpretative and normative hierarchies we underscore the extent to which human rights obligations cannot be artificially splintered from CFT enforcement, nor can States invoke CFT without directly importing human rights obligations, signifying a mutual reliance across both legal regimes. This interdependence has sizeable consequences for State practice, as well as for the work undertaken by international institutions advancing CFT practice for States including in the area of technical assistance and capacity building.

26. See U.N. Charter art. 55(c); see also *id.* art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

27. International Covenant on Civil and Political Rights, art. 4, ¶ 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICPPR]. See U.N. Hum. Rts. Comm., *General Comment No. 29*, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter ICCPR, *General Comment No. 29*].

28. See ICCPR, *supra* note 27, art. 4(1); see generally ICCPR, *General Comment No. 29*, *supra* note 27.

B. Security Council Resolutions

The UN Security Council has long recognized the need to combat “terrorist financing,” first referencing the term in Resolution 1269 in October 1999.²⁹ Following the attacks of September 11, 2001, the Security Council adopted Resolution 1373 under Chapter VII of the UN Charter, obliging all Member States to, *inter alia*, “[p]revent and suppress the financing of terrorist acts” and “[c]riminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”³⁰

The UN Security Council resolutions on CFT differ from and expand upon the Terrorist Financing Convention in key respects. Although Security Council Resolution 1373 incorporated in part provisions of the Terrorist Financing Convention, which had not yet entered into force, it did not adopt the same definition of “terrorist acts” as in the treaty—furthering definitional ambiguity and potential for abuse as there remains no international consensus or agreed-upon international definition of “terrorism.”³¹ Moreover, Resolution 1373 also expressly stipulated and prohibited direct or indirect *State* terrorist financing, which remains unaddressed in the Terrorist Financing Convention.³²

Since Resolution 1373, the Security Council has adopted numerous additional CFT-related resolutions.³³ Most notably, Resolution 2462 in 2019, also adopted under Chapter VII, consolidated and expanded upon the preceding Security Council-created CFT norms, including by clarifying the scope of terrorist financing offences

29. See Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT’L L. 315, 316 (Apr. 2003).

30. S.C. Res. 1373, ¶¶ 1(a)-(b) (Sep. 28, 2001).

31. See CFT Position Paper, *supra* note 3, at 5-6 (explaining in more detail the similarities and differences between the Terrorist Financing Convention and CFT-related Security Council resolutions).

32. S.C. Res. 1373, *supra* note 30 ¶ 2(a). See Application of the International Convention for the suppression of the financing of terrorism and of the international convention on the elimination of all forms of racial discrimination (Ukr. v. Russ.), Preliminary Objections Judgment, 2019 I.C.J. 31, ¶ 61 (Nov. 8).

33. See *Countering the Financing of Terrorism*, UN OFF. OF COUNTER TERRORISM, <https://www.un.org/counterterrorism/cct/countering-the-financing-of-terrorism> [<https://perma.cc/33XB-VZ27>].

to include direct or indirect financing “for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, *even in the absence of a link to a specific terrorist act.*”³⁴ This and other CFT-related Security Council resolutions have raised significant legitimacy challenges, including with regard to the Security Council’s expedited drafting and adoption processes, limited civil society engagement and human rights benchmarking, and the lack of any geographical or time limitations regarding the imposition of the norms therein.³⁵

Notably, however, Security Council Resolution 2462 reaffirms the compatibility of its provisions with other international law obligations, particularly under international human rights law.³⁶ The Resolution expressly:

Demands that Member States ensure that *all* measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law.³⁷

Throughout the Resolution, additional provisions repeatedly reiterate the requisite alignment of CFT measures with international human rights law with reference to specific CFT implementing measures. Among other examples:

- Paragraph 5 requires that Member State criminalization of terrorist financing offenses be “consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law”;
- Paragraph 19 “[c]alls upon Member States to intensify and accelerate the timely exchange of relevant operational

34. See S.C. Res. 2462, *supra* note 4 (emphasis added).

35. See G.A. Res 73/361, ¶¶ 13, 23, 33 (Sep. 3, 2018).

36. See S.C. Res. 2462, *supra* note 4 ¶ 5 (“Reaffirming that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort, noting the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and noting that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization to violence and fosters a sense of impunity.”).

37. See S.C. Res. 2462, *supra* note 4, ¶ 6 (emphasis added).

information and financial intelligence,” including by “[e]nsuring that competent authorities can use financial intelligence shared by financial intelligence units, and relevant financial information obtained from the private sector, in compliance with international law, including international human rights law”;

- Paragraph 20 “[c]alls upon all States to enhance the traceability and transparency of financial transactions, in compliance with international law, including international human rights law and humanitarian law”; and
- Paragraph 23 “encourages Member States to work cooperatively with the non-profit sector in order to prevent abuse of such organizations including front organizations by and for terrorists while recalling that States must respect human rights and fundamental freedoms.”³⁸

Moreover, in other counter-terrorism related resolutions, the Security Council has emphasized that respect for human rights is mutually complementary and reinforcing of effective counter-terrorism measures, recognizing that non-compliance with these and other international obligations contributes to increased radicalization and impunity.³⁹

Recognition of the inevitable interface between counter-terrorism financing obligations and international human rights law obligations also pervades the Technical Guide to the implementation of resolution 1373.⁴⁰ In fact, the Counter-Terrorism Executive Directorate, which is the entity mandated by the Security Council to monitor and assess State implementation of the Security Council resolutions-based CFT regime, is tasked to take relevant human rights issues into account in its work.⁴¹ Although in practice, the specific country assessments are regrettably

38. See S.C. Res. 2462, *supra* note 4, ¶¶ 5, 9, 19, 20, 23 (June 13, 2019).

39. See S.C. Res. 2178, pmbl. ¶ 7 (June 27, 2014).

40. See, e.g., U.N. Security Council, Letter dated Dec. 27, 2019 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2019/998, at 7 (Dec. 27, 2019).

41. U.N. SEC. COUNCIL COMM. CONCERNING COUNTER-TERRORISM, Conclusions for Policy Guidance Regarding Human Rights and the CTC, S/AC.40/2006 (May 25, 2006); see also *Global Survey of the implementation of resolution 1373 (2001) by Member States*, U.N. SEC. COUNCIL COUNTER-TERRORISM COMM., (Nov. 2021).

not generally publicly available—in turn creating unique challenges for oversight and accountability⁴²—the combination of Resolution 2462’s textual recognition of the requisite international human rights law compliance of CFT measures and the Security Council’s structural recognition of necessary human rights oversight reinforces at least in principle the continued applicability of international human rights law and other public international law norms in the CFT space. This structural hardwiring has often been overlooked in the practice of implementing CFT measures and goes to a broader challenge of human rights ‘lite’ implementation of counter-terrorism measures post September 11, 2001. In a fundamental sense, a shift in practice requires going back to basics, namely the texts of authorizing and framing legal authorities, and grounding both State practice and oversight in these foundational imperatives.

C. FATF Standards

The FATF is one of the most prominent actors setting CFT standards for the international community. Originally established in 1989 by the G7, the FATF membership has since expanded to 37 member jurisdictions, with two regional organizations and nine FATF-Style Regional Bodies acting as Associate Members.⁴³ Among its members are States with notorious human rights and broader international law compliance challenges, including China, Israel, Saudi Arabia, and Turkey.⁴⁴ The FATF mandate first centered on combatting money laundering. However, after September 11, 2001, its mandate was expanded to CFT, and subsequently the financing of weapons of

42. This lack of transparency makes it exceedingly difficult to monitor the adequacy of human rights assessments and mainstreaming in this regard. *See* CFT position paper, *supra* note 3, at 27-28.

43. *Members*, FATF, <https://www.fatf-gafi.org/en/countries/fatf.html> [<https://perma.cc/2SNC-CRBD>] (last visited Apr. 18, 2023) (providing an up-to-date list of FATF members and observers).

44. *See, e.g.*, UN Special Procedures Communications Database, UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://spcommreports.ohchr.org/Tmsearch/TMDocuments> [<https://perma.cc/F27Q-9VCA>] (last visited Apr. 18, 2023); *see also* UN Human Rights Treaty Bodies Database, OHCHR, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx [<https://perma.cc/5LVF-XGPQ>].

mass destruction.⁴⁵ The expansive CFT mandate culminated in Nine Special Recommendations on CFT—i.e., the “40+9 Recommendations” on combatting money laundering and terrorist financing, which have since been integrated into the FATF 40 Recommendations and revised multiple times. Together with the Interpretative Notes, the FATF Recommendations are commonly referred to as the “FATF Standards.”

Crucially, the FATF Standards are non-binding and **the FATF** mandate specifically states the intention not to effectuate any legal rights or obligations.⁴⁶ In fact, the FATF is not legally an international organization—with distinct legal status and privileges and immunities as such—but rather a self-described “intergovernmental body.”⁴⁷ Nonetheless, the evaluation procedures for compliance with the FATF Standards—including the “greylisting” and “blacklisting” procedures that carry significant financial and political ramifications for non-compliance⁴⁸—has “hardened” the FATF Standards and rendered the FATF extremely powerful on the international stage. As some commentators have described the FATF, it remains the “most important international organization you’ve never heard of.”⁴⁹ The Standards are clearly ‘soft’ law standards but in practice are treated by States and interlocutors including business enterprises and commercial banks as hard and binding on States.

45. *History of the FATF*, FATF, <https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html#:~:text=The%20Financial%20Action%20Task%20Force,G7%20Summit%20in%20July%201989> [https://perma.cc/3RVA-R2LZ] (last visited Apr. 18, 2023).

46. *See Mandate of the Financial Action Task Force*, FATF, 10 ¶ 48 (Apr. 19, 2023), <https://www.fatf-gafi.org/en/the-fatf/mandate-of-the-fatf.html#:~:text=FATF's%20mandate%20recognises%20the%20need,threats%20that%20all%20countries%20face> [https://perma.cc/R3ZY-G7YQ].

47. *Id.*

48. *See generally, e.g.*, Katrin Eggenberger, *When Is Blacklisting Effective? Stigma, Sanctions and Legitimacy: The Reputational and Financial Costs of Being Blacklisted*, 25 *REV. INT'L POLI. ECON.* 483, 490 (2018) (describing the financial and reputational costs of blacklisting); Mizuho Kida & Simon Paetzold, *The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning*, IMF Working Paper WP/21/153 at 5 (May 2021) (finding a significant negative effect of greylisting on capital inflows); Mark T. Nance, *The Regime that FATF Built: An Introduction to the Financial Action Task Force*, 69 *CRIME L. SOC. CHANGE* 109, 117-118 (2018) (summarizing the FATF expansion including as a tool of influence by powerful countries and increasingly, the private sector).

49. *See, e.g.*, Tom Keatinge et al., *Good Intentions: The FATF Faces Its Own Unintended Consequences*, RUSI, COMMENTARY (Aug. 5, 2021), <https://rusi.org/explore-our-research/publications/commentary/good-intentions-fatf-faces-its-own-unintended-consequences> [https://perma.cc/R3ZY-G7YQ].

The FATF Standards recommend, *inter alia*, that member jurisdictions apply a risk-based approach to terrorist financing, “to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified” (Recommendation 1); provide for terrorist financing offenses under domestic law (Recommendation 5); adopt targeted financial sanctions pursuant to the Security Council counter-terrorism sanctions regime (Recommendation 6); adopt information-sharing measures including for financial investigations (Recommendations 30–31); and adopt a range of sanctions and penalties for terrorist financing offenses (Recommendation 35). Of most relevance to the potential impingement upon fundamental rights and freedoms, Recommendation 8 stipulates the implementation of CFT regulatory measures tailored to a subset of non-profit organizations identified as being at risk of and vulnerable to terrorist financing concerns. Non-profit organizations are essential actors in the human rights chain, critical to the establishment and vibrancy of civic space, and the vehicle by which non-governmental organizations and advocates further their work. Originally, this recommendation, in fact, described non-profit organizations as “particularly vulnerable” to terrorist abuse but after significant pressure and advocacy efforts from civil society across the globe, the FATF removed this presumptive language and revised the accompanying Interpretative Note and Best Practices Paper in 2016 to emphasize the tailored, proportionate, and risk-based approach that requires first the determination of a *subset* of organizations vulnerable to terrorist financing.⁵⁰ A pervasive concern is that despite this re-wording States remain anchored in practice to the ‘particularly vulnerable’ framing, which functions as chimera for limiting and constraining the actions of the non-profit and non-governmental sector in many countries.

The uniquely “coercive” yet “voluntary” character of the FATF⁵¹ creates a challenging environment in terms of accountability for human

50. See Press Release, Charity Security Network et al., NPOs Applaud Important Changes in Financial Action Task Force (FATF) Policy – NPOs no longer considered ‘particularly’ vulnerable, (June 29, 2016), <https://charityandsecurity.org/system/files/2016%2006%20NPOs%20applaud%20important%20changes%20in%20Financial%20Action%20Task%20Force%20%28FATF%29%20policy.pdf> [https://perma.cc/2CZ4-68PK].

51. See Aleksi Pursiainen, *The FATF and Evolution of Counterterrorism Asset Freeze Laws in the Nordic Countries: We Fought the Soft Law and the Soft Law Won*, in K.

rights violations committed in the name of compliance with the FATF Standards. Whereby States may invoke the FATF Standards as pretext for human rights abusive CFT measures, the FATF may rely on its soft legal status, the voluntary nature of the Standards, and the narrow scope of its mandate to circumvent formal institutional accountability or responsibility. Indeed, some States have sought to dispute the compatibility of certain FATF Standards with fundamental international human rights law norms but to little avail, ultimately adapting their approach to the FATF Standards.⁵²

Of note, the FATF has in fact clarified—at least in the Interpretative Notes and related guidance documents corresponding with certain recommendations—that in implementing its recommendations, States are not to contravene fundamental public international law obligations, including under international human rights law. For instance, the Interpretative Note to Recommendation 8 states that “[m]easures to protect NPOs from potential terrorist financing abuse should be targeted and in line with the risk-based approach” and that “[i]t is also important for such measures to be implemented in a manner which respects countries’ obligations under the Charter of the United Nations and international human rights law.” Along similar lines, the Interpretative Note to Recommendation 6 on targeted financial sanctions related to terrorism and terrorist financing stipulates that “[i]n determining the limits of, or fostering widespread support for, an effective counter-terrorist financing regime, countries must also respect human rights, respect the rule of law, and recognize the rights of innocent third parties.”

Moreover, the FATF has actively sought to address the allegations of misuse of the FATF Standards and potential impacts on the civil society, among other affected groups and communities. In February 2021, the FATF Plenary established a project team to analyze the “unintended consequences” resulting from the FATF Standards, including with regard to the curtailment of human rights, with a focus on due process and procedural rights, as well as undue targeting of non-

KARJALAINEN ET AL. (eds.), *INT’L ACTORS AND THE FORMATION OF L.* (2022), n.1 (citing several commentators making both arguments).

52. *See id.* at 166-68 (2002) (describing how Denmark and Norway questioned the human rights law compatibility with the FATF asset freezing standard recommending an administrative freezing mechanism but ultimately lost those fights).

profit organizations, financial exclusion, and de-risking,⁵³ i.e., the practice where financial institutions end or restrict business relationships with certain clients or categories of clients in a blanket attempt to avoid any risk of terrorist financing.⁵⁴ This project culminated in a High-Level Synopsis of initial findings, which found, among other notable conclusions, that the “misapplication of the FATF Standards may affect due process and procedural rights.”⁵⁵ Despite such well-meaning efforts, due to its narrow mandate, there are limitations to the FATF’s course correction and human rights safeguarding, particularly in addressing State responsibility for international human rights law violations committed in the name of the FATF Standards.

III. DOCUMENTATION OF ALLEGED HUMAN RIGHTS ABUSE IN THE NAME OF COUNTER-TERRORISM FINANCING

With the foregoing patchwork setting out international CFT obligations and standards, and the undeniable political and normative pull of the Security Council and FATF in particular,⁵⁶ States across the globe have increasingly adopted CFT laws, regulations, and policies. In fact, there has been a concerted move among certain States towards over-regulation or what some commentators have described in the targeted financial sanctions context as the “comprehensivization” of supposedly targeted financial measures.⁵⁷ These laws and policies implicate a wide range of stakeholders, including State security apparatuses, Central Banks and financial institutions and intermediaries, private companies, and civil society.

53. See *High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards*, FATF, (Oct. 27, 2021), <https://service.betterregulation.com/document/538456> [<https://perma.cc/83LR-AVCS>] [hereinafter “FATF High-Level Synopsis”].

54. *FATF Clarifies Risk-Based Approach: Case-by-Case, Not Wholesale De-risking*, FATF (Oct. 23, 2014) (emphasis added), <https://www.fatf-gafi.org/en/publications/Fatfgeneral/Rba-and-de-risking.html> [<https://perma.cc/7PW3-EW52>].

55. See *FATF High-Level Synopsis*, *supra* note 53, at 6.

56. For a further analysis of the power dynamics at play and the outsized norm-setting role of a dominant minority of States, see CFT position paper, *supra* note 3, at 9. See also Fionnuala Ní Aoláin (Special Rapporteur), *Report of the Special Rapporteur*, *supra* note 12.

57. Gregoire Mallard & Aurel Niederberger, *Targeting Bad Apples or the Whole Barrel? The Legal Entanglements between Targeted and Comprehensive Logics in Counter-Proliferation Sanctions*, in *ENTANGLED LEGALITIES BEYOND THE STATE* 227, 243 (2022).

Despite the human rights and international law safeguards firmly provided for in the applicable international CFT instruments, States have increasingly invoked these same instruments as cover to implement expansive, undue, and overburdensome CFT measures. This section provides a mere snapshot of the extensive existing documentation by the United Nations, academics, civil society actors, and other stakeholders regarding the significant human rights impacts raised by national CFT measures⁵⁸—making clear the linkage between such measures and the FATF Standards and other CFT instruments.

By way of example, in Nicaragua, the Government adopted several CFT laws seeking to expand the scope of the definition of and penalties for terrorist financing offences under domestic law and introducing new, burdensome financial reporting and operating requirements for non-profit organizations.⁵⁹ Strikingly, since 2018, at least 209 civil society organizations—including the country’s largest and most well-established human rights non-profit organizations working in the fields of women’s rights, indigenous peoples’ rights, education, and development—have been stripped of their legal status under Nicaraguan law for allegedly failing to comply with these CFT and related counter-terrorism requirements.⁶⁰ Many non-profit leaders and human rights defenders have been arbitrarily detained, prosecuted, or otherwise judicially harassed in this vein.⁶¹ Such incidents signify potential violations of the rights to freedom of expression and association, minority rights, the right to privacy, due process and fair

58. See, e.g., CFT position paper *supra* note 3; *Mapping on Terrorism Financing Risk in Nonprofit Organizations in Member Countries of the Financial Action Task Force of Latin America*, FATF (Jan 2021); *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security* DUKE L. INT’L HUM. RTS. CLINIC AND WOMEN PEACEMAKERS PROGRAM, (2017); Guilherme France, *The Impacts of AML/CFT Regulations on Civic Space and Human Rights*, TRANSPARENCY INT’L (Apr. 16, 2021); Kate Mackintosh & Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Report commissioned by the United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council (2013); Victoria Ibezim-Ohaeri & Lotanna Nwodo, *Harms from Abroad: Impact of Global Security Measures on Civic Space in Nigeria*, Action Group on Free Civic Space (Dec. 2021).

59. See OL NIC 3/2020 (Nov. 13, 2020); Press Release, United Nations, Nicaragua: New Law Heralds Damaging Crackdown on Civil Society, UN Warns, United Nations (May 9, 2022).

60. See *id.*

61. See *Critics Under Attack Harassment and Detention of Opponents, Rights Defenders and Journalists Ahead of Elections in Nicaragua*, HUM. RTS. WATCH (June 22, 2021), <https://www.hrw.org/report/2021/06/22/critics-under-attack/harassment-and-detention-opponents-rights-defenders-and> [<https://perma.cc/M6FU-YV98>].

trial rights, and other rights and freedoms that are well-settled under international human rights law.

As another example, the Israeli Government adopted Counter-Terrorism Law No. 5776-2016 of 2016, which grants the Ministry of Defense authority to designate organizations as “terrorist organizations” on the grounds of financial assistance to already-designated terrorist organizations, and to, *inter alia*, dissolve the organizations, seize their assets, and imprison and otherwise judicially target organizational leaders, staff, and even donors and supporters.⁶² The Government has since designated and forcibly dissolved at least six leading Palestinian human rights, humanitarian, and development organizations as “terrorist organizations,” on the purported—though uncorroborated⁶³—basis of financing to the Popular Front for the Liberation of Palestinian. The staff, lawyers, and supporters of these non-profit organizations have been subjected to administrative detention, deportation and travel bans, physical office raids and digital surveillance.⁶⁴ These repressive measures come with obvious consequences to the rights to freedom from arbitrary detention, due process and fair trial rights, cultural and minority rights, and the right to privacy and family, among others. The measures also pose significant international humanitarian law implications given the context of occupation and the resulting challenges posed to humanitarian assistance.⁶⁵

In Zimbabwe, the Government gazetted the Private Voluntary Organizations Amendment Bill in November 2021, which, *inter alia*, broadens the definition of organizations subject to further reporting, registration, and even re-registration requirements on the basis of CFT and authorizes the suspension and governmental appointment of private voluntary organization executive committees.⁶⁶ The Government has since introduced further restrictive amendments to the Bill, including the criminalization of individuals involved in organizations not registered under the Private Voluntary Organizations

62. See *UN Special Procedures*, OL ISR 6/2022, 2-9 (May 5, 2022).

63. See Press Release, United Nations, Israel/Palestine: UN Experts Call on Governments to Resume Funding for Six Palestinian CSOs Designated by Israel as Terrorist Organisations (Apr. 25, 2022).

64. See *UN Special Procedures communications* AL ISR 11/2021 (Dec. 27, 2021); AL ISR 11/2022 (June 14, 2022); AL ISR 13/2022 (July 1, 2022); AL ISR 15/2022 (Aug. 10, 2022).

65. See *UN Special Procedures*, OL ISR 6/2022, 10-14 (May 5, 2022).

66. See *UN Special Procedures*, OL ZWE 3/2021, 4-9 (Dec. 17, 2021).

Act—with no transitional provisions protecting organizations lawfully operating as trusts or associations pending such registration—and the unilateral ministerial discretion to designate any non-profit organizations as high risk of terrorist financing.⁶⁷ In the meantime, the Government has allegedly suspended the new registration of organizations, closed down charitable organizations on procedural technicalities absent processes for appeal, and subjected certain non-profit organizations to undue surveillance, office raids, intimidation and physical harassment.⁶⁸

Notably, in each of these country examples, the named Governments expressly relied upon and invoked the FATF Standards and CFT obligations therein.⁶⁹ Each Government is also a State party to the Terrorist Financing Convention.⁷⁰ In an arguable sign of successful framing on the part of those States, the FATF took both Zimbabwe and Nicaragua off its greylists in March 2022 and October 2022 respectively.⁷¹ The FATF did caution in the case of Nicaragua that it was “strongly concerned by the potential misapplication of the FATF Standards resulting in the suppression of Nicaragua’s non-profit sector,” urging Nicaragua “to work with GAFILAT to improve further its AML/CFT regime, including by ensuring its oversight of NPOs is risk-based and in line with the FATF Standards.”⁷² But the fact remains that, pursuant to its methodology, the FATF was seemingly obliged to de-list these States and arguably greenlight such conduct despite the grave human rights consequences. Although technical improvements

67. See Zimbabwe Lawyers for Human Rights Letter to Special Rapporteur on Counter-Terrorism and Human Rights (Oct. 19, 2022), <https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/cfi-gs-impact/2022-10-19/CFI-CT-ZLHR%20Input.docx> [<https://perma.cc/R84F-3K95>].

68. *Id.*

69. See AL NIC 2/2022 (July 25, 2022); Identical letters dated November 23, 2021 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2021/969; Zimbabwe Lawyers for Human Rights Letter to Special Rapporteur on Counter-Terrorism and Human Rights (Oct. 19, 2022).

70. Israel (ratified Feb. 10, 2003), Nicaragua (ratified Nov. 14, 2002); Zimbabwe (acceded Jan. 30, 2013). See G.A. Res. 54/109, *supra* note 1.

71. *Outcomes FATF Plenary*, FATF, (Mar. 2-4, 2022), <https://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-fatf-plenary-march-2022.html> [<https://perma.cc/78GA-PQR7>]; *Outcomes FATF Plenary*, FATF, (Oct. 21, 2022), <https://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-fatf-plenary-october-2022.html> [<https://perma.cc/K6HD-G6US>].

72. *Outcomes FATF Plenary*, FATF (Oct. 21, 2022), <https://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-fatf-plenary-october-2022.html> [<https://perma.cc/N6UJ-FALM>].

to the FATF methodology and mutual evaluation criteria to take overregulation and human rights challenges into consideration would be welcome, they would not shift the fundamental misuse problem, where States are rewarded for the thrust of compliance against the stated threat of terrorism notwithstanding the negative effects that in turn create the conditions conducive for further cycles of violence, anomie, and exclusion.

IV. AVENUES FOR ACCOUNTABILITY AND STATE RESPONSIBILITY

To date, civil society organizations and other affected stakeholders have built incredible technical expertise on CFT matters and have secured direct policy changes with regard to the human rights and civic space impacts of State CFT implementation, particularly through constructive engagement with the FATF. However, one avenue that has remained less explored is the pursuit of *State responsibility* for human rights violations committed in the name of international CFT compliance. This section considers different judicial and arbitral fora and potential legal challenges that civil society actors, States, and other stakeholders may use to hold States to account for alleged CFT misuse and abuse.

The authors acknowledge that in addition to State responsibility, non-State actors, private actors, and other stakeholders may be held responsible for human rights abuses committed in the name of countering the financing of terrorism. However, the primary responsibility to implement counter-terrorism financing obligations—including to ensure human rights and broader international law compliance through human rights due diligence and ex ante impact assessments—lies squarely with the State. Indeed, in accordance with their obligation to respect, protect and fulfill human rights within their territory and/or jurisdiction, States are the “primary duty-bearers under international human rights law,” obliged to, *inter alia*, protect against human rights abuses by third parties, including private actors, and provide access to effective remedy should abuses occur.⁷³ The broader point here is that the creation of ‘new’ counter-terrorism institutions and new normative frameworks must be corralled back to the core

73. See *id.* at 3-12; see also *Guiding Principles on Business and Human Rights*, UN HUMAN RIGHTS OFF. OF THE HIGH COMM’R, at 7 (2011).

regulatory oversight provided by international human rights mechanisms.

A. UN Human Rights Mechanisms

Perhaps the most obvious avenue for bringing claims of alleged human rights violations against States in the context of CFT misuse is through invocation of the core UN international human rights treaties, all of which have established treaty bodies or committees tasked with monitoring implementation of the treaty provisions by States parties and most of which have specific procedures for lodging human rights complaints against States Parties. Such claims would build upon the existing communications by UN Special Procedures on potential human rights violations perpetrated in the CFT context.⁷⁴

As indicated in the prior section, State CFT measures may implicate a range of human rights and fundamental freedoms that are well protected by the core international human rights treaties. By way of example, undue non-profit registration and reporting requirements and operating restrictions on the basis of CFT may unlawfully infringe upon the rights to freedom of opinion and expression,⁷⁵ rights to freedom of peaceful assembly and association,⁷⁶ and right to take part in public affairs and related public consultation rights,⁷⁷ as protected by the International Covenant on Civil and Political Rights (“ICCPR”), among other core instruments. Indeed, where CFT measures targeting non-profit organizations are not risk-based—i.e., not narrowly tailored to the subset of organizations empirically identified as currently being at risk of and vulnerable to terrorist financing due to inadequate existing regulations, including self-regulatory measures—they are

74. See, e.g., CFT position paper, *supra* note 3, at 16 (communications chart).

75. G.A. Res. 217 (III)A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948), art. 19; See ICCPR, *supra* note 27, art. 19; see also Int’l Covenant on Civil and Pol. Rts., *General Comment No. 34*, art. 19 CCPR/C/GC/34 (Sep. 12, 2011).

76. See G.A. Res. 217 (III)A, art. 20; See ICCPR, *supra* note 27, art. 22; see also G.A. Res. 53/144 (UN Declaration on Human Rights Defenders); Int’l Covenant on Civil and Pol. Rts., *General Comment No. 37*, art. 21 CCPR/C/GC/37 (Sep. 17, 2020).

77. See ICCPR, *supra* note 27, art. 25; see also Int’l Covenant on Civil and Pol. Rts., *General Comment No. 25*, art. 25 CCPR/C/21/Rev.1/Add.7 (Jul. 12, 1996).

likely in contravention of the principles of proportionality and necessity as a matter of international law.⁷⁸

CFT restrictions that in design or impact disproportionately target minority groups and individuals on the grounds of religion or belief, race, color, or ethnic origin, or gender and age may contravene the international law requirement of non-discrimination, in potential violation of the ICCPR, International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), and Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) respectively.⁷⁹ Such measures may include, for instance, sweeping terrorist or terrorist organization designations and judicial harassment of certain groups or individuals on the ground of alleged identification with or peaceful manifestation of religious belief; overburdensome operating restrictions targeting Muslim non-profit organizations or other minority groups; and administrative measures such as the revocation of social welfare and other public benefits, disproportionately affecting women and girls as family members of designated individuals.⁸⁰

Moreover, many preventative and enforcement measures, such as surveillance, prosecutions, de-risking, and the revocation of citizenship, residency, employment, and public benefits, trigger myriad human rights treaty provisions. Among others, claims might be brought alleging violations of the rights to freedom from interference with privacy, family, or home,⁸¹ freedom of movement and nationality,⁸² freedom from torture and cruel, inhuman, or degrading treatment or

78. See, e.g., ICCPR, *supra* note 27, arts. 12(3), 18(3), 19(3), 21(3), 22(2); ICESCR, arts. 8(1); see also Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4.

79. See, e.g., G.A. Res. 217 (III)A, *supra* note 76, art. 2; See ICCPR, *supra* note 27, at art. 2; ICERD, art. 2; CEDAW, art. 2; A/75/337, ¶ 36.

80. See CFT position paper, *supra* note 3.

81. See G.A. Res. 217 (III)A, *supra* note 76, art. 12; ICCPR, *supra* note 27, art. 17; see also Int'l Covenant on Civil and Pol. Rts., General Comment No. 16, art. 17 U.N. Doc., (Apr. 8, 1988).

82. See G.A. Res. 217 (III)A, *supra* note 76, arts. 13, 15 (Dec. 10, 1948); ICCPR, *supra* note 27, art. 12; see also ICCPR, General Comment No. 27, art. 12 (Nov. 2, 1999).

punishment⁸³; rights to property and work⁸⁴; and fundamental due process and fair trial rights,⁸⁵ as protected under the ICCPR, International Covenant on Economic, Social, and Cultural Rights (“ICESR”), among others.

Depending on the human rights treaty invoked, any affected individual, group, or in some cases, State party may have standing to file a complaint against another State party that has accepted the applicable communications procedure. All of the UN Human Rights Treaties stipulate individual communications procedures. Further, several have procedures for inter-State communications. By way of example, Article 21 of the Convention against Torture and Article 10 of the Optional Protocol to the ICESCR stipulate procedures for the human rights treaty bodies, i.e. Committees, to consider inter-State communications where a State party alleges another is not giving effect to the provisions of the treaty.⁸⁶ Articles 11 to 13 of the ICERD and articles 41 to 43 provide for more complex procedures where an ad hoc Conciliation Commission may be established to resolve inter-State disputes regarding the proper interpretation or application of the treaty.⁸⁷

Although the inter-State communications procedures remain relevantly unexplored, the human rights consequences of CFT present a potentially ripe avenue for this form of dispute resolution. Indeed, in stark contrast to CFT entities—including the FATF, which is limited from making international human rights law

83. See ICCPR, *supra* note 27, art. 7; see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85.

84. See G.A. Res. 217 (III)A, *supra* note 76, arts. 23, 26 (Dec. 10, 1948); G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, art. 6, 13, (Dec. 16, 1966); see also Committee on Economic, Social and Cultural Rights, General Comment No. 18, U.N. Doc. art. 6.

85. See G.A. Res. 217 (III)A, *supra* note 76, arts. 10, 11 Dec. 10, 1948); ICCPR, *supra* note 27, arts. 9, 14, 15; see also Human Rights Committee, General Comment No. 32, U.N. Doc., art. 14, (May 26, 2004).

86. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

87. International Convention on the Elimination of All Forms of Racial Discrimination; see *Complaints about human rights violations, UN Treaty Bodies*, <https://www.ohchr.org/en/treaty-bodies/complaints-about-human-rights-violations#interstate> [<https://perma.cc/88P7-6U6Q>] (last visited Apr. 18, 2023).

assessments due to the narrow scope of its mandate,⁸⁸ and the Security Council's Counter-Terrorism Executive Directorate, which is not a judicial actor and whose human rights assessments in any event remain entirely obscured due to the confidential nature of its country assessments⁸⁹—the UN human rights treaty bodies comprise first and foremost, human rights experts, and their final decisions are made public. As a matter of first principles, CFT-related communications before the human rights treaty bodies present a unique opportunity for the express legal affirmation of the primacy of human rights law in the face of purported CFT aims. It also provides for the capacity to bring transparency to the actions of States broadly utilizing CFT measures, a commodity whose absence is glaring in the counter-terrorism regulatory context.

B. Regional Human Rights Courts

Similarly, States may be subject to CFT-related allegations of human rights violations before the regional human rights courts. Like the human rights treaty bodies, the regional human rights courts already have robust jurisprudence safeguarding fundamental rights and protections in the counter-terrorism context. Much of this case law and reasoning would arguably apply to other CFT-related measures.

For instance, the European Court of Human Rights has issued several decisions on cases involving broader counter-terrorism related violations of the right to respect for private and family life stipulated in Article 8 of the European Convention on Human Rights. The Court has affirmed in these cases that States Parties cannot adopt digital surveillance systems in the name of terrorism, absent adequate and effective safeguards against abuse,⁹⁰ and that any secret surveillance must be strictly necessary and proportionate to the legitimate aim being

88. FATF Mandate, at 4-5 (Apr. 12, 2019) (setting out the specific objectives, functions and tasks of the FATF and clarifying that the mandate is “not intended to create any legal rights or obligations”).

89. See *Framework Document for CTC Visits to States in order to Enhance the Monitoring of the Implementation of Resolution 1373* (2001), (March 9, 2005), https://www.un.org/sites/www.un.org/securitycouncil.ctc/files/framework_for_statevisits.pdf [<https://perma.cc/B99A-6D5V>] (clarifying that the country reports remain confidential “unless that State decides otherwise”); see also CFT position paper, *supra* note 3, at 27 n.176.

90. Weber and Saravia v. Germany (dec.), App. No. 54934/00., ¶ 106., Eur. Ct. H.R., Application no. 54934/00, sec. 106 (June 29, 2006).

pursued.⁹¹ In the context of physical surveillance, the Court has similarly determined that adequate and effective safeguards must be in place against abuse, including potential arbitrary interference by the security and law enforcement sectors.⁹² Indeed, in the context of an anti-terrorist unit's search and seizures, the Court found States parties in violation of Article 8 for lack of such requisite safeguards.⁹³ In this regard the Court has explained that it considers the following indicators when determining whether counter-terrorism and national security measures are adequately circumscribed:

the geographic and temporal scope of the powers; the discretion afforded to the authorities in deciding if and when to exercise the powers; any curtailment on the interference occasioned by the exercise of the powers; the possibility of judicially reviewing the exercise of the powers; and any independent oversight of the use of the powers.⁹⁴

With regard to adequate due process safeguards, the European Court of Human Rights has also developed rich jurisprudence on the necessary guarantees due to individuals subject to criminal, civil, and administrative measures by the State in the name of countering terrorism. In cases interpreting Article 6 of the Convention, which provides for the right to a fair trial, the Court has underlined the importance of the independence and impartiality of judicial actors including special counter-terrorism courts, equality of arms between prosecution and defense, prompt access to lawyers during State custody, and the limited use of secret evidence or closed hearings as absolutely necessary.⁹⁵ Moreover, the Court has recognized that certain administrative measures may implicate additional rights and protections under the Convention. For instance, the Court has found arbitrary interference where a local federal agency dismissed an

91. *Segerstedt-Wiberg and Others v. Sweden*, App. No. 62332/00, ¶ 88 (June 9, 2006).

92. *See id.*

93. *See Vinks and Ribicka v. Latvia*, App. No. 54934/00, ¶ 106 (June 29, 2006); *see Yunusova and Yunusov v. Azerbaijan* App. No. 59620/14, ¶¶ 113-114, 118 (Oct. 16, 2020).

94. *Beghal v. the United Kingdom*, App. No. 4755/16, ¶ 89 (May 28, 2019).

95. *See* Guide to the Case-Law of the European Court of Human Rights: Terrorism, Eur. Ct. H.R. (Aug. 31, 2022), https://www.echr.coe.int/Documents/Guide_Terrorism_ENG.pdf [<https://perma.cc/7AHY-6GY2>], at 24-25, (citing, e.g., *McKeown v. the United Kingdom*); *Doorson v. Netherlands*, Eur. Ct. H.R., sec. 70 (1996); *Jasper v. the United Kingdom* [GC], Eur. Ct. H.R., sec. 52 (2000); and *B. and P. v. the United Kingdom*, Eur. Ct. H.R., sec. 37 (2001); *Salduz v. Turkey* [GC], Eur. Ct. H.R., § 51 (2008).

employee accused of affiliation with a terrorist organization, recognizing, *inter alia*, the significant stigmatization and professional and personal reputation harms that resulted and the lack of adequate judicial review of the dismissal.⁹⁶ The Court has also found unlawful interference with an individual's right to respect for private and family life where his citizenship was revoked in the context of counter-terrorism proceedings.⁹⁷

Similar claims are no doubt plausible in the CFT context. Although States parties may invoke their obligations under Security Council resolutions 1373 and 2462 as justification for restrictive measures, blanket invocation of such grounds is insufficient. States parties are obligated to clearly state the specific, legitimate aims being pursued, the strict necessity of the restrictions proposed, the legality of the measures, and the due process and other safeguards adopted to ensure the proportionality and non-discriminatory character of the measures. Indeed, by way of comparison, in the counter-terrorism sanctions context, the European Court of Human Rights has previously found violations of the right to respect for private and family life where an Italian and Egyptian citizen was subject to a Swiss entry and transit ban stemming from his listing pursuant to UN Security Council Resolutions 1267, 1333, and 1390.⁹⁸

C. European Court of Justice

European Union Member States may also be brought before the European Court of Justice and General Court of the European Union for the misuse of CFT measures absent adequate human rights safeguards, particularly due process rights, and continuing risk assessments, including potential laws, directives and policies adopted pursuant to Security Council Resolutions 1373 and 2462. In the seminal *Kadi case*,⁹⁹ the European Court of Justice was faced with a challenge by an individual subject to an assets freeze pursuant to an EU regulation transposing the UN Security Council resolution 1267 sanctions regime and related designations concerning the Islamic State

96. Pişkin v. Turkey, App. No. 33399/18, ¶¶ 216-229 (Dec. 15, 2020).

97. See, e.g., K2 v. the United Kingdom (dec.), App. No. 42387/13 ¶ 49 (Feb. 7, 2017).

98. Nada v. Switzerland, App. No. 10593/08, ¶¶ 1, 22, 198 (Sept. 12, 2012).

99. Joined Cases C-402/05 P & C-415/05, P. Kadi and Al Barakaat Int'l Foundation v. Council and Comm'n, 2008 E.C.R. I-6351.

in Iraq and the Levant, Al-Qaida, and associated individuals, groups, undertakings, and entities.

The Court determined on appeal that because the protection of fundamental human rights is embedded into the very “foundation of the Union”—pursuant to, *inter alia*, the European Union Charter of Fundamental Rights—any Union measures, including measures incorporating and implementing the sanctions designation of the Security Council, must be compatible with those fundamental rights. As the Court expressly clarified:

It is true also that Article 297 EC implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security.

Those provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.¹⁰⁰

Ultimately the Court determined that because the individual claimant was not informed of the grounds for his designation, his rights to be heard, to effective judicial review, and to property were all violated.¹⁰¹

Notably, with regard to the competence of the European Court of Justice to review acts taken in the name of Security Council resolutions adopted under Chapter VII of the UN Charter, the Court has clarified that reviewing compatibility with fundamental rights is distinct from a direct review of the lawfulness of the international agreement *per se*. In other words, where the review only extends to the European Union’s measures giving effect to the resolutions and not the resolution itself, the Court can exercise jurisdiction.¹⁰² Along these lines, in *Behrami v. France* and *Saramati v. France, Germany and Norway*, the Court found it had competence to adjudicate a matter involving an asset seizure measure where the source of that measure was an EU regulation taken pursuant to a Security Council resolution.¹⁰³ The same rationale might apply with regard to the Court’s jurisdiction over human rights

100. *Id.* ¶¶ 302-303.

101. *Id.* ¶¶ 368, 384.

102. *Id.* ¶¶ 281, 286, 290, 303.

103. *Id.* ¶ 313.

claims stemming from CFT measures undertaken in compliance with Security Council resolutions 1373 and 2462—not just vis-à-vis the EU terrorist designations list, but also potentially pursuant to the EU’s anti-money laundering and CFT rules and directives, provisional agreement on transparency of virtual assets, directive on passenger name record data, and forthcoming reforms and regulatory measures.¹⁰⁴ It is notable that the decision of the European Court of Justice in *Kadi* precipitated fundamental changes in the regulation of counter-terrorism sanctions at the Security Council, and is directly correlated to the establishment of the Office of the Ombudsman.

D. International Court of Justice

Inter-State claims alleging human rights violations committed in the CFT context could even potentially be adjudicated before the International Court of Justice—pursuant to the Terrorist Financing Convention and/or the human rights treaties discussed in Part III.A, where the requisite compromissory clause exists.¹⁰⁵ Indeed, the possibility of raising human rights-related considerations as a matter of proper interpretation or application of the Terrorist Financing Convention could force the International Court of Justice to address at least in part the requisite compatibility between international human rights law obligations and international CFT obligations.

Article 24 of the Terrorist Financing Convention provides the following compromissory clause:

Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of

104. European Council of the European Union, Fight against Money Laundering and Terrorist Financing, <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/fight-against-terrorist-financing/> [<https://perma.cc/ZR9N-VXXX>] (Mar. 29, 2023).

105. The ICJ may also exercise jurisdiction in cases of special agreement or compulsory jurisdiction. Int’l Ct. Just., Basis of the Court’s Jurisdiction, <https://www.icj-cij.org/en/basis-of-jurisdiction> [<https://perma.cc/78J3-ZLMP>].

Justice, by application, in conformity with the Statute of the Court.¹⁰⁶

This clause was most recently invoked by Ukraine in *Ukraine v. Russia*, which is presently pending on the merits before the International Court of Justice.¹⁰⁷

Ukraine has alleged that “[f]ar from preventing the financing of terrorism”—including pursuant to Article 18 of the Convention, which requires States parties to “co-operate in the prevention” of terrorism financing offenses—the Russian Federation “financed terrorism as a matter of State policy” and failed to take the necessary preventative and suppressive measures under the Convention.¹⁰⁸ Although the Court has yet to determine the merits of these allegations, the Court did clarify its jurisdiction *ratione materiae* with regard to Russia’s preliminary objections. In its judgment of November 8, 2019, the Court addressed, *inter alia*, the scope of terrorist financing perpetrators recognized under the Terrorist Financing Convention. The Court explained that the Convention does not cover State financing of terrorist acts, although such financing may still be unlawful as a matter of international law, including pursuant to the applicable Security Council resolutions.¹⁰⁹ Notably, however, the Court did find the determination of State responsibility to be relevant insofar as States parties fail to take appropriate measures in the prevention and suppression of terrorism financing offenses. The Court clarified:

State financing of acts of terrorism is outside the scope of the [Terrorist Financing Convention]; therefore, the commission by a State official of an offence described in Article 2 does not in itself engage the responsibility of the State concerned under the Convention. However, all States parties to the [Terrorist.

106. See G.A. Res. 54/109, *supra* note 1.

107. See generally ICJ, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), “Latest Developments,” <https://www.icj-cij.org/en/case/166> [<https://perma.cc/J7S7-Y5WH>].

108. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukr. v. Russ.), Application instituting proceedings, 2017, I.C.J. Rep. 166 ¶ 128 (Jan. 16, 2017).

109. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukr. v. Russ.), Preliminary Objections, Judgment, 2019 I.C.J. Rep. 558 ¶ 60 (Nov. 8, 2019).

Financing Convention] are under an *obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism* committed by whichever person. *Should a State breach such an obligation, its responsibility under the Convention would arise.*¹¹⁰

Ultimately the Court determined by majority that it had jurisdiction to entertain the claims raised by Ukraine under the Terrorist Financing Convention.¹¹¹

This judgment, albeit preliminary in nature, has arguably paved the way for other potential claims of State responsibility under the Terrorist Financing Convention, not for State financing of terrorism, but for the failure of State parties to implement the appropriate and in some cases, necessarily circumscribed, preventative, suppressive, and cooperative measures as stipulated in the Convention. With relevance to international human rights law and other public international law violations perpetrated in the name of CFT, such allegations might include the exercise of criminal jurisdiction in violation of *jus cogens* norms and other norms of general international law in violation of Article 7 of the Terrorist Financing Convention; the failure to inform individuals detained for terrorist financing of their right to contact a consular representative, in violation of Article 9; and the failure to guarantee fair treatment and related due process safeguards to persons taken into custody or brought into proceedings pursuant to the Convention, in violation of Article 17.

E. International Arbitration

It is also plausible that international investment arbitral tribunals may be asked to consider allegations of State human rights abuse in investor-state arbitration or other forms of business and human rights arbitration. Indeed, foreign investors may be directly affected by overly restrictive or otherwise international law non-compliant CFT measures, such as de-risking measures, asset freezing, and even expropriation on the purported basis of CFT.¹¹²

110. *Id.* ¶ 61 (emphasis added).

111. *See id.*

112. Though not the subject of the present Essay, the private sector, including banks and financial intermediaries, could be subject to human rights-related disputes in both international treaty or commercial arbitration settings, pursuant to the UN Guiding Principles on Business and Human Rights and the Hague Rules on Business and Human Rights Arbitration. Guiding

Interestingly, the interpretation of the international investment law requirements of proportionality, fair trial guarantees, and fair and equitable treatment could theoretically draw from the international human rights law requirements of proportionality, necessity, non-discrimination, and fair trial and due process rights. For example, in *Al-Warraq v Indonesia*, the arbitral tribunal looked to the due process and unfair trial standards stemming from the ICCPR in order to determine whether the investor received fair and equitable treatment by the State.¹¹³ Of particular note here is the potential overlap among the proportionality requirement under international human rights law, the proportionate approach embedded into the risk-based approach espoused by the FATF Standards, as further reinforced by Security Council Resolutions 1373 and 2462, and the doctrine of proportionality in international investment arbitration.¹¹⁴ Putting aside the potential idiosyncrasies and permutations in the application of the principle of proportionality,¹¹⁵ it does appear at the very least, that a disproportionate measure that unlawfully infringes certain protected rights and freedoms as a matter of international human rights law, would also contravene the FATF risk-based approach, and might even correlate with violations of the fair and equitable treatment standard.

F. National Courts

In addition to the foregoing international judicial and arbitral forums, national courts may also exercise personal and subject matter jurisdiction in related human rights disputes, including where States adopt CFT-related measures pursuant to the UN Security Council sanctions and other counter-terrorism resolutions. Such cases might

Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, OHCHR, HR/PUB/11/04 (2011); see CFT Position Paper, *supra* note 3, at 33.

113. Hesham Talaat M Al-Warraq v. Republic of Indonesia, UNCITRAL, Final Award, ¶ 521 (UNCITRAL, Dec. 15, 2014).

114. See generally Eric De Brabandere & Paula Baldini Miranda da Cruz, *The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective*, 89 *NORDIC J. INT’L L.* 471 (2020); GEBHARD BÜCHELER, *PROPORTIONALITY IN INVESTOR-STATE ARBITRATION* (2015).

115. Emily Crawford, *Proportionality*, in *MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW* (2012); Daniel Bardonnet, “Quelques observations sur le principe de proportionnalité en droit internationale,” in *2 LE DROIT INTERNATIONALE DANS UN MONDE EN MUTATION: EN HOMMAGE AU PROFESSEUR EDUARDO JIMENEZ DE ARECHAGA 995-1036* (Manual Rama-Montaldo, ed. Fundación de Cultura Universitaria 1994).

include claims of violations of international human rights law—where such standards are customary and/or have been incorporated under domestic law—and analogous national human rights requirements. By way of example, in *Al Haramain Islamic Foundation, Inc. v. US Department of Treasury*, the United States Court of Appeals for the Ninth Circuit upheld a lower court ruling that the Treasury Department’s procedures to shut down the Al-Haramain Islamic Foundation of Oregon were unconstitutional, in contravention of the Fifth Amendment’s due process guarantee by failing to give adequate notice of the reasons for designation on the terrorist list and failing to issue a court order, pursuant to the Fourth Amendment, when implementing an assets seizure.¹¹⁶ Given the increased use of expansive CFT measures at the national level, combined with greater knowledge of CFT requirements as a result of civil society engagement with CFT requirements, and Recommendation 8 in particular, we predict an uptick in national litigation.

V. CONCLUSION

As human rights violations committed under the pretext of compliance with international CFT obligations abound, stakeholders must think creatively about the panoply of international justice forums available to reinforce the continued applicability of international human rights law and to hold States to account for CFT misuse and abuse. Accountability measures are not only paramount as a matter of public international law, but in terms of effectiveness. Only a human rights-based approach to CFT and counter-terrorism more broadly will prove effective in tackling the very conditions conducive to terrorist financing and terrorism. Indeed, the civil society actors that are targeted and repressed under the guise of CFT are often the very actors that have access to information on potential vulnerabilities to terrorist financing, as well as existing self-regulatory measures already being taken to mitigate the risk of terrorist financing abuse. More fundamentally, as the international community has explicitly reaffirmed, “effective counterterrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.”¹¹⁷ It is high time that the stakes be raised so that States are held responsible

116. *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 1001 (9th Cir. 2011).

117. S. C. Res. 2395, at 1-2 (Dec. 21, 2017).

for unlawful and counterproductive CFT measures, reaffirming the primacy of international human rights law.