Overview of key international human rights standards and connections with Recommendation 8

The FATF Interpretive Note to Recommendation 8 on non-profit organisations (NPOs) stresses that measures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities. ... Actions taken for this purpose should, to the extent reasonably possible, avoid any negative impact on innocent and legitimate beneficiaries of charitable activity. However, this interest cannot excuse the need to undertake immediate and effective actions to advance the immediate interest of halting terrorist financing or other forms of terrorist support provided by NPOs.\(^1\) Moreover, the UN experts agree that states must not abuse the necessity of combating terrorism by resorting to measures that are unnecessarily restrictive of human rights. Clear safeguards must be put in place by the law, to prevent abuse (of the limitations) and, if abuses do occur, to ensure that remedies are provided.\(^2\) The effective enjoyment of the right to freedom of opinion and expression, right to peaceful assembly and freedom of association are central elements that mark the difference between democracy and terror.\(^3\)

The key role played by a vibrant and active NPO sector was recognised during the UN High-Level Conference on Counter-Terrorism in June 2018, as the UN Secretary-General stated that “civil society is central to (...) our broader counter-terrorism strategies”.\(^4\) Additionally, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism highlighted that robust research shows there is no evidence legal restrictions on NPO sector reduce the number of terrorist attacks within a country.\(^5\) On the contrary, legal restrictions on NPOs had profound effects on crippling their capacities to contribute to counter-terrorism efforts.

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\(^1\) FATF Best Practice, Combating the Abuse of Non-Profit Organisations (Recommendation 8), paragraph 3(c).

\(^2\) UN SR CT, UN General Assembly report 61/267, Para. 11

\(^3\) UN Special Rapporteur on freedom of opinion and expression, report to GA, Human Rights Council 7/14, para. 53


\(^5\) Research available at: https://www.csis.org/blogs/international-consortium-closing-civic-space/liberty-or-security-do-civil-society-restrictions
1. Freedom of Association

Freedom of association is protected by article 22(1) of the International Covenant on Civil and Political Rights (ICCPR), which provides that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". There are concerns about the use of counter-terrorism legislation to restrict otherwise legitimate activities regarding freedom of association, such as through the "restrict[ion] or prohibit[ion] of the formation or registration of associations". Moreover, "[u]nder the guise of fighting terrorism or extremism, associations comprised of minorities, including religious, linguistic or ethnic minorities, may be subjected to delays in registration, denial of registration, harassment and interference."6

While recognizing the legitimate need for States to ensure national security and public safety, the concern remains that restrictions may be used "as an excuse to silence critical or diverse voices" including through reliance upon criminal laws and penal sanctions.8 When determining the imposition or legality of any restrictions on associations, the State is required to justify any restrictions in accordance with prescribed requirement for measures to be “necessary in a democratic society” (Article 22.2, ICCPR). Specific area of concern has been counter-terrorism legislation imposing stricter regulation for the creation and status of associations, especially where ambiguous definitions of terrorism are relied upon. This can have the disproportionate effect of limiting or even preventing the work of associations with legitimate aims which are not pursuing terrorist objectives or otherwise operating unlawfully.9 It is usually manifested as a one-size-fits-all regulations that falls disproportionately on smaller NPOs with little to no risk of terrorist abuse.

Significantly too, "[t]he fact that an association calls for achieving through peaceful means ends that are contrary to the interest of the State is not sufficient to characterize an association as terrorist".10 On the other hand, proscribing associations which have as their aim the destruction of the State through terrorist means may be covered by the limitation clauses of Article 22.2 ICCPR.

In order to ensure impartiality and independence, it is important that any proscription is based on fact rather than presumption and that any such determination is subject to review or appeal by an independent judicial body. An organization should not be described as "terrorist" unless such legal safeguards are present.11 Similarly, any dissolution of an association violates human rights law if there is no legal basis for doing so, if it is not necessary or proportionate, or if it is discriminatory.

The issue of fundraising activities of some associations has been especially sensitive since associations may be used as conduits for the financing of terrorist activities as well as for unlawful money laundering activities. Yet, this can be a fine balance, since the ability for bona fide associations to fundraise is central to their ability to carry out their activities and to pursue legitimate goals. Funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with the right to freedom of association.12

Additional UN resources:
UN Special Rapporteur factsheets series, http://freeassembly.net/factsheets/association/

9 General Assembly report 61/267, para. 23.
10 General Assembly report 61/267, paras. 24 and 27.
1. Freedom of Assembly

International legal framework is embedded in the Article 21 of the International Covenant on Civil and Political Rights (ICCPR), which states that "[t]he right of peaceful assembly shall be recognized." Public assembly may be defined as the intentional and temporary presence of a number of individuals in a public place which is not a building or structure for a common expressive purpose.

Special Rapporteur on the right to freedom of peaceful assembly and association noted in 2017, counter-terrorism legislation may lead to violations of freedom of assembly through harassment and violence against human rights defenders and other people.\(^{13}\) The stringent international safeguards that exist need to be applied when determining any restrictions.

This right may be restricted where the measures are in conformity with the law and ... are necessary in a democratic society. However, restrictions upon the right of freedom of assembly should not be misused under a counter-terrorism pretext, for instance as a means of restricting legitimate democratic activities, beyond what is absolutely necessary to respond to legitimate security imperatives.\(^{14}\) It may be appropriate in some circumstances to restrict freedom of assembly, however, this should not be done by means of a general prohibition, but instead be more targeted, in order not to violate ICCPR.

**Additional UN resources:**
UN Human Rights Committee (2020) General Comment 37, [https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx](https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx);
UN Special Rapporteur factsheets series, [http://freeassembly.net/factsheets/assembly/](http://freeassembly.net/factsheets/assembly/)

2. Freedom of Expression

Freedom of opinion and expression is guaranteed by the Article 19 of the International Covenant on Civil and Political Rights (ICCPR). This provision states that "[e]veryone shall have the right to hold opinions without interference"; and that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers; the expression and receipt of communications of every form of idea and opinion capable of transmission to others, such as political discourse, canvassing, discussion of human rights, journalism, teaching and religious discourse.\(^{15}\) Significantly, the right of freedom of opinion can never be restricted or suspended, not even in situations of emergency.

As with any restriction on ICCPR rights, any limitation of this freedom must be proportionate and necessary in democratic society. For example, under Article 19(3), States are not permitted to ban Internet websites simply because of their content being critical of the government; any restrictions on content must satisfy the Article 19(3) criteria.\(^{16}\) Moreover, in terms of its parameters, it is never permissible under Article 19(3) for a State to "hara[ss], intimidi[te] or stigmati[z]e a person", including through such acts as their arrest, detention or trial, for reasons connected with their opinions.\(^{17}\)

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\(^{13}\) General Assembly report 72/135, para. 18  
\(^{14}\) UN General Assembly report 61/267  
\(^{15}\) Human Rights Committee CCPR/C/84/SYR  
\(^{16}\) Human Rights Committee concluding observations CCPR/CO/84/SYR  
\(^{17}\) Ibid.
A common source of concern has been erosive effect of counter-terrorism legislation on freedom of opinion and expression together with related human rights such as that of privacy. Individuals should be free to "seek, receive and impart information and ideas of all kind", even where it has the potential to be deeply offensive. During counter terrorism efforts, there is a risk that States unduly restrict free expression on grounds of national security, including media outlets as well as the exercise of legitimate political rights. In turn, this can have a negative impact upon other fundamental rights, including those of assembly and association.

Additional UN resources:

3. Non discrimination / Profiling

Under article 2 International Covenant on Civil and Political Rights (ICCPR), "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." I.e. this prohibition against discrimination applies to all Convention rights. In addition, there is a separate non-discrimination principle provided for by article 26 ICCPR, which provides that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law". The prohibition of discrimination is so fundamental to human rights that, even in "time of public emergency which threatens the life of the nation", measures taken to derogate from human rights may not be discriminatory (Article 4(1) ICCPR). Notably, several universal anti-terrorism conventions contain non-discrimination clauses: the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 2010 (article 14), 1997 Convention for the Suppression of Terrorist Bombings, and 1999 Convention for the Suppression of the Financing of Terrorism.

In determining whether or not differential treatment in counter-terrorism measures constitutes discrimination, a court or other authority will generally consider the following issues:

- Does the measure give rise to differential treatment on a prohibited ground (such as those listed in article 2(2) ICCPR)?
- Is the differential treatment necessary to achieve the aim pursued?
- Is the differential treatment proportionate?

In determining whether or not differential treatment is proportionate, it is often helpful to consider whether the aim achieved through the difference in treatment could be achieved by means other than a measure which gives rise to a difference in treatment on a prohibited ground – meaning, whether the means employed are the least restrictive or whether the purpose could be achieved with a less significant (or no) difference in treatment. If there is a difference in treatment, the burden of proof is on the State to demonstrate a reasonable and objective justification.

A particularly sensitive and controversial issue can be that of 'profiling' by law enforcement and intelligence officials, such as in the context of seeking to prevent violent extremism and terrorist acts. Profiling has been defined as "the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law-
enforcement decisions". Any use of law enforcement powers in counter-terrorism efforts, e.g., where persons are considered 'suspect' for the sole reason of belonging to certain ethnic or religious communities, is likely to violate human rights on grounds of discrimination. In addition, it risks having a significant negative impact on the prevention and investigation of terrorist offences.

In 2016, in a Joint Declaration on Freedom of Expression and Countering Violent Extremism, United Nations and regional special rapporteurs recommended that "States should never base surveillance on ethnic or religious profiling or target whole communities, as opposed to specific individuals, and they should put in place appropriate legal, procedural and oversight systems to prevent abuse of surveillance powers".

4. Right to Public Participation

Article 25 of the ICCPR recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. This requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.

The conduct of public affairs is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.

Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation and no unreasonable restrictions should be imposed, even in the counter-terrorism context.

Additional UN resources:
UN Human Rights Committee (1996). General comment No. 25: 
https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2025.pdf

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20 General Assembly report 4/26, para. 33
21 UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, para. 2(g)