

MARCH 2018



COUNTERTERRORISM MEASURES AND CIVIL SOCIETY

Changing the Will, Finding the Way

EDITORS

Lana Baydas
Shannon N. Green

CONTRIBUTING AUTHORS

Alma Abdul-Hadi Jadallah
Lana Baydas
Sohini Chatterjee

Shannon N. Green
Péter Krekó

Lauren Mooney
Julie N. Snyder

A Report of the
CSIS Human Rights Initiative

CSIS | CENTER FOR STRATEGIC &
INTERNATIONAL STUDIES

iCON The International Consortium
on Closing Civic Space

MARCH 2018

Counterterrorism Measures and Civil Society

Changing the Will,
Finding the Way

EDITORS

Lana Baydas
Shannon N. Green

CONTRIBUTING AUTHORS

Alma Abdul-Hadi Jadallah
Lana Baydas
Sohini Chatterjee
Shannon N. Green
Péter Krekó
Lauren Mooney
Julie N. Snyder

A Report of the
CSIS Human Rights Initiative

iCON The International Consortium
on Closing Civic Space

CSIS | CENTER FOR STRATEGIC &
INTERNATIONAL STUDIES

ABOUT CSIS

For over 50 years, the Center for Strategic and International Studies (CSIS) has worked to develop solutions to the world's greatest policy challenges. Today, CSIS scholars are providing strategic insights and bipartisan policy solutions to help decisionmakers chart a course toward a better world.

CSIS is a nonprofit organization headquartered in Washington, D.C. The Center's 220 full-time staff and large network of affiliated scholars conduct research and analysis, and develop policy initiatives that look into the future and anticipate change.

Founded at the height of the Cold War by David M. Abshire and Admiral Arleigh Burke, CSIS was dedicated to finding ways to sustain American prominence and prosperity as a force for good in the world. Since 1962, CSIS has become one of the world's preeminent international institutions focused on defense and security; regional stability; and transnational challenges ranging from energy and climate to global health and economic integration.

Thomas J. Pritzker was named chairman of the CSIS Board of Trustees in November 2015. Former U.S. deputy secretary of defense John J. Hamre has served as the Center's president and chief executive officer since 2000.

CSIS does not take specific policy positions; accordingly, all views expressed herein should be understood to be solely those of the author(s).

© 2018 by the Center for Strategic and International Studies. All rights reserved.

Center for Strategic & International Studies
1616 Rhode Island Avenue, NW
Washington, DC 20036
202-887-0200 | www.csis.org

CONTENTS

- IV Acknowledgments**
- 1 Introduction**
Lauren Mooney
- 9 Australia's Exceptional
Counterterrorism Powers**
Is There Room for Improvement?
Shannon N. Green
- 23 Bahrain**
A Suffocated Civil Society
Alma Abdul-Hadi Jadallah
- 35 Unintended Consequences**
Security and Civil Society in Burkina Faso
Julie N. Snyder
- 47 Elastic Interpretation of National Security**
Closing Civic Space in Hungary
Sohini Chatterjee and Péter Krekó
- 61 Civic Space in India**
*Between the National Security
Hammer and the Counterterrorism Anvil*
Lana Baydas
- 73 Conclusion and Recommendations**
Lana Baydas and Lauren Mooney
- 79 About the Editors and Authors**

ACKNOWLEDGMENTS

This research was conducted through the CSIS International Consortium on Closing Civic Space (iCon), a network of experts whose insights helped shape the vision for this report. CSIS would also like to thank all of those who were interviewed for the case studies. Their invaluable contributions and perspectives assisted the authors depict an accurate representation of each country context, and informed the analysis and findings. Gratitude is expressed to the reviewers of the case studies, including Ginna Anderson, Brittany Benowitz, Jennifer Cooke, Ravindran Daniel, Corinne Dufka, Diala Jadallah, Aminata Kassé, Dan Mahanty, Alex Moorehead, Olga Oliker, Richard Rossow, Doug Rutzen, Andrew Shearer, Kartikeya Singh, Farha Tahir, Natalie Tecimer, Mandeep Tiwana, Charles Kojo VanDyck, and Bernard Zongo. Saurav Upadhyay conducted preliminary research for the Bahrain case. Paul Nguyen-Cong-Duc, independent researcher with the Human Rights Initiative, conducted helpful research that informed the introduction and recommendations.

This report was made possible by the generous support from the Oak Foundation and the Charles Stewart Mott Foundation.

INTRODUCTION

Lauren Mooney

“Through their direct connections with the population and their prodigious work in poverty reduction, peacebuilding, humanitarian assistance, human rights and social justice, including in politically complex environments, civil society organizations play a crucial role against the threat of terrorism.”¹ –Maina Kiai, UN special rapporteur on the rights to freedom of peaceful assembly and of association

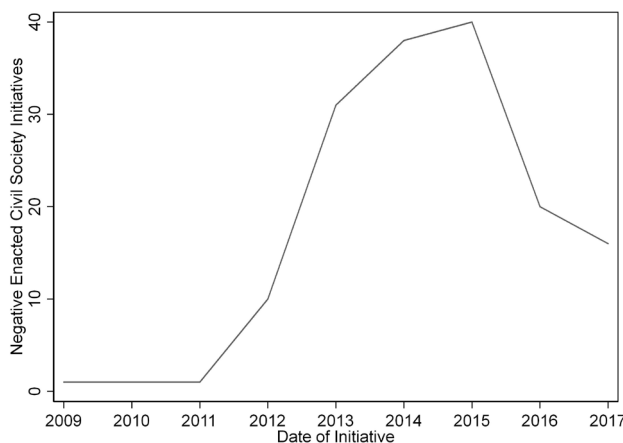
There is an abundance of evidence that a diverse and dynamic civil society is vital to the health and strength of democracy, and to the national security of a country.² Civil society plays an integral role in countering violent extremism and terrorism through delegitimizing terrorist narratives.³ However, the world has witnessed an alarming rise in restrictions placed on civil society actors to curtail their space and operations, impeding upon the realization of their

rights to the freedom of expression, association, and peaceful assembly—frequently in the name of countering terrorism and protecting national security, among other drivers. While this trend first became prevalent in the mid-2000s, civic space has diminished more rapidly in recent years. The International Center for Not-for-Profit Law has recorded the adoption of 64 restrictive laws on civil society from 2015 to 2016 alone.⁴ These restrictive measures, in both democratic and undemocratic countries, have hindered the ability of civil society actors to fulfill their vital role of protecting rights and providing services for citizens, and holding governments accountable.⁵ Governments use a wide range of tools and approaches to close civic space, including legal constraints, arbitrary detention of activists, and verbal discrediting or public vilification through media campaigns or online trolling from non-state actors.

- 1 Statement by Maina Kiai, United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Financial Action Task Force Consultation and Dialogue Meeting with Non-Profit Organi[z]ations, April 13, 2016, http://ohchr.org/Documents/Issues/FAssociation/UNSR_statement_FATFmeeting-13April2016.pdf.
- 2 Maria J. Stephan, “Responding to the Global Threat of Closing Civic Space: Policy Options,” testimony before Tom Lantos Human Rights Commission, March 21, 2017, <https://www.usip.org/publications/2017/03/responding-global-threat-closing-civic-space-policy-options>.
- 3 For more, see Shannon N. Green and Keith Proctor, *Turning Point: A New Comprehensive Strategy for Countering Violent Extremism* (Washington, DC: CSIS, November 2016), <https://www.csis.org/features/turning-point>.
- 4 International Center for Not-for-Profit Law, “Survey of Trends Affecting Civic Space: 2015–16,” *Global Trends in NGO Law* 7, issue 4 (December 2017), <http://www.icnl.org/research/trends/trends7-4.pdf?pdf=trends7-4>.
- 5 Ibid.

Civil society is a broad term that covers a range of organizations from social movements, to trade unions, to religious organizations, to community-based voluntary associations. Although the issue of closing space ultimately impacts all of civil society, the social justice sector is most often the initial target of government restrictions. Social justice civil society organizations (CSOs)—whether operating in the realm of human rights, development, environmental justice, or anticorruption and transparency—typically utilize some form of advocacy (in addition to research, legal strategies, and other methodologies) to engage with and hold governments accountable to the needs of their citizens.

Negative Enacted Civil Society Initiatives from 2009 to 2017⁶



There are a number of drivers that have contributed to the crackdown on civil society. Experts argue that states have come to recognize civil society's strength, especially considering its frequent role in challenging the executive branch and, in some instances, overthrowing authoritarian regimes, thereby providing justification for governments to impose such restrictions.⁷ These

attacks go unchallenged and have increased as the United States and the West begin to fade as beacons for democratic values.⁸ Compounded by a lack of U.S. and Western leadership, democracy has retreated while populism is on the rise, impelling states to push back against perceived or alleged external interference, demonizing CSOs as "foreign agents" and "cosmopolitan elites."⁹ These notions have found a more receptive audience internationally; globalization has given way to renewed calls for sovereignty.

Civil society now faces new challenges in a complex global terror environment, as governments and nonstate actors have used counterterrorism legislation and measures as pretexts for closing civic space.¹⁰ In the wake of the devastating September 11 attacks, the international community immediately mobilized into action, bringing the issue of terrorism to the forefront of global security priorities. Only two weeks after the attacks, the UN Security Council unanimously adopted Resolution

6 Amanda Murdie, "Do Civil Society Restrictions Reduce Terrorism?," CSIS, forthcoming. Please note that the data on laws related to civil society was provided by ICNL in late 2017. There were 158 initiatives included in the dataset that were both negative and enacted in countries recognized in the international system.

7 Stephan, "Responding to the Global Threat of Closing Civic Space: Policy Options."

8 Oliver Hudson, "Maina Kiai: 'We've Got to Go Back to Basics,'" *Sur International Journal on Human Rights* 26 (December 2017), <http://sur.conectas.org/en/maina-kiai-weve-got-to-go-back-to-basics/>.

9 Saskia Brechenmacher, *Civil Society under Assault: Repression and Responses in Russia, Egypt, and Ethiopia* (Washington, DC: Carnegie Endowment for International Peace, 2017), http://carnegieendowment.org/files/Civil_Society_Under_Assault_Final.pdf.

10 See more here: Shannon N. Green and Lana Baydas, "Counterterrorism Measures: Pretext for Closing the Space for Civil Society," *CSIS Commentary*, March 24, 2017, <https://www.csis.org/analysis/counterterrorism-measures-pretext-closing-space-civil-society>.

1373 (2001), which called for comprehensive action with concrete steps to combat international terrorism. Without defining terrorism, it directed states to “enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security.”¹¹ Following the adoption of Resolution 1373, the UN General Assembly also put in place a Global Counter-Terrorism Strategy, which requires states to adopt and implement measures to prevent and combat terrorism based on the principles laid out in the strategy, including the condemnation of terrorism, promoting a culture of peace and justice, and coordination and cooperation among states in combating crimes related to terrorism.¹² Perhaps most importantly, the documents neither define terrorism nor properly emphasize the importance of human rights protection within a counterterrorism strategy.¹³ Over 15 years later, there is still not a universally accepted definition of terrorism or agreement on the limits of efforts to prevent it.

Over 140 governments have adopted counterterrorism legislation since September 11, 2001.¹⁴ Due to the lack of an agreed-upon international definition of terrorism, states adopt their legislation from different starting points.¹⁵ Consequently, counterterrorism laws range from specific and precise, to broad

Egypt, 2017 NGO Law

Article 3: the organization’s basic statute should include a provision on the respect for Egypt’s Constitution, and prohibition from engaging in any work that the government considers harmful for national security, public order, public morals, or public health. [emphasis added]

and vague.¹⁶ For example, China uses ambiguous language to define terrorism as “actions that create social panic [and] endanger public safety... through methods such [as] violence, destruction, intimidation, so as to achieve their political, ideological, or other objectives.”¹⁷ Likewise, Jordan defines it as any attempt to “disturb public order, endanger public safety and security... or disturb national security by means of threat, intimidation, or violence.”¹⁸ Similarly, Egypt’s NGO law specifically targets CSOs, going so far as to define an organization’s statute in order to protect national security: “The organization’s basic statute should include a provision on the respect for Egypt’s Constitution, and prohibition from engaging in any work that the government considers harmful for national security, public order, public morals, or public health.”¹⁹

These varied laws demonstrate that governments not

11 UN Security Council, Resolution 1373, September 28, 2001, [http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20\(2001\).pdf](http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf).

12 UN Counter-Terrorism Implementation Task Force, “UN Global Counter-Terrorism Strategy,” <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>.

13 American Bar Association Center for Human Rights, “Persecuting Human Rights Defenders in the Name of Counterterrorism,” August 25, 2017, https://www.americanbar.org/content/dam/aba/administrative/human_rights/counterterrorism_human_rights_advocacy.authcheckdam.pdf.

14 See the CSIS database of legislation on the definition of terrorism at <https://www.csis.org/programs/international-consortium-closing-civic-space-icon/aligning-security-and-civic-space-0>.

15 Green and Baydas, “Counterterrorism Measures”

16 See the CSIS database of legislation on the definition of terrorism at <https://www.csis.org/programs/international-consortium-closing-civic-space-icon/aligning-security-and-civic-space-0>.

17 Ibid.

18 Ibid.

19 Ibid.

China, 2015 Counterterrorism Law

Article 3: “Terrorism” as used in this Law refers to propositions and actions that create social panic, endanger public safety, violate person and property, or coerce national organs or international organizations, through methods such [as] violence, destruction, intimidation, so as to achieve their political, ideological, or other objectives. [emphasis added]

only tend to use overly broad language but also conflate terrorist threats with broader issues of national security and public order. Moreover, invoking their fight against terrorism, they are adopting and enacting laws and measures that are noncompliant with international human rights principles and standards and further narrow the space around civil society. By blurring the lines between terrorism and real or alleged national security threats, CSOs are even more vulnerable to abuse. As Fionnuala Ní Aoláin, UN special rapporteur on the protection and promotion of human rights while countering terrorism, explains, “By any stretch of the imagination targeting civil society actors is wholly inconsistent with meaningfully attending to genuine terrorist threats.”²⁰ This is exemplified by Saudi Arabia’s recent actions, having arrested and detained up to 60 prominent civil society activists in the name of countering terrorism.²¹ Likewise, the ambiguity between terrorism and national security threats does not exist exclusively in

the language of legislation, but is as well embodied in governments’ enforcement *measures*. For instance, in February 2018, the Egyptian Armed Forces announced the launch of a comprehensive military operation that aims to end terrorism; the operation will also “combat other crimes that affect Egypt’s internal security and stability.”²²

As the scope of counterterrorism legislation evolved, it has been normalized and sometimes absorbed into national law, creating a worrying vagueness between exceptional emergency security measures for countering terrorism and ordinary criminal and civil processes.²³ These temporary emergency security measures offer an expansion of legal regulation, extension of criminal law to new categories of offenses, and sustained limitations on rights from assembly to association.²⁴ According to international law, states are permitted to derogate from certain human rights obligations during a state of emergency.²⁵ The United Nations stipulates that these measures must be of an exceptional and temporary nature, with their imposition only on the condition of exceptional threat to the life of the nation.²⁶ Despite the fact that both national legislation and international law offer limitations to the state of emergency, governments oftentimes ignore these limitations or offer false pretenses to extend the state of emergency. In France, experts raised concerns on the prolonged state of emergency in the country since the November 2015 Paris attacks. Though President Macron lifted it for the first time

20 Fionnuala Ní Aoláin, “Counter-Terrorism and Crackdowns on Civil Society,” *Just Security*, January 5, 2018, <https://www.justsecurity.org/50599/counter-terrorism-crackdowns-civil-society/>.

21 *Ibid.*

22 Mada Masr, “‘Operation Sinai 2018’: What we know so far,” February 9, 2018, <https://www.madamasr.com/en/2018/02/09/feature/politics/operation-sinai-2018-what-we-know-so-far/>.

23 UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/72/43280, September 27, 2017, http://www.ohchr.org/Documents/Issues/Terrorism/A_72_43280_EN.pdf.

24 *Ibid.*

25 United Nations, “International covenant on civil and political rights,” General Comment 29, CCPR/C/21/Rev.1/Add.11, August 13, 2001, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en.

26 *Ibid.*

Gender is an important component that is often lost in the dialogue surrounding counterterrorism and closing civic space. Women and other marginalized groups are frequently collateral damage or direct targets in the fight against terrorism, with their fundamental freedoms increasingly restricted by states sliding into authoritarianism. Women’s rights organizations also find themselves vulnerable to funding crises as civic space closes.

Yet, the role of women’s and women’s rights organizations continues to be increasingly important in a variety of political contexts and crises.²⁷ Moving forward, it will be critical to ensure that these voices are placed at the center of the discussion, considered agents of change and peace, and to create and implement counterterrorism policies that do not enforce gender stereotypes. Indeed, the nuanced nature of CSOs should be captured. According to a women’s organization in sub-Saharan Africa, “Counterterrorism policy needs to acknowledge our resistance to terrorism as activists and communities; we are all seen as one right now—we are all lumped into the same box.”²⁸

in October 2017, it was replaced by a new antiterrorism law that made many special provisions permanent, including the powers held by the police and investigators to raid, detain, and question terrorism suspects.²⁹

Civil society is not merely victim to states’ abuse of counterterrorism legislation. The international community’s attempts to stem the flow of illicit funds to terrorist organizations has also frequently led to the closing of civic space. The Financial Action Task Force on Money Laundering (FATF) was first established by the 1989 G-7 Summit to address the risk of money laundering. Its mandate was expanded after 9/11 to tackle the issue of ter-

rorist financing.³⁰ FATF created Recommendation 8 to prevent the abuse of the nonprofit sector by terrorist organizations, believing that all nonprofit organizations were at high risk to terrorist financing. This notion of extreme risk in the sector has done incalculable damage to civil society. In addition to giving governments an excuse to crack down on peaceful, legitimate organizations that are a thorn in their side, many countries have directly or indirectly used FATF compliance as a justification to pass restrictive laws in the name of countering terrorism.³¹ For example, FATF strongly pressured Brazil—threatening sanctions—to adopt counterterrorism and combating terrorist financing legislation, though there are no active terror-

27 Duke Law International Human Rights Clinic and Women Peacemakers Program, *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security* (2017), <https://www.womenpeacemakersprogram.org/assets/CMS/Reports/TTPS-DUKE-FINAL-PRINT-AP-WEB.pdf>.

28 Ibid. See more at the Center for Human Rights and Global Justice’s recent report, “A Decade Lost: Locating Gender in U.S. Counter-Terrorism,” NYU School of Law, 2011, <http://chrgj.org/wp-content/uploads/2012/07/locatinggender.pdf>; and Lana Baydas, Lauren Mooney, and Paul Nguyen-Cong-Duc, “A Panoramic Gender Lens to Fight Terrorism and Counter Violent Extremism,” CSIS Commentary, March 8, 2018, <https://www.csis.org/analysis/panoramic-gender-lens-fight-terrorism-and-counter-violent-extremism>.

29 Nicholas Vinocur, “New French anti-terror law to replace 2-year state of emergency,” Politico, October 31, 2017, <https://www.politico.eu/article/new-french-anti-terror-law-to-replace-2-year-state-of-emergency/>.

30 Financial Action Task Force on Money Laundering, History of the FATF, <http://www.fatf-gafi.org/about/historyofthefatf/>.

31 Duke Law, *Tightening the Purse Strings*.

Early Warning Signs—The Targeting of LGBTI Rights by Harsh Counterterrorism Laws

As restrictive counterterrorism laws sweep the globe, lesbian, gay, bisexual, transgender, and intersex (LGBTI) rights are among the first rights to be attacked and the last to be protected by fellow CSOs. Frequently depicted as agents of foreign propaganda, LGBTI groups and individuals face discrimination, harassment, imprisonment, and countless other forms of abuse.³² Governments justify the seizure of their rights as a matter of national security, saying that draconian counterterrorism laws are necessary to stop the spread of insidious Western influence and values.

Examining 2017 alone paints a disturbing picture of a global backlash against gay rights.³³ In Egypt, the government has increased arrests for openly LGBTI individuals for threatening the public order, and several public figures issued staunch condemnations of homosexuality, with one television host even saying that it “is a crime that’s as terrible as terrorism.”³⁴ Over 100 gay and bisexual men were detained, tortured, and murdered in Chechnya in April 2017, yet another stain on Russia’s sordid history of LGBTI abuse.³⁵ And the Indonesian Defense Minister claimed that “[i]t’s as we can’t see who our foes are, but out of the blue everyone is brainwashed—now the [LGBTI] community is demanding more freedom, it really is a threat.”³⁶ Turkey banned all LGBTI events using the justification of protecting public security.³⁷ Across a multitude of factors, homophobia, masquerading as a safeguard for national security, endangers LGBTI individuals globally.

The health of LGBTI CSOs within a country can serve as a weathervane for the state of broader civil society. As the Global Philanthropy Project notes, the targeting of LGBTI groups often signals an incoming crack-down on civil society writ large.³⁸

- 32 Douglas Rutzen, “Aid Barriers and the Rise of Philanthropic Protectionism,” *International Journal of Not-for-Profit Law* 17/1, March 2015, 13.
- 33 Omar G. Encarnacion, “The Global Backlash against Gay Rights: How Homophobia Became a Political Tool,” *Foreign Affairs*, May 2, 2017, <https://www.foreignaffairs.com/articles/2017-05-02/global-backlash-against-gay-rights>.
- 34 Jacob Wirtschafter, “Egypt’s Latest Crackdown on Gays Creates Fear in LGBT Community,” *USA Today*, October 18, 2017, <https://www.usatoday.com/story/news/world/2017/10/18/egypts-latest-crackdown-gays-creates-fear-lgbt-community/772889001/>.
- 35 Sewell Chan, “U.N. Experts Condemn Killing and Torture of Gay Men in Chechnya,” *New York Times*, April 13, 2017, https://www.nytimes.com/2017/04/13/world/europe/un-chechnya-gay-men-killing-abuse.html?_r=0.
- 36 Max Bearak, “There’s a Rising Global Tide of Crackdowns on LGBT Communities,” *Washington Post*, October 20, 2017, https://www.washingtonpost.com/news/worldviews/wp/2017/10/20/theres-a-rising-global-tide-of-crackdowns-on-lgbt-communities/?utm_term=.baf4a4305fa6.
- 37 Samuel Osborne and Chris Baynes, “Turkey Bans All LGBT Events in Capital to ‘Protect Public Security,’” *Independent*, November 19, 2017, <http://www.independent.co.uk/news/world/europe/lgbt-events-banned-turkey-ankara-protect-public-security-governors-office-health-and-morality-a8063526.html>.
- 38 Meg Davis, “The Perfect Storm: The Closing Space for LGBT Civil Society in Kyrgyzstan, Indonesia, Kenya, and Hungary,” Global Philanthropy Project, 2016, https://www.ilga-europe.org/sites/default/files/the-perfect-storm-_-pages.pdf.

ist groups in the country.³⁹ In response, Brazil passed a counterterrorism law described by human rights groups as “a serious setback for democracy because, under the justification of protecting the country, the law aims to criminalize social movements and activists fighting for their rights.”⁴⁰ Despite these obstacles, there have been recent advancements to remedy the damage done by FATF to the nonprofit sector. Due to pressure from a coalition of civil society actors, FATF removed language from Recommendation 8 that characterized nonprofits as “particularly vulnerable” to terrorist abuse.

Considering this complex global landscape, the CSIS international consortium on closing civic space (iCon) produced a series of five case studies—Australia, Bahrain, Burkina Faso, Hungary, and India—that illustrates the various contexts surrounding security and civil society. Through in-country interviews and desk research, these case studies characterize each country’s legislative and operational environment for civil society, national security threats, and counterterrorism approach. The case studies contained in this report examine the impact of counterterrorism laws and practices on the space for civil society. The report highlights the challenges of unwinding counterterrorism legislation put in place after devastating terrorist attacks and upholding human rights obligations in the face of real and perceived security threats. Moreover, it emphasizes the need to regard security and human rights as complementary priorities instead of competing ones and make recommendations to that end.

Each case study highlights a different set of threats to civic space emanating from concerns

Mexico, 1931 amended in 2017 Federal Penal Code

Article 1: Who using toxic substances, chemical, biological or similar weapons, material, radioactive material, nuclear material, nuclear fuel, radioactive mineral, source of radiation or instruments emitting radiations, explosives, or firearms, or by fire, flood or any other violent means, intentionally perform acts against goods or services, public or private, or against physical, emotional, or people, that produce alarm, fear or terror in the population or in a group or sector of it, to undermine national security or to pressure the authority or individual, or to force this to make a determination. [emphasis added]

about national security and terrorism. The Australia case, as articulated by Shannon N. Green, is a classic example of a government adopting far-reaching and exceptional counterterrorism powers that could impact civil society, and the enjoyment of human rights at large, if they are misused. The effect of these measures is already being experienced by human rights advocates who express dissent against these laws or engage in sensitive activity, like representing or advocating for refugees and migrants, religious minorities, or indigenous communities.

Alma Abdul-Hadi Jadallah’s Bahrain study demonstrates how vaguely defined and politically motivated counterterrorism laws and other restrictive measures are used to stifle human rights defenders, journalists, human rights organizations, humanitarian organizations, and political opponents. In Bahrain, space for civil society is effectively closed, with only government-organized CSOs functioning.

39 Ben Hayes, *The impact of international counter-terrorism on civil society organizations: Understanding the role of the Financial Action Task Force* (Berlin, Germany: Bread for the World, April 2017), https://www.brot-fuer-die-welt.de/fileadmin/media-pool/2_Downloads/Fachinformationen/Analyse/Analysis_68_The_impact_of_international_counterterrorism_on_CSOs.pdf.

40 Ibid.

Burkina Faso, on the other hand, illustrates the challenges that civil society faces in the absence of effective public institutions and a strong judiciary while the threat of terrorism looms. Julie N. Snyder discusses how civil society has historically played an outsized role in holding the government of Burkina Faso accountable and delivering services. It now faces new vulnerabilities from the government and an increasingly dire security situation.

The cases of Hungary and India are distinct in that the threat of terrorism has been overblown by nationalist leaders to justify a crackdown on civil society and close civic space. As Sohini Chatterjee and Péter Krekó explain, civil society in Hungary has suffered substantially under the rule of Prime Minister Viktor Orbán and his political party, Fidesz. Under the pretext of the unprecedented migration crisis, Fidesz has consolidated control over the legislative and judicial branches, as well as the media, in order to execute its campaign to establish an illiberal regime.

In a similar vein, India's authorities championed nationalism and successfully branded the opposition as antinational or a threat to India's national security. Lana Baydas's case study examines how violent public discourse has been used to further silence CSOs, human rights defenders, and dissidents. India represents a unique case because civil society faces threats from both the government and nonstate actors, who troll, kill, and harass civil society activists.

All of the case studies in this report found that governments have instrumentalized the vague terms of "counterterrorism," "national security," or "public order," as it suits their interests, to clamp down on civil society. As global terror threats morph and expand, the international community must, now more than ever, mobilize and coordinate in response. It is imperative that

this response avoids infringing upon the rights of peaceful civil society actors whose role is integral to the prevention of violent extremism.

AUSTRALIA'S EXCEPTIONAL COUNTERTERRORISM POWERS IS THERE ROOM FOR IMPROVEMENT?

Shannon N. Green

Background

The threat of terrorism in Australia is serious and enduring. Since 2014, the national terrorist threat level has been elevated to *probable*, meaning that there is credible intelligence suggesting that individuals or groups possess the intent and capability to conduct a terrorist attack in Australia.¹ The primary threat is from lone actors or small groups of extremists carrying out unsophisticated plots using weapons that are easily available (kitchen knives, cars, etc.). These attacks are hard for law enforcement agencies to thwart given that the plans do not require significant external support or funding, and the plotters rarely provide advance warning of their intentions. At the same time, Australia faces the risk of sophisticated plots developed by terrorist cells, linked to international organizations.² Over the last three years alone, authorities have disrupted 14 major operations in the planning stages, including a twin terror plot discovered in 2017 to blow up a commercial airliner and unleash poison gas in a public space.³

Despite the government's successes in detecting and disrupting plots, terrorists have executed five

terrorist attacks since 2001. In September 2014, an 18-year-old attacked two counterterrorism police officers with a knife outside the Victoria Police Endeavour Hills station. A year later, a 15-year-old boy shot and killed Curtis Cheng, an unarmed civilian employee of the New South Wales Police Force in Parramatta, Australia. The most high-profile attack occurred in December 2014 when a lone gunman held 18 hostages at a café located at Martin Place in Sydney, Australia. Mother-of-three Katrina Dawson and café manager Tori Johnson lost their lives in the 16-hour standoff and siege of the café. In 2016 and 2017, there were two stabbings conducted by young men thought to be inspired by the Islamic State in Iraq and Syria (ISIS). During the field research for this chapter in December 2017, a man drove his car into pedestrians crossing a busy intersection in Melbourne, injuring 19 people. Police have not deemed this incident a "terrorist attack" even though the mentally disturbed individual said that he was motivated by mistreatment of Muslims.

External propaganda, particularly from ISIS, has played a prominent role in many of these incidents. ISIS has used the power of the internet and a tai-

- 1 Australian Government, "National Terrorism Threat Advisory System," <https://www.nationalsecurity.gov.au/securityandyourcommunity/pages/national-terrorism-threat-advisory-system.aspx>.
- 2 Shannon N. Green and Andrew Shearer, interview with senior government officials, Canberra, Australia, December 18, 2017.
- 3 Euan McKirdy and Karen Smith, "Foiled plot to blow up plane, unleash gas revealed in Australia," CNN, August 5, 2017, <https://www.cnn.com/2017/08/03/asia/australia-plane-terror-plot-isis/index.html>.

lored messaging campaign to entice 220 Australians to travel to Iraq and Syria and fight for the so-called caliphate. In addition to the threat from Islamist extremists, the Commonwealth remains vigilant to other forms of extremism. While there are no designated terrorist organizations representing far-right or far-left ideologies in the criminal code, the government uncovered a right-wing plot in August 2016 and arrested the instigator.⁴

The Australian government has responded to these threats with a robust counterterrorism strategy that rests on five pillars:

- challenging violent extremist ideologies;
- stopping people from becoming terrorists;
- shaping the global environment;
- disrupting terrorist activity within Australia; and
- having effective responses and recovery should an attack occur.⁵

This strategy is complemented by and closely coordinated with efforts to counter violent extremism (CVE). In recent years, the Commonwealth has stepped up its CVE efforts, with the long-term goal of reducing “the risk of home-grown terrorism by strengthening Australia’s resilience to radicali[z]ation and assisting individuals to disengage from

violent extremist influences and beliefs.”⁶ Australia’s CVE approach aims to work with communities and partners to identify and intervene with “at-risk” groups and individuals and, where possible, divert them from the path of violent extremism. The hope is that teachers, healthcare workers, family members, and influencers can disrupt the radicalization-to-violence process before there is a need for law enforcement to get involved.⁷

High-level government officials explain that this strategy is threat-based, not ideological, and is proportionate to the threat environment in Australia.⁸ As new threats develop, and departments realize that they are lacking the tools to address the risks on the horizon, they develop new authorities and capabilities.⁹ Their goal is to be ahead of the curve rather than lurching from crisis to crisis.¹⁰ Critics, on the other hand, argue that the threat of terrorism is overblown and has led to the creation of a sweeping national security regime and body of laws that undermine the very democratic freedoms that counterterrorism efforts are meant to protect.¹¹ They allege that the government has adopted laws and accrued powers that it does not require, as evidenced by how infrequently it invokes exceptional counterterrorism authorities. This chapter explores these issues in detail, exam-

4 Shannon N. Green and Andrew Shearer, interview with senior government officials, Canberra, Australia, December 18, 2017.

5 Council of Australian Governments, *Australia’s Counter-Terrorism Strategy: Strengthening Our Resilience* (Canberra: Commonwealth of Australia, 2015), <https://www.nationalsecurity.gov.au/Media-and-publications/Publications/Documents/Australia-Counter-Terrorism-Strategy-2015.pdf>.

6 Australian Government, “Countering Violent Extremism Strategy,” <https://www.livingsafetogether.gov.au/aboutus/Pages/countering-violent-extremism-strategy.aspx>.

7 Shannon N. Green and Andrew Shearer, interview with senior government officials, Canberra, Australia, December 18, 2017.

8 Ibid.

9 Shannon N. Green and Andrew Shearer, interview with senior government official, Canberra, Australia, December 18, 2017.

10 Shannon N. Green and Andrew Shearer, interview with senior government official, Canberra, Australia, December 19, 2017.

11 According to the Global Terrorism Index, which objectively measures and ranks countries based on the impact of terrorism, Australia is in the middle of the pack at 65 out of 130 countries—meaning it is significantly less terror prone than France or the United Kingdom and significantly more terror prone than Norway or Switzerland. The country is, however, a part of a global trend of increasing threat in Organization for Economic Cooperation and Development (OECD) countries due to Islamic State in the Levant (ISIL) and ISIL-inspired attacks.

ining the impact of Australia’s counterterrorism measures on human rights, particularly the freedoms of association, assembly, and expression. It concludes with recommendations for ensuring human rights *and* security against a backdrop of enduring terrorist threats.

Counterterrorism Regime

In the last 15 years, Australia has passed a raft of legislation creating new criminal offenses related to terrorism; ascribing novel authorities to the executive branch and police; and shifting law enforcement’s approach from one of reaction to prevention. Many of these measures were passed following major international terrorist attacks and have created a web of laws with broad scope and reach. Before 2001, only Australia’s Northern Territory had a law directly aimed at the prevention of terrorism.¹² All other jurisdictions treated politically motivated violence, including terrorism, under the traditional criminal code. Since the September 11 attacks on the World Trade Center and Pentagon, the Commonwealth Parliament has passed 67 pieces of antiterror legislation.¹³ These laws—Part 5.3 and 5.5 of the Criminal Code Act 1995—do the following:¹⁴

- Define a terrorist act as an “act, or a threat to commit an act, that is done with the intention to coerce or influence the public or any government by intimidation to advance a political, religious or ideological cause, and the act causes: death, serious harm or endangers a person; serious damage to property; a serious risk to the health or safety of the public, or seriously interferes with, disrupts or destroys critical infrastructure such as a telecommunications or electricity network.” A terrorist act

does not include engaging in advocacy, protest, dissent, or industrial action where a person does not have the intention to urge force or violence or cause harm to others. If found guilty of committing a terrorist act, a person could face up to life imprisonment.

- Create a range of new offenses, including criminalizing those who commit a terrorist act; plan or prepare for a terrorist act; finance terrorism or a terrorist; provide or receive training connected with terrorist acts; possess “things” connected with terrorist acts; or collect or make documents likely to facilitate terrorist acts. A person may be convicted of a terrorist act if he/she intends to commit one of these offenses or if the person was reckless as to whether his or her actions would amount to a terrorist act.
- Allow the government (by attorney-general decree) to designate a terrorist organization if it advocates terrorism or engages in preparing, planning, assisting, or fostering the doing of a terrorist act. The threshold is high for adding an organization to the list. Once an organization is included on the list, a range of offenses apply to those who are linked to that organization through financial support, membership, or other types of association.
- Establish a control order regime if the Australian Federal Police, with the concurrence of the attorney-general and the courts, believing it is necessary to prevent a terrorist attack. Control orders allow law enforcement to set a range of limits on a person’s mobility and interactions without having to prove that person’s guilt in a court of law. Restriction

12 George Williams, “A Decade of Australian Anti-Terror Laws,” *Melbourne University Law Review* 35, issue 3 (2011), <https://search.informit.com.au/documentSummary;res=IELHSS;dn=520408496475278>.

13 *Ibid.*

14 Australian Government Attorney-General’s Department, “Australia’s counter-terrorism laws,” <https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/Australiascounterterrorismlaws.aspx>.

tions can include: stopping a person from being in a particular area or leaving Australia; communicating or associating with certain people; owning or using certain things; carrying out certain activities, like work; or accessing certain forms of technology such as the internet. It can also require individuals to wear a tracking device, stick to a curfew, report to a designated official, and be fingerprinted and photographed. Control orders cannot last longer than 12 months for people 18 and older. It can apply to children aged 14 to 18 for a maximum of three months.

- Enable the government to preventatively detain someone, without charge or trial, where there is a threat of an imminent terrorist attack or immediately after a terrorist attack has occurred. Under Commonwealth law, the maximum amount of time a person can be preventatively detained is 48 hours. Under state and territory laws, a person can be detained for an additional 12 days, for a maximum of 14 days. The preventative detention regime cannot be used for children under the age of 16, although the government is looking to lower the age threshold.
- Allow the government to keep individuals convicted of a terrorist offense in custody indefinitely after they have served their prison sentence if there is reason to believe that they continue to pose a grave danger to the community. This post-sentence detention regime will come into play in 2020 when the first group of Australians with terrorism-related convictions complete their sentences.
- Conduct warrantless searches whereby police officers can enter a premise to prevent a “thing” from being used in a terrorist attack or where there is a serious and imminent risk to a person’s life. While on the premises, law enforcement can seize any other “thing” if they have reasonable grounds to believe that doing so is necessary to protect public safety.
- Provide an extended questioning period (with the approval of a judicial officer) of 24 hours, compared to the 12 hours allotted for nonterrorism offenses. This additional period may be granted where it is necessary for police to collect and analyze information from overseas authorities, operate between different time zones, or translate material. During questioning, the suspect has the right to have a lawyer present.
- Designate areas where Australians are prohibited from traveling, unless they qualify for exemptions for humanitarian workers, journalists, or family members. Thus far, Raqqa and Mosul are the only zones that have been designated (Mosul has since been rescinded). Travel to a designated area without prior authorization could result in a 10-year prison sentence. This tool gives the government the ability to keep suspected foreign fighters in custody without having to reach the evidentiary standard required for a terrorism offense.
- Allow the government to strip dual nationals convicted or suspected of terrorism of their Australian citizenship. The law does not allow anyone to be rendered stateless.
- Broaden authorities’ electronic surveillance powers, not only for terrorist suspects but also for those believed to be in communication with the person(s) under investigation. For example, a 2015 law required internet providers and telecommunications companies to store stipulated customer metadata (i.e., information generated by customers calling, texting, or using the internet) for at least two years. In October 2017, the Coun-

cil of Australian Governments (COAG) announced its intent to set up a national facial biometric database that can quickly match individuals' photos from passports, visas, driver's licenses, and other forms of photographic identification. This database will consolidate and make information sharing easier between databases that already exist at the state and territory level, and is meant to stem homegrown terrorism.

In addition to these counterterrorism laws, the government has several pieces of legislation in the pipeline, meant to close perceived gaps in the national security toolkit. This includes a law that would oblige technology companies to provide security agencies with access to encrypted user communication and a package of bills aimed at curbing foreign interference in Australian politics. The latter would criminalize "covert, deceptive and threatening actions" that attempt to sway the Commonwealth's political process or undermine national security.¹⁵ Under this new regime, civil society organizations that spent over \$100,000 Australian dollars (\$75,121) on political advocacy during a single year over the past three years would be classified as political campaigners. As such, they would need to declare donations from foreign sources in excess of \$250 Australian dollars (\$187.80) with the Australian Electoral Commission.¹⁶ Civil society organizations have mobilized against this effort, fearing that it will inhibit their ability to access foreign funding and advocate on issues critical for their sector. They also decry the onerous reporting requirements contained in the

bill, which will tie them up with red tape and divert their attention from their advocacy and service delivery missions. Government officials have not been sympathetic to civil society's concerns, insisting that such controls are needed to prevent foreign powers from exploiting charities to undermine democratic processes in Australia.¹⁷

Many of the counterterrorism laws detailed above were necessary to close gaps in Australia's criminal code following September 11. As Australian legal expert George Williams argues, Australia required new antiterror laws to deal with the specific and unique nature of the problem.¹⁸ For example, the Commonwealth needed a statutory framework for preventing the financing of terrorist attacks overseas and for classifying organizations as terrorist entities.¹⁹ Similarly, criminal law in 2001 was not geared toward preventing a devastating terrorist attack. For most other criminal offenses, the force of the law can only be applied once a criminal act has been committed. Australia realized that it needed a legal framework to intervene sooner in the chain of events to prevent catastrophic damage and loss of life.²⁰ Government officials explain that such measures were necessary to uphold its responsibilities to protect fundamental human rights, including the right to life and right to assembly.

However, in its desire to guard against terrorist attacks and protect the citizenry, Australia has created exceptional powers that raise questions about the impact on civil society, Muslim communities, and civil liberties.

15 Kelsey Munro, "What is really in Australia's new foreign interference laws?," SBS News, December 8, 2017, <https://www.sbs.com.au/news/what-is-really-in-australia-s-new-foreign-interference-laws>.

16 Lisa Cornish, "In Australia, new bill has charities fearing a war on advocacy," Devex, December 8, 2017, <https://www.devex.com/news/in-australia-new-bill-has-charities-fearing-a-war-on-advocacy-91716>.

17 Lisa Cornish, "At government hearings, Australian NGOs get harsh reception," Devex, February 5, 2018, <https://www.devex.com/news/at-government-hearings-australian-ngos-get-harsh-reception-92020>.

18 Williams, "A Decade of Australian Anti-Terror Laws."

19 *Ibid.*

20 *Ibid.*

Impacts

Impact on Human Rights

One serious concern about Australia's counterterrorism regime is the permanent nature of powers and authorities that were supposed to be exceptional. It has become clear that the war on terror—though the name is no longer in vogue—will continue unabated as long as the threat morphs and spreads. While a few of Australia's laws have a sunset clause, most are in effect for an indefinite duration.²¹ This creates a danger that the laws could be used long after they are necessary.

Another question centers around whether Australia's counterterrorism measures are necessary and appropriately calibrated to the threat. Government interviewees insist that they do not ask for tools that they do not need, and that there are multiple checks and balances in the system to ensure that counterterrorism powers are not abused. Human rights advocates disagree. Several lawyers interviewed said that existing laws were capable of addressing emerging threats, and, therefore, there was no need for additional measures. The sharpest rebuke came from Gillian Triggs, the former Australian human rights commissioner who has been at loggerheads with the government. She argued that successive administrations had taken advantage of the fear caused by terrorism to introduce laws that were “out of proportion to the legitimate aim of protecting national security.”²² This criticism has been hard to prove because the government has not disclosed classified information justifying the need for these measures.²³

Others have pushed back on the grounds that some counterterrorism protocols are not practical and cannot be implemented with adequate regard to due process. The Law Council of Australia, the principal organization representing the interests of Australia's legal profession, has questioned the validity of several laws because they are not workable from a legal professional's standpoint.²⁴ For example, with the control order regime, sensitive information is used to justify restrictions on people's personal liberty but is not shared with the potential controlee or his/her representative.²⁵ Without access to all of the evidence, lawyers cannot provide an effective or robust defense.

Interviewees also expressed dismay with the speed at which counterterrorism laws are enacted. Under the Howard coalition government, which was in power during September 11, 2001, and remained so until December 2007, the federal parliament enacted an average of 7.7 pieces of national security legislation each year.²⁶ The tempo slowed under the Rudd and Gillard governments but picked back up with the advent of ISIS and particular challenges related to its international recruitment campaign. Australia has passed an additional nine laws in the past three years to deal with foreign fighters and the radicalization of Australians as young as 10 years old, among other issues.²⁷ The rapid clip of legislation does not allow for sufficient consultation with civil society or consideration of human rights impacts. External experts often have just days to review and comment on massive pieces of legislation. Even government interviewees admit-

21 Ibid.

22 Calla Wahlquist, “Gillian Triggs: Australian law has fallen prey to ‘isolation and exceptionalism,’” *The Guardian*, September 17, 2017, <https://www.theguardian.com/australia-news/2017/sep/27/gillian-triggs-australian-law-has-fallen-prey-to-isolation-and-exceptionalism>.

23 Shannon N. Green, interview with the Law Council of Australia, Canberra, Australia, December 18, 2017.

24 Ibid.

25 This is being remedied, as discussed later in the chapter, through the introduction of a special advocates regime.

26 Williams, “A Decade of Australian Anti-Terror Laws.”

27 Shannon N. Green and Andrew Shearer, interview with senior government official, Canberra, Australia, December 18, 2017.

ted to very rushed timelines for counterterrorism laws. As a result, avoidable mistakes have been made, such as when the government had to revise section 35P of the Australian Security Intelligence Organization (ASIO) act (concerning offenses for the disclosure of information relating to a security intelligence organization) because it was deemed unconstitutional and in violation of Australia's obligations under international human rights law.²⁸

In addition to these overarching concerns, specific powers are clearly inconsistent with international human rights norms that guarantee personal liberty, due process, and the presumption of innocence until proven guilty. The control order regime, for instance, can limit an individual's movements, communications, and professional and personal interactions if doing so would substantially assist in preventing a terrorist attack. Control orders can be put in place even if a person has not been charged and will never be tried. Numerous bodies in Australia, including the Parliamentary Joint Committee on Human Rights (PJCHR), have determined that the control orders regime violates a range of human rights guarantees, including the right to the security of the person; the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; and the right to freedom of movement.

Counterterrorism laws and practices also infringe on freedom from arbitrary detention by authorizing indefinite post-sentence detention for those convicted of terrorism offenses, and threaten the right to a fair

trial by allowing convictions based on evidence potentially not seen by the accused or his/her legal representative.²⁹ In addition, human rights advocates are deeply concerned about ASIO's questioning and detention powers which are "some of the most intrusive and worrying aspects of Australia's counterterrorism regime."³⁰ Essentially, a person can be taken into custody and questioned for seven days without external communication, legal representation, or being suspected of any crime if ASIO believes they have information that will help prevent a terrorist attack. Incriminating information disclosed during this period of detention can be used against the individual if they are eventually charged.

Human rights organizations have documented these inconsistencies and made recommendations to align the Commonwealth's counterterrorism laws with its human rights obligations.³¹ These calls have mostly gone unheeded.

Impact on Civil Society

Critics allege that cumulatively Australia's counterterrorism laws and policies have had a "chilling effect" on civil society and human rights defenders. United Nations Special Rapporteur on the situation of human rights defenders, Michel Forst, issued a critical statement at the end of his fact-finding mission in late 2016. He was "astonished to observe mounting evidence of a range of cumulative measures that have levied enormous pressure on Australian civil society."³² Expecting

28 Australian Government Independent National Security Legislation Monitor, "Section 35P of the ASIO Act," February 2, 2016, <https://www.inslm.gov.au/reviews-reports/section-35p-asio-act>.

29 Australian NGO Coalition, *Australia's Compliance with the International Covenant on Civil and Political Rights*, Submission to the Human Rights Committee (N.p.: Australian NGO Coalition, September 2017), <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59c364bb64b05fb1d2438e2f/1505977580713/18623-PUB+ICCPR+Report+for+HRL-C+2017+%28WEB%29.pdf>.

30 *Ibid.*

31 *Ibid.*

32 UN Office of the High Commissioner for Human Rights, "End of mission statement by Michel Forst, United Nations Special Rapporteur on the situation of human rights defenders," October 18, 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>.

to find an exemplary environment for civil society, instead he found a growing body of statutory laws and measures, at the federal and state level, constraining the rights of defenders.

These efforts have disproportionately affected organizations working on environmental protection, refugee and immigrant rights, and indigenous communities. Interviewees explained that organizations focused on these “sensitive” issues have faced online threats from anonymous sources, as well as pressure from the government to separate their advocacy efforts from service provision. According to one interlocutor, the government has floated potential legislation requiring environmental organizations to devote a certain percentage of their budget to remediation vice advocacy.³³ Forst also noted that “Community Legal Cent[er]s are facing a cut of nearly one third of their budget nationally, and that Environmental Defenders Offices and the National Congress of Australia’s First Peoples have completely been defunded by the Federal Government. Those that continue receiving funds have to abide by the so-called ‘gagging’ clauses in their funding agreements, instructing them against ‘lobbying’ the Governments or ‘engaging in public campaigns.’”³⁴ A less concrete example of the “chilling effect” was the fact that most lawyers and activists working on human rights were unwilling to be interviewed on record for this report, fearing a loss of access to government officials.

Human rights advocates also complain of attempts by government officials to discredit, intimidate, or delegitimize their work and their organizations.

Special Rapporteur Forst expressed dismay at these public defamation campaigns, stating that “environmentalists, whistleblowers, trade unionists and individuals like doctors, teachers, and lawyers protecting the rights of refugees have borne the brunt of the verbal attacks.”³⁵ The most prominent target of official condemnation was the former Australian human rights commissioner, Gillian Triggs. Supporters of Triggs charge that she was the victim of a coordinated government campaign to impugn her integrity and impartiality after the commission published a scathing report on child immigrant detention. Opponents argue that she allowed politics to affect her judgment and used a taxpayer-funded institution to pursue a radical, leftist agenda. These sentiments break down along partisan lines. Regardless of which narrative one believes, since her departure, the commission has become more tempered in its criticism of the government’s human rights record as it attempts to rebuild trust with and access to officials.

Beyond these broad impacts to the sector, counterterrorism laws constrain freedom of association by criminalizing contact with a terrorist organization, even if the individual involved has only a tangential relationship to that entity and has no proven intent of engaging in or providing support to a terrorist organization. One interviewee shared the story of a university student being detained because she borrowed her sister’s laptop, and her sister had tenuous links to an individual associated with a group on the terrorist list.³⁶ The student was eventually released but not without tarnishing her reputation and causing her to quit school.

33 Shannon N. Green, interview with Nathan Kennedy, Australian Lawyers for Human Rights, Sydney, Australia, December 21, 2017.

34 UN Office of the High Commissioner for Human Rights, “Australian Government must re-build trust of civil society—UN human rights expert,” October 18, 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20693&LangID=E>.

35 Ibid.

36 Shannon N. Green, interview with Cindy Penrose, New South Wales Bar Association, Sydney, Australia, December 20, 2017.

Impact on Rule of Law

Since the initial tranche of antiterror legislation was passed in 2002, human rights and civil liberties advocates, as well as some in the legal community, have expressed concern about the potential for the preemptive approach to extend to other areas of the law. A decade and a half of experimentation with preventative counterterrorism authorities has fundamentally changed Australia's approach to criminal policing and law enforcement.³⁷ Legislation has now been adopted criminalizing preparatory acts related to espionage and treason and child sex trafficking, and the control order regime has been adapted to deal with biker gangs in South Australia. This slippage of extraordinary measures into everyday policing has also been witnessed in the way that Australia deals with immigration and security assessments.³⁸

Government officials convey that this is a natural evolution, given the nature of criminal activity, and question why they would not prevent terrible things from happening rather than wait for a criminal act. The public seems to support this approach—interviewees estimated that approximately 80 percent of the Australian populace expects the government to take proactive steps to prevent criminal offenses of all kinds, including terrorism. Yet, the consequences of loosening human rights protections for people merely *suspected of intending* to commit a crime raises the likelihood that an increasing number of Australians will be wrongfully accused and face the attendant punishment. Over time, these preemptive approaches to law enforce-

ment threaten to undermine the very freedoms and civil liberties that national security efforts are meant to protect.

Safeguards

Despite these extraordinary counterterrorism powers, Australian authorities have rarely used them. Even the government's sharpest critics concede that there are very few instances of overreach or abuse of these provisions. In fact, the control order regime has only been applied in six instances, and the ASIO questioning and detention warrants that cause so much consternation have never been used. The government notes these facts as proof of its restraint and the safeguards in place, including institutional checks and oversight mechanisms.

First, government officials assert that parliamentary scrutiny serves as a significant barrier to pushing through legislation that violates human rights. According to one senior government official, "human rights considerations are hardwired into the legislative process."³⁹ This is because parliament passed the Human Rights (Parliamentary Scrutiny) Act 2011, which stipulates that, when introducing a bill, legislators have to include a "statement of compatibility" verifying that the legislation is consistent with Australia's human rights commitments. It also established the Parliamentary Joint Committee on Human Rights (PJCHR) to consider whether proposed legislation complies with Australia's international human rights obligations. While this was a positive step, the PJCHR's recommendations are unenforceable and have been generally ignored.⁴⁰ For example, the PJCHR found that the "Foreign Fighters" legislation, which forbids travel

37 Annie Pettitt, "Counter-terrorism Policing in Australia: Impacts on Civil Society," in *Civil Society Under Strain: Counter Terrorism Policy, Civil Society and Aid Post- 9/11*, ed. Jude Howell and Jeremy Lind (West Hartford, CT: Kumarian Press, 2009).

38 *Ibid.*

39 Shannon N. Green and Andrew Shearer, interview with senior government officials, Canberra, Australia, December 18, 2017.

40 Australian NGO Coalition, *Australia's Compliance with the International Covenant on Civil and Political Rights*.

to certain declared areas, undermined the right to a fair trial and the presumption of innocence. The bill passed anyway. Likewise, the statement of compatibility has proven to be an insufficient check on legislative overreach. Interviewees explained that the quality of the statements themselves has been poor, has failed to make a strong legal case for Australia's international human rights obligations, or has had little influence on the legislation adopted or government policy.

In addition to the PJCHR, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) carefully considers all legislative proposals, including the human rights implications. The PJCIS reviews the statement of compatibility and hears testimonies from outside organizations and experts. At times, these hearings have led to improvements to the legislation or better approaches to achieve the same security result with less impact on human rights. This happened with respect to the "declared areas" offense and provisions to revoke Australians' dual citizenship.⁴¹ Yet, most interviewees described the legislative process as extremely rushed and lacking sufficient debate, consultation, and scrutiny, blunting the potential for opposition to form. In addition, 10 out of 11 members of the PJCIS hail from the two major parties, the Labor Party and the Liberal Party, which tend to vote together on counterterrorism legislation. The PJCIS, while a useful forum for legislative review and debate, thus has not served as an effective tool for preventing the adoption of legislation that violates international human rights standards.

Second, defenders of the Commonwealth's counterterrorism approach highlight internal bodies that help identify and mitigate the risk of abuse. For instance, the independent national security

legislation monitor (INSLM)—a unique oversight position appointed by the governor-general for up to two, three-year terms—independently reviews the operation, effectiveness, and implications of national security and counterterrorism laws; considers whether the laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary; and assesses whether laws are being used for purposes unrelated to terrorism or national security.⁴² Reviews can be initiated independently by the INSLM or referred to the INSLM by the prime minister or PJCIS. When conducting reviews, the INSLM is required to consider whether the laws are consistent with Australia's human rights obligations, counterterrorism obligations, and international security obligations. The INSLM has access to all relevant material, including highly sensitive documents, and can compel government officials to answer questions. Even with the wide latitude and authority bestowed upon the INSLM, those in the position have taken a tailored, pragmatic approach. In the past seven years, the INSLM has issued reports on matters including control order regime safeguards, ASIO's questioning and detention powers, and the impact of ASIO legislation on journalists, in addition to its annual reports.

The impact of the INSLM's reviews have been mixed. After reviewing Section 35P of the ASIO act, the INSLM concluded that it would negatively affect journalists reporting on special intelligence operations and have a chilling effect on freedom of the press. The government accepted these recommendations and amended the language. In other cases, the government has not changed course because of the INSLM's recommendation. For example, former INSLM the Hon. Roger Gyles endorsed a special advocates regime to provide

41 Andrew Shearer, phone call with member of parliament, Australian House of Representatives, Melbourne, December 20, 2017.

42 Australian Government Independent National Security Legislation Monitor, "About the INSLM," <https://www.inslm.gov.au/about>.

potential controlees with a choice of counsel from a pre-cleared pool. The government accepted this recommendation and is putting a special advocates regime in place.⁴³ Yet, the previous INSLM the Hon. Bret Walker recommended that the control order regime as it was constructed be abolished altogether—a position that was rejected by the government.

Another important oversight mechanism is the inspector-general of intelligence and security (IGIS), an independent statutory office holder who reviews the activities of the six intelligence agencies: ASIO, Australian Secret Intelligence Service, Australian Signals Directorate, Australian Geospatial Intelligence Organization, Defense Intelligence Organization, and Office of National Assessments.⁴⁴ The mandate of IGIS is to ensure that intelligence agencies “act legally and with propriety, comply with ministerial guidelines and directives, and respect human rights.”⁴⁵ Senior government officials asserted that IGIS is powerful and autonomous. It has the right to initiate investigations or take up complaints referred by ministers. In conducting an inquiry, IGIS has full access to intelligence agencies’ premises and internal documents, even highly classified materials related to operations.⁴⁶ In addition, the inspector-general can require the attendance of witnesses and take sworn evidence.⁴⁷ Government officials repeatedly referenced the central role of IGIS in providing a check on the abuse of counterterrorism powers; yet, civil society actors did not seem aware of or reassured by the ability of IGIS to curb government overreach.

Finally, Prime Minister Turnbull recently announced a major government reorganization that will create a

new home affairs portfolio, consolidating the agencies responsible for immigration, border security, counterterrorism, cybersecurity, transport security, domestic intelligence, and emergency management under one senior minister, much like the Department of Homeland Security in the United States. Senior government officials suggest that this reorganization will strengthen human rights and civil liberties protections by separating counterterrorism functions from the Department of Justice. According to this argument, the attorney general and his staff will now have greater autonomy and ability to challenge the legality and constitutionality of counterterrorism practices. In reality, the attorney general will continue to have a central role in supporting the government’s counterterrorism agenda and is unlikely to part ways with the Home Affairs ministry on counterterrorism matters. Human rights advocates also fear that the abuse of counterterrorism provisions will increase with the creation of a consolidated security department, under the leadership of Peter Dutton, who also serves as the minister of immigration and border protection. Dutton is a lightning rod for the human rights community, as he oversees Australia’s controversial policy of refusing to allow asylum seekers arriving by boat to come onshore and keeping refugees and asylum seekers in inhumane conditions on Manus and Nauru islands. In addition, Dutton angered human rights activists when he labeled lawyers who represent asylum seekers as “un-Australian.”⁴⁸

The courts have not served as a significant barrier to the implementation of counterterrorism measures or as a guardrail for government overreach. This is largely because Australia is one of the only

43 Interview with the Law Council of Australia.

44 Inspector-General of Intelligence and Security, “About IGIS,” <https://www.igis.gov.au/about>.

45 Ibid.

46 Shannon N. Green and Andrew Shearer, interview with senior government official, Canberra, Australia, December 19, 2017.

47 Inspector-General of Intelligence and Security, “About IGIS.”

48 Rashida Yosufzai, “‘Extraordinary attack’: Lawyers angry at Peter Dutton’s ‘Un-Australian’ remark,” SBS News, August 29, 2017, <https://www.sbs.com.au/news/extraordinary-attack-lawyers-angry-at-peter-dutton-s-un-australian-remark>.

democratic countries without a bill or rights or constitutional guarantees of civil liberties. Moreover, although Australia is party to core international human rights instruments—including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the International Convention on the Elimination of All Forms of Racial Discrimination—it has not enacted these treaty obligations into domestic law. Therefore, there is no legal yardstick against which to measure counterterrorism legislation, and Australia’s judiciary does not consider international human rights commitments as binding.

Human rights advocacy organizations have made several attempts to improve human rights protections and enshrine Australia’s international obligations in domestic law. Most notably, in 2010, a coalition of human rights groups and civil liberties advocates led a major push to create a Human Rights Act. The government conducted a wide-ranging national consultation and received a record 35,000 public comments. Of these submissions, 87 percent of the respondents were in favor of codifying Australia’s human rights commitments in domestic legislation. Despite this public support, the government decided not to introduce a Human Rights Act, explaining that “the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides us.” Interviewees discussed the possibility of reviving the conversation around a Human Rights Act but question whether the outcome would be any different this time. If anything, they believe the government’s position has hardened against such legislation. In fact, government interviewees expressed a great deal of skepticism about the utility of such a human rights bill. They believe that existing protections are sufficient and that passing such legislation would hamper their legitimate efforts to keep the population safe from terrorist attacks.

Conclusions

Australia has established unprecedented and far-reaching executive powers and tools to prevent terrorist attacks. The government maintains that such capabilities are needed to safeguard the most basic human right of all—the right to life—and points out that Australia’s citizenry overwhelmingly supports a robust and pragmatic approach to counterterrorism. Yet, these authorities contravene the Commonwealth’s human rights obligations under international law, including the right to due process, the presumption of innocence until proven guilty, and the right to be free from arbitrary detention. Counterterrorism approaches also jeopardize rights that are essential to a vibrant and independent civil society, including freedom of association, assembly, and expression.

Despite these risks and concerns about the overall chilling effect on civil society, the government has been mostly restrained in its use of these powers. There are very few concrete examples of the state (at the national or sub-national level) or law enforcement abusing its authority in the name of counterterrorism. Government officials point to institutions, such as the PJCHR, PJCIS, INSLM, and IGIS—as well as a free and vibrant press and independent judiciary—as effective checks on government overreach. In addition to these mechanisms, what is preventing the government from abusing its counterterrorism powers are deeply institutionalized norms that come from being a democratic country. Australia’s government does not want to prey upon its citizens or use national security threats to justify a crackdown on civil society or human rights. And Australian citizens expect the government to use its authority within the bounds of the law and only when necessary. This compact works so long as those in office respect the democratic rules of the game and are committed to protecting human rights. However, without stronger institutional and legal assurances, the system

is prone to abuse by future leaders with more authoritarian tendencies. Already, Australian human rights defenders are worried about the impact of counterterrorism laws on democratic institutions and norms in the Commonwealth; the freedoms of association, assembly, and expression that are vital to an active and engaged civil society; and social cohesion and inclusion for all inhabitants of Australia. To truly protect the population from terrorist attacks, Australia's government, working closely with civil society, should align its counterterrorism approach with its international human rights obligations and enshrine these rights in domestic law.

To the Australian government

- Consult with civil society, practitioners, and experts early in the process of drafting legislation. Engaging early and often with civil society can prevent lawmakers from enacting legislation that will later be challenged for its legality and/or constitutionality. It will also help legislators think through the first-, second-, and third-order impacts, including on human rights and civil society, and thus on counterterrorism efforts. These experts, if engaged upfront, might be able to help craft legislation that meets the government's security requirements in a way that is more tailored and proportionate to the threat.
- Enact a bill of rights or domestic legislation that enshrines Australia's human rights obligations. The absence of national legislation or constitutional provisions guaranteeing human rights has served as a barrier to unwinding or improving counterterrorism legislation when passed. The lack of a bill of rights or domestic human rights body of law has also inhibited effective legal challenges to antiterror legislation. Passing such human rights guarantees would serve as a permanent check on executive over-reach.

- Broaden composition of the PJCIS. For the PJCIS to play an effective role in scrutinizing counterterrorism legislation and not just being a rubber stamp, it should include more representation from parties besides Liberal and Labor. Broadening the composition of the PJCIS would slow down the process of passing major laws that will have a lasting effect on Australia's security and democracy, and allow for more robust consideration and debate of these measures.

To civil society actors

- Develop the evidence base demonstrating the negative impact of counterterrorism measures on civil society. The Australian government is dismissive of the idea of a "chilling effect" on civil society and needs harder data to prove that counterterrorism laws are indeed having negative impacts on civil society. Such data must be impartial and as concrete as possible.
- Build a constituency for human rights and civic space. Civil society must build a broader constituency for human rights and an enabling environment for the sector. By and large, Australian citizens are supportive of the government's counterterrorism efforts and indifferent to threats to civil liberties. To fend off more expansive counterterrorism measures, including surveillance initiatives, human rights defenders must convince the population—and policymakers—that human rights are not merely a leftist agenda. Rather, protecting civic space is essential for ensuring the nation's security and protecting the inclusiveness that has made Australia a successful, vibrant multicultural society.

To the international community

Other countries can learn from—and adopt—what Australia is doing well. The international communi-

ty should draw on Australia's strategies to reconcile security and human rights and encourage similar approaches in countries struggling to keep civic space open amid severe terrorism threats.

- Specify that the definition of terrorism does not include legitimate political activity. Australia adopted a precise definition of terrorism that underscores that “a terrorist act does not include engaging in advocacy, protest, dissent, or industrial action where a person does not have the intention to urge force or violence or cause harm to others.” This provision lessens the opportunity for the state to undermine human rights and democratic freedoms under the guise of national security.
- Establish an independent monitor to review national security legislation. The INSLM, while imperfect, is an important mechanism to independently assess the legality, necessity, and proportionality of counterterrorism legislation. It could be strengthened by mandating that the government enact its recommendations and align domestic law with international human rights standards. Yet, even in its current form, the INSLM provides an important avenue for remedying counterterrorism laws that threaten human rights and civil liberties.

BAHRAIN

A SUFFOCATED CIVIL SOCIETY

Alma Abdul-Hadi Jadallah

Background

The Kingdom of Bahrain is an Arab constitutional monarchy that has been led by King Hamad bin Isa Al Khalifa since March 1999.¹ Historically, Bahrain was a British protectorate, and gained its independence in 1971. The Al Khalifa family has ruled Bahrain since 1783 and is a prominent representation of predominantly Sunni rule in the Gulf region.² The country's population is estimated to be just over 1.4 million, 52 percent of whom are expatriates.³ The country is known for its cultural, ethnic, and religious diversity, as well as its open society. In addition to its majority-Muslim population (70.2 percent), Bahrain is home to individuals from diverse faith groups and origins, including Christians (30 percent), Jews (a fraction of 1 percent), and Hindus (9.8 percent), as well as Asians and other Arabs.⁴ This diversity differentiates Bahrain from its neighboring Gulf

Cooperation Council (GCC) countries, of which it is a member.

The precise demographic composition of Bahraini Muslims is a significant point of contention in the country. Although the majority of the Muslim population is Shia (estimated to be around 70 percent⁵), the government disputes the extent to which its Shia population constitutes a majority.⁶ Indeed, the government has made a concerted effort to increase the Sunni population by granting citizenship to non-Bahraini Sunnis from Jordan, Pakistan, and Syria in a discretionary and arbitrary manner. It is estimated that 90,000 people have been naturalized as citizens in Bahrain since 1999, a significant number given the country's small population.⁷ These naturalizations are often contested by the Shia community as a politically motivated move to tip the demographic balance in favor of the Sunni ruling family.

1 Kingdom of Bahrain Ministry of Foreign Affairs, H.M. The King, <http://www.mofa.gov.bh/AboutBahrain/Goverment/HMtheKing/tabid/137/language/en-US/Default.aspx>.

2 "Bahrain Country Profile," BBC News, August 27, 2017, <http://www.bbc.com/news/world-middle-east-14540571>.

3 Kingdom of Bahrain Ministry of Information Affairs, Population and Demographics, <http://www.mia.gov.bh/en/Kingdom-of-Bahrain/Pages/Population-and-Demographic-Growth.aspx>.

4 BICI, "Report of the Bahrain Independent Commission of Inquiry," November 23, 2011, <http://www.bici.org.bh/BICIreportEN.pdf>.

5 Percentage may have decreased given the number of naturalizations approved for individuals with Sunni affiliation

6 Kenneth Katzman, "Bahrain: Reform, Security, and U.S. Policy," Congressional Research Service, September 29, 2017, <https://fas.org/sgp/crs/mideast/95-1013.pdf>.

7 Jane Kinnimont and Omar Sirri, "Bahrain: Civil Society and Political Imagination," October 2014, Chatham House, 7, <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/20141028BahrainKinnimontSirri.pdf>.

The lack of trust between the two communities has translated into discrimination against the Shia community's civil, political, economic, social, and cultural rights. Unless considered supporters of the ruling family, Bahraini Shias are excluded from many government positions, including high-level cabinet positions, and from roles in the country's security forces such as the Bahraini Defense Force, the National Security Agency (NSA), and the police. Bahraini Shias thus believe their exclusion from such positions is tantamount to discrimination and limits their influence both economically and politically.⁸ This practice, compounded by the government's naturalization campaign, only serves to confirm Shia fears of systemic discrimination by the ruling family and the government. These concerns have been exacerbated by the government's practice of arbitrarily revoking the citizenship of exiled Shia dissidents and detaining or judicially harassing any family members that remain in the country.⁹

Communal friction in Bahrain was further aggravated by the government's response to the popular uprising in February 2011. Civil society organizations, trade unions, and political parties took to the streets to demand an end to discrimination and to call for equal rights and reforms. Throughout the course of the protests, the government killed and detained hundreds of protestors, and subjected many of them to torture. Human rights defenders (HRDs) and political opposition lead-

ers were arrested and charged with terrorism, and continue to languish in detention.

Bahrain is considered a strategic country to the United States in the Middle East and North Africa region. It was designated a "major non-NATO U.S. ally" in 2002 and is home to the U.S. Fifth Fleet and over 7,000 U.S. forces. The United States has provided arms to Bahrain over the years. Arms sales were briefly withheld under the Obama administration because of human rights violations.¹⁰ Any conditions on arms sales to Bahrain were recently reversed by the Trump administration. In March 2017, the Trump administration lifted the condition that Bahrain must improve its human rights record to participate in the sale of F-16 fighter jets and other weapons from the United States.¹¹ This may be due to the fact that Bahrain is regarded as a key ally in the fight against international terrorism.

Despite this long-standing relationship, the United States has been unable to wield influence in any meaningful way to encourage reforms. In December 2014, the U.S. assistant secretary of state for democracy, human rights and labor, Tom Malinowski, was asked to leave Bahrain for meeting with members of Al Wefaq, the country's largest political opposition society.¹² Some analysts believe that the U.S. government has failed to adequately leverage the military assistance it provides to Bahrain and its stationing of military forces to encourage the government to change the status quo. Indeed, absent a significant shift in the U.S. government's approach

8 BICI, "Report of the Bahrain Independent Commission of Inquiry"; Kinnimont and Sirri. "Bahrain: Civil Society and Political Imagination."

9 Kristen Chick, "Bahrain is stripping dissidents of their citizenship, and the U.S. is silent," *Washington Post*, July 8, 2017, https://www.washingtonpost.com/world/middle_east/bahrain-is-stripping-dissidents-of-their-citizenship-and-the-us-is-silent/2017/07/08/3ad347d0-5154-11e7-91eb-9611861a988f_story.html?utm_term=.4b3226ebf08f.

10 Katzman, "Bahrain: Reform, Security, and U.S. Policy."

11 Carol Morello, "State Department drops human rights as condition for fighter jet sale to Bahrain," *Washington Post*, March 29, 2017, https://www.washingtonpost.com/world/national-security/state-department-drops-human-rights-as-condition-for-fighter-jet-sale-to-bahrain/2017/03/29/6762d422-1abf-406e-aaff-fbc5a6a2e0ac_story.html?utm_term=.a8b2d35843c5.

12 "Expelled US diplomat Tom Malinowski condemns Bahrain," BBC News, July 8, 2014, <http://www.bbc.com/news/world-us-canada-28221189>.

to its relationship with Bahrain, the situation in the country is unlikely to change despite efforts by Congress and advocacy groups to encourage such a shift. In recent years, Congress has included report language in its annual appropriations legislation requiring the Department of Defense to report to Congress on contingency plans for the Fifth Fleet. The relocation of the U.S. Fifth Fleet from Bahrain is seen by some as a move necessary to give the U.S. government greater flexibility in dealing with crises such as the crackdown on the February 2011 protests and to take away the presence of the Fifth Fleet as an enabler for Bahraini government to act in a manner inconsistent with its international human rights obligations.¹³

Counterterrorism in Context

Inspired by the regional Arab Spring movement, the aftermath of the February 2011 protests initially yielded some government reforms. The Bahraini government freed political prisoners and removed two Al Khalifa family members from cabinet positions. However, protestors continued to occupy Pearl Square. The Bahraini government subsequently requested the assistance of the Gulf Cooperation Council, which led to a direct intervention by the Saudi-led joint Peninsula Shield Force to help quell what it considered a Shia rebellion—implying close ties with Iran, and a threat to its rule. The government—in its attempts to end the demonstrations—destroyed 30 Shia places of worship and later detained hundreds of human rights defenders and political opposition leaders, some of whom were subjected to torture and forced confessions—a practice that continues today.¹⁴

In response to pressure from the international community, the government established the Bahrain Independent Commission of Inquiry (BICI), which is comprised of international legal experts. BICI found that the government deliberately and systematically used excessive force against protestors, including torture and forced confessions. The BICI report was widely considered to be the possible beginning of a process of reform in Bahrain. The BICI report contained twenty-six recommendations to encourage accountability for abuses by security forces committed during the protests. In 2016, the Bahraini government contends that it implemented the majority of the recommendations, a claim strongly contested by Bahraini civil society and reputable international human rights organizations. Indeed, the State Department report to the Congress on the implementation of BICI recommendations indicated that “the Government of Bahrain has implemented some important recommendations of the commission of inquiry” while cautioning that “there are other key recommendations that have not been fully implemented.”¹⁵ The report also noted that “efforts to build trust across Bahraini society and foster an environment conducive to national reconciliation have stalled, diminishing the effect of government actions to implement BICI recommendations, and minimizing popular acceptance of newly established government institutions.”¹⁶ In 2017, the government reversed the fulfillment of two recommendations. Specifically, the National Security Agency (NSA), despite its record of torture and abuse, was given back its arrest and investigation powers. In addition, in April 2017, King Hamad bin Isa Al Khalifa

13 Toby C. Jones, “Tim to Disband the Bahrain-Based U.S. Fifth Fleet,” *The Atlantic*, June 10, 2011, <https://www.theatlantic.com/international/archive/2011/06/time-to-disband-the-bahrain-based-us-fifth-fleet/240243/>.

14 BICI, “Report of the Bahrain Independent Commission of Inquiry.”

15 The U.S. State Department, “Steps Taken by the Government of Bahrain to Implement the Recommendations in the 2011 Report of Bahrain Independent Commission of Inquiry (BICI),” June 21, 2016, <http://pomed.org/wp-content/uploads/2016/06/State-BICI-Report.pdf>.

16 *Ibid.*

signed legislation authorizing civilians to be tried before military courts.¹⁷

Some experts have argued that the actions of the Bahraini government can be understood in the context of geopolitical developments in the region, particularly considering concerns over the perceived rise of Iranian influence—though this claim was rejected in the BICI report. Given Bahrain’s strong economic and social ties with Saudi Arabia, its attempts to blame legitimate dissent on Iranian influence is a reflection of the politics of the region and has only served to exacerbate sectarian tensions in the country.¹⁸ Further, in light of Bahrain’s relationship with Saudi Arabia, its key economic partner and ally, and Saudi Arabia’s tense relationship with Iran, there is concern that the fate of the country may be determined by forces outside of Bahrain.

The militarized response to Pearl Square protests and the government’s securitized approach to civil society and dissent continues to influence current Sunni-Shia relations in Bahrain. This led to the country reaching its lowest point of human rights protection since the 2011 protests.¹⁹ Ongoing human rights violations against civil society organizations (CSOs), human rights defenders, and political opposition leaders continue to be reported.

The authorities have actively imposed quasi-legal and administrative restrictions that criminalize internationally protected human rights such as the freedoms of expression, assembly, and association.²⁰ The government banned the only independent newspaper in the country, *Al Wasat*, on the grounds that it stirred up tension and violence and jeopardized Bahrain’s relations with other countries in the region.²¹ Media space is currently dominated by outlets that support the government. Bahraini citizens are also banned from organizing demonstrations absent prior approval.²²

The Bahrain authorities, invoking the excuse of fighting terrorism, continue to use excessive force to crack down on protests that occur in Shia villages on a regular basis. The U.S. Department of State Country report on Terrorism indicates that “terrorist attacks against [Bahrain’s] security forces declined in 2016,”²³ with “at least three attacks result[ing] in casualties or injuries; only one of which involved explosives.”²⁴ It links the decrease in terrorism to the government’s efforts in detecting, neutralizing, and containing terrorist threats. However, the report notes concern that Bahrain’s antiterror measures have led to human rights violations, including arbitrary deprivation of nationality to “pursue politically motivated cases against

17 Human Rights Watch, “Bahrain: Events of 2017,” *The World Report 2018*, <https://www.hrw.org/world-report/2018/country-chapters/bahrain>.

18 International Crisis Group, “Popular Protests in North Africa and the Middle East (III): The Bahrain Revolt,” April 6, 2011, <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/bahrain/popular-protests-north-africa-and-middle-east-iii-bahrain-revolt>.

19 Freedom House, “Bahrain Profile,” *Freedom in the World Report 2017*, <https://freedomhouse.org/report/freedom-world/2017/bahrain>.

20 Alma Abdul-Hadi Jadallah, interviews with individuals preferred to be anonymous conducted for the purpose of this case study: August 8, 2017, August 22, 2017, September 3, 2017, September 7, 2017, October 13, 2017, October 17, 2017, November 11, 2017, January 5, 2017, February 5, 2018.

21 Human Rights Watch, “Bahrain Only Independent Newspaper Shutdown,” June 18, 2017, <https://www.hrw.org/news/2017/06/18/bahrain-only-independent-newspaper-shut-down>.

22 Freedom House, “Bahrain Profile.”

23 The U.S. Department of State, *Country Reports on Terrorism 2016*, July 2017, <https://www.state.gov/documents/organization/272488.pdf>

24 *Ibid.*

mainstream opposition and Shia activists without a history of involvement in violent acts.”²⁵

Absent any meaningful space for peaceful protest and political dissent—and for civil society to organize—it is unclear what avenues, if any, remain to have political reform and stability in the country. By taking such actions, the Bahraini government has left itself without the very people it will eventually need to negotiate a solution to the country’s political crisis.

Counterterrorism Legal Framework

Bahrain’s long history of civil society engagement and any tentative positive political will created by the limited reforms the government implemented in the post-2011 period have been significantly undermined by the government’s actions. Since 2011, the government has undertaken comprehensive efforts to prosecute legitimate political opposition leaders and human rights defenders (HRDs) under its broad terrorism laws and through laws such as the Law of Associations, which effectively prevents the ability of CSOs to function independently and freely. Although the government implemented broad antiterrorism laws prior to the 2011 protests, several problematic amendments have since been passed that have allowed the government to criminalize nearly all forms of peaceful dissent.

A counterterrorism bill titled “Protecting Society from Terrorist Acts” (enacted in 2006) has been utilized by the government to criminalize legitimate peaceful dissent and to detain HRDs and opposition leaders for internationally protected rights such as the freedoms of assembly and association. The law defines terrorism as “the use of force or threatening to use it or any other unlawful means constituting a

crime legally punishable by law resorted to by a perpetrator for the execution of an individual or collective criminal plan with the aim of *disrupting public order, threatening the Kingdom’s safety and security, or damaging national unity or security of the international community if this would result in harming persons, terrorizing and intimidating them, and endangering their lives, freedoms, or security or causing damage to the environment, public health, national economy or public utilities, facilities or properties, or seizing them and obstructing the performance of their business activities, preventing or obstructing the government authorities, places of workshop or academic institutions from carrying out their activities.*” [emphasis added.]

The law’s vague language and ill-defined terms such as “disrupting public order,” “threatening the Kingdom’s safety and security,” and “damaging national unity” have come under a great deal of criticism. In addition to the laws’ violation of the principle of legality, its overly expansive definition of terrorism infringes on the rights to freedom of expression, freedom of association, and peaceful assembly. As Martin Scheinin, the former U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stated, “the definition of terrorism is overly broad since there is no requirement of specific aim to commit a terrorist act and some acts are deemed to be ‘terrorist’ without the intention of causing death or serious bodily injury.”²⁶ He further noted that “restrictions on freedom of association and assembly would allow the criminalization of peaceful demonstrations by civil society. Excessive limitations are being placed on freedom of speech due to the use of broad and vague terms regarding the offense of incitement to terrorism since there is not a clear threshold for criminalization established.”²⁷ It

25 Ibid.

26 United Nations, “Bahrain terror bill is not in line with international human rights law – UN expert,” UN News Centre, July 25, 2006 <http://www.un.org/apps/news/story.asp?NewsID=19298&>.

27 Ibid.

also provides the public prosecutor with excessive powers in a manner that denies due process to those prosecuted under the law.²⁸

Furthermore, Article 6 of the law imposes life imprisonment “for everyone who forms, establishes, organizes or operates, contrary to the provisions of the law, a society, association, organization, group, gang or a branch of any of the above or undertakes the leadership or command thereof for the purpose of calling for obstructing the enforcement of the provisions of the Constitution or the laws or preventing any of the government organizations or public authorities from carrying out their activities or infringes upon the citizen’s personal freedom or other freedoms or public rights secured by the Constitution, the law or undermines national unity if terrorism is one of the methods used in the realization or implementation of the purposes called for by the society, association, organization, group or gang or any of their branches.” The article utilizes similarly vague language without clearly indicating the definition of society, organization, and group, giving authorities sweeping and discretionary power to label any organization, society, or group as terrorist.

During the 2008 Universal Periodic Review (UPR) in the Human Rights Council, Bahraini authorities indicated that counterterrorism measures do not target HRDs, since “their activities are not related to terrorism according to the law.”²⁹ Yet the Bahraini government has used its overly broad

definitions of terrorism to detain protesters and convict several opposition leaders, including many medical personnel and trade unionists involved in the country’s demonstrations in 2011 and after.³⁰ A special military court in June 2011 convicted 21 opposition leaders—seven in absentia—for national security crimes including acts of “terrorism,” for engaging in acts such as giving speeches critical of Bahrain’s human rights abuses and calling for and participating in peaceful street protests. In 2012, the court sentenced eight defendants to life in prison and the rest to terms of up to 15 years, based in part on the sentencing provisions of the 2006 counterterrorism law.³¹

The law was later amended and further strengthened in July 2013 by Royal Decree No. 20. Sentences for terrorism-related crimes were increased to include the revocation of citizenship and death penalty.³² In their joint submission to Bahrain’s review under the UPR, Article 19 and Bahrain Institute for Rights and Democracy noted that “[t]his puts in legislation a preexisting practice, giving the [Ministry of Interior] the authority to strip the citizenship of anyone deemed a “national security threat.” This law, compounded by the 2014 amendment to Article 10 of the 1963 Citizenship Law, have empowered the Bahraini authorities to strip the nationality of over 330 individuals. Of those cases, 292 are members of the Shi’a community and include opposition figures, journalists and [human rights defenders].”³³ Further amend-

28 Ibid.

29 Human Rights Council, Report of the Working Group presented at the UPR session, May 22, 2008, (A/HRC/8/19), 4, para. 96(e), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/136/07/PDF/G0813607.pdf?OpenElement>.

30 Brian Dooley, Testimony to the Tom Lantos Human Rights Commission of the U.S. Congress, “Human Rights in Bahrain: Next Steps,” September 9, 2016, https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/Dooley%20-%20Lantos%20Testimony%20September%209%202016_0.pdf.

31 Human Rights Watch, “No Justice in Bahrain,” February 28, 2012, <https://www.hrw.org/report/2012/02/28/no-justice-bahrain/unfair-trials-military-and-civilian-courts>.

32 Bahraini Government Legislation and Legal Opinion Commission, Royal Decree no. 20, <http://www.legalaffairs.gov.bh/Media/LegalPDF/L2013.pdf>.

33 Article 19 and the Bahrain Institute for Rights and Democracy (BIRD), Joint Submission for the UPR of Bahrain, October 4, 2016, <http://birdbh.org/wp-content/uploads/2016/10/A19-BIRD-Joint-Submission-to-UPR-of-Bahrain.pdf>.

ments were introduced in Decree no. 68 of 2014 to establish a unit known as “Terrorist Crimes Prosecutor.” The unit has the power to extend detention for up to six months for investigation purposes.³⁴ The 2013 amendments also banned demonstrations in the capital, Manama, and provided the government with the legal authority to prosecute political associations it accuses of inciting and supporting violence or terrorism. In March 2017, the Bahraini Parliament (Shura Council) approved an amendment to article 105(b) of the Bahraini Constitution of 2002, providing military courts with jurisdiction over civilians charged with terrorism offenses.³⁵ In April 2017, Bahrain’s authorities referred a civilian victim of enforced disappearance to trial before a military court for the first time since 2011.³⁶ Some argue that “the expansion of the military courts’ jurisdiction and the restoration of the NSA’s arrest authority may, together, constitute the foundation of a parallel legal system for individuals deemed to jeopardiz[e] national security, whereby ‘enemies of the state’ like civil society activists can be more rapidly and quietly disappeared, tortured, imprisoned, or even executed by the authorities.”³⁷

Numerous Bahraini and international human rights organizations and the United Nations have documented the government’s utilization of the 2006 law and its amendments to sentence peaceful protes-

tors, HRDs, and political opposition leaders to long (or even life) sentences without due process, subject detainees to torture and forced confessions, and arbitrarily revoke the citizenship of hundreds of Bahraini dissidents. The detention of key figures such as Abdul-Hadi al-Khawaja, who was sentenced to life in prison for his human rights work, and Nabeel Rajab, another HRD who faces more than a decade in jail for criticizing the government’s actions on social media, are emblematic of the extent to which peaceful dissent is criminalized in Bahrain.

It is estimated that between 3,500 to 4,000 people, including minors, are detained in Bahraini prisons; many of them are political prisoners. Human rights organizations and various organs of the United Nations have documented prisoners suffering physical abuse, torture, denial of medical care and due process, and inadequate sanitary conditions while in detention.³⁸ Most recently and on the basis of counterterrorism law, Ebtisam al-Saegh, a prominent female human rights defender, was arrested, tortured, and charged with terrorism for tweeting about the ill treatment of women at the hands of the NSA.³⁹

Under the guise of maintaining security and countering terrorism, the Bahraini government has implemented significantly restrictive measures to target civil society actors. These measures constitute

34 Bahraini Government Legislation and Legal Opinion Commission, Decree no 68, 2014, <http://www.legalaffairs.gov.bh/LegislationSearchDetails.aspx?id=72085#.WcVazFtSy70>; see also American for Democracy and Human Rights in Bahrain, “Bahraini Authorities Introduce Additional Oppressive Laws,” December 22, 2015, <http://www.adhrb.org/2015/12/bahraini-authorities-introduce-additional-oppressive-laws/>.

35 Library of Congress, “Bahrain: Constitutional Amendment Allows Military Trials of Civilians,” *Global Legal Monitor*, March 6, 2017, <http://www.loc.gov/law/foreign-news/article/bahrain-constitutional-amendment-allows-military-trials-of-civilians/>.

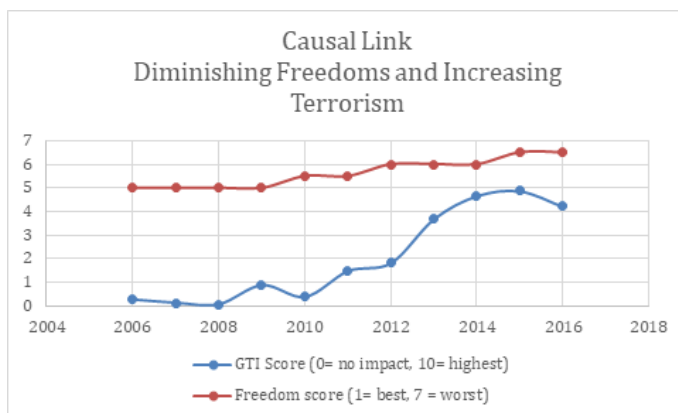
36 Amnesty International, “Bahrain: First Civilian Case Referred to Military Court,” May 9, 2017, <https://www.amnesty.org/en/latest/news/2017/05/bahrain-first-civilian-case-referred-to-military-court/>.

37 CIVICUS, “Closure of civic space constitutes an existential threat to independent civil society in Bahrain,” 2017, <https://www.civicus.org/index.php/media-resources/news/interviews/2986-closure-of-civic-space-constitutes-an-existential-threat-to-independent-civil-society-in-bahrain>.

38 U.S. Department of State, “Bahrain 2016 Human Rights Report,” <https://www.state.gov/documents/organization/265704.pdf>.

39 Amnesty International, “Bahrain: Human rights defender charged with terrorism,” July 19, 2017, <https://www.amnesty.org/en/latest/news/2017/07/bahrain-human-rights-defender-charged-with-terrorism/>.

an existential threat to independent civil society.⁴⁰ Bahraini authorities have utilized countering terrorism as justification to curtail the rights to the freedoms of expression, association, and peaceful assembly. Based on the data provided by Freedom House's Freedom in the World Report and in the Vision of Humanity's Global Terrorism Index, the below graph demonstrates a correlation between shrinking civic space in Bahrain with an increase in terrorist attacks in the period between 2006 and 2015.^{41,42} Although the graph shows a decrease in terrorism incidents in 2016, this could be explained by an increase in the level of security operations in



the country.

Source: Freedom House, *Freedom in the World 2006–2017*, Vision of Humanity *Global Index Report 2006–2017*

It illustrates how the Bahraini authorities essentially dealt with the country's protests and unrests by implementing a systematic closure of civic space

and resorting to coercive measures to enforce its legitimacy. Thus, the data suggest that restrictive measures may have influenced a rise in and prolongation of terrorism, contrary to what the government maintains that limiting the political and civic spaces might decrease the level of terrorism threats in the country.

Counterterrorism and Closed Civic Space

Following the 2011 events and the failure of political dialogue between the government and the opposition, the government actively implemented the Penal Code and pursued more restrictive legislative changes to its laws governing media, association, political societies, and public gatherings. This has resulted in significantly curtailing the constitutionally guaranteed rights to the freedoms of expression, association, and peaceful assembly.⁴³

Decree No. (21) of 1989, Issuing the Law of Associations, Social and Cultural Clubs, Special Committees Working in the Field of Youth and Sports and Private Institutions (Law of Associations), provides authorities with excessive powers to prevent the development of and to control independent CSOs and other associations using vague language.⁴⁴ Article 3 of the 1989 law prohibits the establishment of an association that contradicts the "public order." This law is still in effect despite the adoption of the 2012 law of association that imposes more restrictive provisions.⁴⁵ It enables,

40 CIVICUS, "Closure of civic space."

41 Freedom House, "Bahrain," *Freedom in the World 2006–2017*, <https://freedomhouse.org/report/freedom-world/2006/bahrain..>

42 Vision of Humanity, "Global Terrorism Index 2006–2017," <http://visionofhumanity.org/indexes/terrorism-index/>.

43 Jane Kinninmont and Omar Sirri, "Bahrain: Civil Society and Political Imagination," Chatham House, October 2014, <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/20141028BahrainKinninmontSirri.pdf>.

44 International Center for Not-for-Profit Law, Decree No. (21) of 1989 Issuing the Law of Associations, Social and Cultural Clubs, Special Committees Working in the Field of Youth and Sports and Private Institutions, <http://www.icnl.org/research/library/files/Bahrain/21-89-En.pdf>.

45 Human Rights Watch, "'Interfere, Restrict, Control:' Restraints on Freedom of Association in Bahrain," June 20, 2013, <https://www.hrw.org/report/2013/06/20/interfere-restrict-control/restraints-freedom-association-bahrain>.

for example, the Ministry of Social Development to refuse registration to nongovernmental organizations (NGOs) that it deems to be not needed in society.⁴⁶ The broadly worded Law of Associations provides the government with the authority to dissolve organizations at will and to prohibit CSOs from “engaging in politics” to suppress legitimate and peaceful dissent.⁴⁷ It also grants the government the authority to arbitrarily reject applications for registration and to significantly limit the ability of organizations to fundraise and receive foreign funding.⁴⁸ The actions the government has taken under this law include dissolving the Bahrain Center for Human Rights, replacing the boards of several CSOs after board members criticized government actions, and dissolving the Bahraini teachers union for their participation in the 2011 protests.⁴⁹

In addition to the Law of Associations, the Law for Political Societies of 2005, the Law of Public Gathering of 1973, and the Press Law of 2002 allow the government to undermine the freedoms of associations and expression, and peaceful assembly. Under these laws, authorities can deny the registration of a political society or suspend it without reason. Political societies are further prohibited from contacting political groups outside the country absent official approval or receive donations or assistance from a foreign person or entity.⁵⁰

Gatherings and political rallies in Bahrain are regulated by the Law on Public Gatherings, Processions

and Assemblies (Law 18 of 1973, Law on Public Gatherings), which restricts the practice of all three of these rights. It requires prior notification and approval from the Head of Public Security. Holding or participating in a public gathering that has not been approved in advance would subject organizers to up to six months in prison, and participants up to three-month imprisonment. In August 2013, the government amended Article 11 of the Law on Public Gatherings by decree to indefinitely ban all public assemblies in the capital Manama except demonstrations in front of international organizations. Despite the ban on assemblies, protests continue to take place in the country. Such protests are routinely subject to the excessive presence of police and use of force. In May 2017, five persons were killed and 286 individuals were arrested during a protest in Duraz.⁵¹

Furthermore, by amending the Law on Political Associations in 2016, the government imposed a prohibition on any religious figure from joining political societies or engaging in political activities. In defense of this amendment, pro-government lawmakers argued it would prevent religious acts from being politicized.⁵² However, it is seen as a move to weaken the political opposition that is formed along religious lines.

The 2005 Political Societies Law, which also contains overly broad language and which prohibits the establishment of political societies on the basis of “class, sect, geography, profession, religion, language, race,

46 Ibid.

47 Ibid.

48 Ibid.

49 Ibid.

50 Ibid.

51 CIVICUS, “Police Use Excessive Force to Quell Protest In Duraz—5 Killed, Hundreds Arrested,” June 16, 2017, <https://monitor.civicus.org/newsfeed/2017/06/16/five-killed-hundreds-arrested-protest-duraz-bahrain/>.

52 Economist Intelligence Unit, “Law Bans Religion from Political Societies,” June 13, 2016, <http://country.eiu.com/article.aspx?articleid=1414307125&Country=Bahrain&topic=Politics&subtopic=Forecast&subsubtopic=Political+stability&u=1&pid=854293869&oid=854293869&uid=1>

or sex,” only serves to confirm fears of systematic and deliberate discrimination against Bahraini Shias.⁵³ In December 2014, the government detained Sheikh Ali Salman two days after his reelection as secretary general of Al Wefaq, the country’s largest political society, and as a result of speeches he made. Sheikh Ali Salman was charged with inciting a change of regime by nonpeaceful means, provoking hatred of a segment of society against another, and encouraging others to break the law.⁵⁴ Sheikh Salman remains imprisoned today. The U.N. Human Rights Council’s Working Group on Arbitrary Detention determined that he is being arbitrarily detained, and that his case “is regarded as a representative of violations of international human rights standards which regularly occur in Bahrain.”⁵⁵

In July 2016, the government dissolved Al Wefaq, a move that the then-U.N. Secretary General Ban Ki Moon labeled as “the latest in a series of restrictions on the rights to peaceful assembly, freedom of association, and freedom of expression in Bahrain.”⁵⁶ Upon its dissolution, the government seized the political society’s assets and blocked its website. Similar actions have been taken against other political societies such as Wa’ad, which the government dissolved in 2017 for violating the Law on Political Associations for allegedly “advocating violence, supporting terrorism and incitement to encourage crimes.”⁵⁷

These actions were taken in the run-up to the upcoming legislative elections of the Lower House in late 2018, thus inhibiting the Lower House’s inability to hold the executive branch accountable. The government is likely to utilize the upcoming elections in the fall of 2018 “as a symbolic opportunity to persuade the world it has made democratic progress while simultaneously engineering a pliant lower house with a false claim to international legitimacy.”⁵⁸

Conclusion

The Bahraini government’s ongoing use of restrictive laws in the name of countering terrorism, and its systematic approach to stifling nearly all forms of peaceful dissent, has continued to polarize Bahraini society and significantly weakened Bahraini civil society. Criminalizing participation in legitimate and peaceful civil society activity and dissolving the country’s opposition political societies are unsustainable approaches to managing dissent. In addition, such policies clearly violate internationally protected human rights. The government’s “politicization of [counterterrorism] issues threatens to conflate legitimate prosecutions of militants with politically motivated actions against the mainstream, nonviolent opposition and Shia community.”⁵⁹ By imprisoning human rights defenders, political dissidents,

53 Human Rights Watch, “Interfere, Restrict, Control.”

54 United Nations Human Rights Council Working Group on Arbitrary Detention, “Opinions adopted by the Working Group on Arbitrary Detention at its seventy-third session, 31 August–4 September 2015,” September 17, 2015, http://www.ohchr.org/Documents/Issues/Detention/Opinions2015AUV/Opinion%202015%2023_Bahrain_Salman_AUV.pdf.

55 *Ibid.*, 5.

56 United Nations Secretary-General, “Statement attributable to the Spokesman for the Secretary-General on Bahrain,” July 8, 2016, <https://www.un.org/sg/en/content/sg/statement/2016-07-18/statement-attributable-spokesman-secretary-general-bahrain>.

57 Americans for Democracy and Human Rights in Bahrain. “Bahrain Again Postpones Imprisoned Opposition Leader Sheikh Ali Salman,” December 28, 2017, <https://www.adhrb.org/2017/12/bahrain-again-postpones-arbitrary-trial-of-imprisoned-opposition-leader-sheikh-ali-salman/>.

58 CIVICUS, “Closure of civic space.”

59 The U.S. Department of State, “Country Reports on Terrorism 2016,” July 2017, <https://www.state.gov/documents/organization/272488.pdf>.

and political opposition leaders for engaging in peaceful protests; and barring their engagement with other international organizations and foreign civil society actors, the government has effectively closed civic space in the country. This continues to be one of the main drivers of the country's continuing political crisis and undermines any future prospects for a negotiated solution to the crisis. Through the imprisonment of moderate political opposition leaders and civil society leaders, the government has limited any opportunity to negotiate with an opposition that would be willing to engage in dialogue to achieve democratic reforms.

Recommendations

To the Bahraini government

- Undertake a national reconciliation program to address the legitimate grievances of groups that are or perceive themselves to be discriminated against in political, social, and economic terms.
- Take measures to address the culture of impunity in the country, including implementing the BICI recommendations that address issues of accountability, such as establishing independent bodies to investigate legitimate claims of wrongdoing by the country's security forces.
- Begin implementing confidence building measures such as:
 - Reinstating political opposition societies and civil society organizations that were disbanded and allow them to operate freely and independently;
 - Releasing all those who are detained as a result of the exercise of freedom of speech, assembly, and association; and
 - Removing travel bans imposed on human

rights defenders.

- Amend counterterrorism laws and regulations to remove overly broad language and bring them in line with international standards. Ensure that they focus specifically on maintaining public safety instead of criminalizing legitimate, peaceful dissent.
- Amend laws and regulations related to the regulation of civil society and political societies such as the Law of Associations and the Political Societies Law to ensure they conform to the international standards set forth by the International Covenant on Civil and Political Rights, to which Bahrain is a party.
- Support the work of insider mediators who have the influence and social capital to convene and facilitate conversations at the grassroots level to help identify common ground.

To civil society actors

- Continue to document measures and practices that violate the rights to the freedoms of expression, association, and peaceful assembly and advocate that such rights be safeguarded and protected by the government of Bahrain.
- Continue to adopt nonsectarian language in calls for reform, leveraging political—as well as nonviolent means—to initiate change in Bahrain. Follow both global, as well as culturally sensitive, best practices to encourage dialogue in support of identifying common ground.
- Continue to demand an independent judicial system and utilize legal mechanisms to address undue restrictions and challenges.

To the international community

- Utilize diplomatic and economic pressure

to call on the government of Bahrain to fulfill its international human rights obligations and to ensure that reforms are both initiated and implemented in good faith.

- Support international human rights organizations in their efforts to report on the conditions of Bahraini prisoners and ensure access to Bahrain by the various independent actors, such as the United Nations special rapporteurs.

UNINTENDED CONSEQUENCES SECURITY AND CIVIL SOCIETY IN BURKINA FASO

Julie N. Snyder

Background¹

Burkina Faso is one of the poorest countries in the world, ranked 185 out of 188 countries in the UN Human Development Index.² The vast majority of its largely rural population exists at the subsistence level, and the country relies heavily on international aid and imports from neighboring countries.³

The country is often lauded for its highly tolerant society and the peaceful coexistence of diverse ethnic and religious groups. And in spite of its poverty and recent political turmoil, Burkina Faso's economy remains stable.⁴ But its economic vulnerability and increasingly dire regional challenges, such as the scourge of violent extremism, pose a significant threat. Small, landlocked, and

surrounded by challenging neighbors, including Mali to the northwest and Niger to the northeast, Burkina Faso has already felt the effects of its volatile neighborhood with two high-profile terror attacks launched in the capital Ouagadougou and a sharp increase of threats along the country's northern border.⁵

The presence of violent Islamist armed groups in and around Burkina Faso, coupled with the country's recent political history, conspire to make the security and political context fragile.⁶ Former President Blaise Compaoré ruled Burkina Faso for 27 years until a popular uprising forced him from office in October 2014.⁷ Citizens, civil society organizations (CSOs), journalists, youth

- 1 There are few analytical sources available on Burkina Faso. This piece has supplemented these gaps with extensive interviews with Burkinabè sources.
- 2 United Nations Development Program, "Human Development Reports: Burkina Faso," <http://hdr.undp.org/en/countries/profiles/BFA>.
- 3 Burkina Faso recently began negotiations for a second compact to improve food security, education, and infrastructure with the Millennium Challenge Corporation. Julie N. Snyder, interview with Mat Jacobs, Millennium Challenge Corporation, Washington, DC, July 7, 2017.
- 4 Millennium Challenge Corporation, "Congressional Notification Sheet," March 6, 2017, https://assets.mcc.gov/content/uploads/2017/05/Burkina_Faso_Initial_Engagement_Agreement_609g_CN_6March17.pdf.
- 5 Former UN Special Rapporteur for Human Rights Ben Emmerson discusses these challenges prior to the terrorist attacks here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/107/59/PDF/G1410759.pdf?OpenElement>.
- 6 Though there is no universally accepted definition of the term "violent extremism," for the purposes of this paper, the USAID definition is used, which describes violent extremism as "advocating, engaging in, preparing, or otherwise supporting ideologically motivated or justified violence to further social, economic and political objectives."
- 7 "Burkina Faso: Blaise Compaoré A Rendu Sa Démission," *LeFaso.Net*, October 31, 2014, <http://lefaso.net/spip.php?article61550>.

movements, and professional associations led nationwide protests against Compaoré's attempt to extend his stay in power. The Burkina Faso Youth League negotiated "with the military hierarchy to prevent the use of force against the demonstrators" and the bar association worked with the army and opposition groups to establish a transitional government.⁸ In spite of this success, there are still questions about the civilian-military relationship in Burkina Faso, particularly as civil society takes its first steps into engaging with the security sector.

Civil society in Burkina Faso was energized and empowered by its success in ousting the Compaoré regime and paving the way for democratic elections. And the new government, which owes its existence to civil society's mobilizing power, has been generally respectful, according to many Burkinabè, and hesitant to interfere with their operations.⁹

However, many of the same players in Compaoré's cabinet, including sitting President Roch Marc Christian Kaboré, remain in power in the current administration.¹⁰ Weak judicial and legislative branches plague the government of Burkina Faso, though, as Freedom House notes, "the end of Compaoré's regime gave way to a freer environment in

which opposition parties were able to consolidate popular support during the campaigning period and gain power through the elections."¹¹ This transition has remained rocky as the Burkinabè people feel disenchanting and frustrated with the political sphere, citing that nothing has changed.¹² Though Compaoré has been charged with multiple counts of corruption, his trial exists in name only while he resides comfortably in exile in Côte d'Ivoire. Moreover, the lack of political and economic progress combined with the perception of power-hungry elite has further soured the public on the current administration.¹³

Counterterrorism in Context

From late 2016, regional turmoil in the Sahel has spilled into Burkina Faso. With a small and poorly resourced army of around 12,000 troops, Burkina Faso relies heavily on French and U.S. military support and training of forces.¹⁴ In return, Burkina Faso allows French military forces to launch counterterrorism operations under Operation Barkhane from its soil.¹⁵ Despite robust kinetic activity, reports abound of growing violent extremism in northern Burkina Faso on the border with Mali.¹⁶ In 2012, Human Rights Watch documented efforts to recruit Burkinabè men along

8 Herman J. Cohen, "Civil Conflict, Civil Society: A History of Political and Social Change in Burkina Faso," *Peace Insight*, February 4, 2015, <https://www.insightonconflict.org/es/blog/2015/02/civil-conflict-civil-society-history-political-social-change-burkina-faso/?en=1>.

9 Julie N. Snyder, interview with individual from U.S. Embassy in Burkina Faso, Ouagadougou, Burkina Faso, September 27, 2017.

10 "Roch Marc Christian Kabore Elected Burkina Faso President," *BBC*, December 1, 2015, <http://www.bbc.com/news/world-africa-34971505>.

11 Freedom House, "Freedom in the World 2016: Burkina Faso," <https://freedomhouse.org/report/freedom-world/2016/burkina-faso>.

12 Julie N. Snyder, interview with Bernard Zongo, Washington, DC, July 20, 2017.

13 Julie N. Snyder, interview with Michel Rabo, Le Réseau Dignité, Ouagadougou, Burkina Faso, September 30, 2017.

14 Interview, Alice Hunt Friend, Washington, DC, July 10, 2017.

15 *Ibid.*

16 Julie N. Snyder, interview with Corinne Dufka, Human Rights Watch, Washington, DC, July 16, 2017.

the Malian border by Amadou Koufa, leader of the terrorist group Ansar al-Dine.¹⁷ Additional accounts report Burkinabè members of al-Qaeda in the Maghreb (AQIM) hiding out in the northern forests of Burkina Faso.¹⁸

Many of those interviewed suggested that the appeal of these organizations for those in the north is based less in ideology, but rather is centered around opportunity; for years, these communities have been isolated and largely abandoned by the state. National and international humanitarian CSOs moved into the north to fill this gap. However, the significant increase in attacks has led many CSOs to pull back for security reasons. CSOs have rarely spoken out against, voiced their concerns, or asked for government action in regard to the terrorist attacks in the northern part of the country this year.¹⁹ When international CSOs stopped their activities, many local partners stopped as well.

The relative neglect and marginalization coupled with a lack of protection by security forces has reportedly driven many into the arms of extremists. Several people also mentioned that abuses committed by security forces further fueled these grievances, though the recent inclusion of gendarmes in military operations in the north has caused civilian abuses to decrease significantly.²⁰

At the same time, Ansar-ul-Islam lil-Ichad wal Jihad (IRSAD) is exploiting the generational and hierarchical divides of Burkina Faso to recruit more followers.²¹ Universities in Burkina Faso have become powerful centers of radicalization as the young population becomes increasingly frustrated with the government.²² Malam Dicko, a Burkinabè leader of IRSAD, has radicalized and reportedly trained over 200 Burkinabè men.²³ IRSAD originally formed as a social organization and morphed into a violent extremist group.²⁴ His followers have made brutal threats toward local officials in Djibo, as well as violently closed down schools that teach French curriculum in the north.²⁵ These people and institutions are targeted because of their so-called Western influence, such as using the French language. IRSAD forced teachers in the north to teach in Arabic or face death.²⁶ Because of these threats, the majority of teachers, CSOs, and education workers in these areas have fled, further isolating northern populations and leading to a perception of government neglect.²⁷

A suicide bombing by an affiliate of AQIM of a popular hotel in Ouagadougou in January 2016 rocked the country. Kaboré immediately tightened border control.²⁸ U.S. diplomatic security

17 Ibid.

18 Ibid.

19 Interview with Bernard Zongo.

20 Interview with Patrice Yeye.

21 Interview with Corinne Dufka.

22 Ibid.

23 "Burkina Faso: More Progress, Less Movement," *Africa Confidential*, Vol. 58, No. 6, March 17, 2017, https://www.africa-confidential.com/article-preview/id/11944/More_progress%2c_less_movement.

24 Counter Extremism Project, "Burkina Faso: Extremism and Counter-Extremism," April 28, 2017, https://www.counterextremism.com/sites/default/files/country_pdf/BF-04282017.pdf.

25 "Burkina Faso: More Progress, Less Movement."

26 Interview with Corinne Dufka.

27 Ibid.

28 Interview with Alice Hunt Friend.

elevated the terrorist threat level in Ouagadougou from low to medium.²⁹ Rumors spread of Burkinabè police breaking up a small terrorist cell in Ouagadougou after the attack.³⁰ Yet another attack on a popular Turkish restaurant in Ouagadougou in August 2017 left 18 dead, further stoking fears.³¹

High tensions, particularly for those who live on vulnerable border areas, have not been adequately addressed. Vicious attacks on civilians in northern Burkina Faso, particularly those in the province of Soum, happen frequently.³² While the government responded positively by reinforcing troops in these areas, sending more military and gendarmes, they still face enormous gaps in protection. Attacks are unpredictable and well-organized. The last time the government tried to reinforce and send more troops, the terrorists attacked and caused even more civilian casualties.³³

Frustrations toward an insufficient government response are mounting. Roaming militiamen, known as the *koglwéogo*, have stepped in across Burkina Faso to serve as irregular security forces and administer their version of justice. They are armed and have their own detention centers—no evidence

has shown that they have links to salafist-inspired extremist groups.³⁴ These self-regimented, auto-defense groups emerged during the former regime as the government failed to provide security forces, particularly in remote border areas.³⁵ In many of these areas, shepherds, farmers, and cattle herders must travel in order to conduct business; during their journey, they are often attacked by highwaymen.³⁶ Without government security forces to protect them, they often rely on the *koglwéogo*. The *koglwéogo* refused the government's offer to be incorporated into the wider police force.³⁷ Therefore, the Burkinabè government is concerned about their ultimate role.

After the regime change, the *koglwéogo* started becoming more visible. They began clashing with the local population in northern Burkina Faso.³⁸ Civil society raised awareness of the abuses and successfully engaged the Ministry of Justice to adopt a decree in October of 2016 “to regulate their activities.”³⁹ However, this balance has proven difficult to maintain, as the government is aware of its own inability to provide security to all of its citizens.⁴⁰ There is some desire to formalize these groups through a community policing plan where the government and civilians can rely on the *koglwéogo*.⁴¹ However, the majority of CSOs are against this plan because they fear

29 Ibid.

30 Ibid.

31 Paul Schemm, “Gunmen Attack Turkish Restaurant in Burkina Faso, Killing 18,” *Washington Post*, August 14, 2017, https://www.washingtonpost.com/world/gunmen-attack-turkish-restaurant-in-burkina-faso-killing-18/2017/08/14/cc58e8e-80be-11e7-ab27-1a21a8e006ab_story.html?utm_term=.b4927fbc4df.

32 Interview with Patrice Yeye.

33 Julie N. Snyder, interview with François Traore, National Democratic Institute, Washington, DC, July 11, 2017.

34 Interview with Aminata Kassé.

35 Interview with François Traore.

36 Ibid.

37 Interview with Patrice Yeye.

38 Interview with François Traore.

39 Amnesty International, “Burkina Faso 2016/2017,” <https://www.amnesty.org/en/countries/africa/burkina-faso/report-burkina-faso/>.

40 Interview with François Traore, National Democratic Institute, Washington, DC, July 11, 2017.

41 Ibid.

that these groups cannot be controlled. While the government tries to create a framework to formalize these groups, placing them under its security sector umbrella, CSOs pushed back, saying that they have no reason to be placed under that description and brought under government control.⁴² There are also concerns that supporting the *koglwéogo* may deepen ethnic tensions.

Several international partners, such as France, the United States, and the European Union are working to improve the security situation in the north. French troops and intelligence have reinforced Burkinabè efforts to counter insurgencies along the borders.⁴³ In 2016, the European Union launched two enormous programs in addition to its commitment to broader socioeconomic development initiatives across the broader Sahel: the first, named *Groupes d'Action Rapide-Surveillance et Intervention (GAR-SI)*, was established to improve the effectiveness and professionalism of G5 Sahel forces, including the Burkinabè; the second, named *Programme Gestion Intégrée des Espaces Frontaliers au Burkina Faso (ProGEF)*, aims to improve national border management laws, build the capacity of security forces, and foster socioeconomic development within border communities.⁴⁴ These efforts are in the early stages of implementation.

In addition to its widespread development programs, the U.S. embassy is engaging with the government to develop Burkinabè civil affairs teams around the country.⁴⁵ In late 2017, the U.S. government approved up to \$60 million to support the G5 Sahel

joint force; \$30 million of this pledge has been dedicated to Burkina Faso.⁴⁶ International partners interviewed indicated a willingness on behalf of the Burkinabè government to act but it lacks a broader strategy or language to describe its challenges. While some Burkinabè officials interviewed suggested that G5 Sahel security forces will provide much needed assistance along the border areas, many other interviewees vehemently disagreed, noting the dysfunction of the G5 Sahel.

Counterterrorism Legal Framework and the Burkinabè Judiciary

In response to an international call for action to combat terrorism and to address terrorist threats domestically, Burkinabè authorities adopted an antiterrorism act in 2015. The law defines acts of terrorism “by their nature or context, such acts are intended to intimidate or terrorize a population or to compel a State or an international organization to perform or refrain from performing any act.”⁴⁷ Following the global trend of adopting a vaguely worded definition, the law broadened the definition of terrorist acts to include some crimes that intend to influence the government and create fear in the population, acts committed in preparation for a terror attack, and activities that support terrorism.

Using language similar to French counterterrorism laws, the law prolongs detention periods, and includes penalties ranging from fines to life imprisonment, and the limits of national jurisdiction in persecuting acts of terror as well as the use of special

42 Ibid.

43 Julie N. Snyder, interview with individuals from the French Embassy, Ouagadougou, Burkina Faso, October 3, 2017.

44 European Commission, “Commission Decision C(2017) 2579,” January 8, 2017, <http://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-5291-F1-EN-ANNEX-2-PART-1.PDF>.

45 Interview with individuals from the U.S. embassy in Burkina Faso.

46 U.S. Department of State, “United States Pledging up to \$60 Million in New Support for Security Assistance in the Sahel Region,” October 30, 2017, <https://www.state.gov/secretary/remarks/2017/10/275175.htm>; Julie N. Snyder, interview with individuals from the U.S. State Department, Washington, DC, December 7, 2017.

47 International Consortium on Closing Civil Space, “Database of Legislation on the Definition of Terrorism,” CSIS, 2017, <https://www.csis.org/programs/international-consortium-closing-civic-space-icon/aligning-security-and-civic-space-0>

investigative techniques such as surveillance, and the elimination of time restrictions for search operations in cases involving terrorism.⁴⁸

The legal framework and the weak justice system embodies the frustrations many Burkinabè face on a day-to-day basis.⁴⁹ This presents an enormous challenge in navigating the complex security and civic space relationship. The challenges faced by the judiciary have been compounded by the increasing number of people detained in association with terrorism activity. Currently, approximately 160 people charged with terrorism are being held in Burkinabè detention centers, with no access to lawyers, advocates, or communication with the outside world.⁵⁰ Many of the detainees have been sitting in detention for years with no progress on their trials—the Burkinabè court system is severely understaffed and lacks the capacity to process even the simplest of cases.⁵¹ Often, these cases are pending due to complex legal issues, such as extradition, as many of these arrests happened along the borders of Niger and Mali.⁵²

A history of collusion coupled with the idea of “protecting one’s own” within the judiciary cri-

ples efforts for reform and further inflames grievances.⁵³ Amnesty International and Human Rights Watch have documented a number of alleged abuses against civilians committed by the Burkinabè army.⁵⁴ There are currently no programs or proposals under way to correct this problem—this sets an alarming precedent as Burkina Faso has yet to carry out a single trial on terrorism, despite passing several comprehensive laws on counterterrorism.⁵⁵

However, a severe lack of capacity has made enforcing these laws and prosecuting alleged terrorists nearly impossible. Terrorist suspects are left to languish in prison with little hope for justice.⁵⁶ The failure to implement these laws has further hampered the justice system and fueled frustrations of the Burkinabè people.

Failing to act on counterterrorism/anti-money laundering legislation has allowed funding from rich individuals from the Gulf and Iran to flood into Burkina Faso unchecked—several of those interviewed suggested a growing concern that these funds could help fuel extremism.⁵⁷ Though banks are required by law to report the transfer of these

48 Loi N°060-2009/AN Portant Repression D’actes De Terrorisme Au Burkina Faso. Jo N°10 du 11 Mars 2010; LOI N°084-2015/cnt Portant Modification De La Loi N°060-2009/AN DU 17 Decembre 2009 Portant Repression D’actes De Terrorisme Au Burkina Faso.

49 Freedom House’s 2016 Freedom of the World Country Report on Burkina Faso notes that the country “judiciary is formally independent but has historically been subject to executive influence and corruption. The courts are further weakened by a lack of resources and citizens’ lack of awareness of their rights.” See more here: <https://freedomhouse.org/report/freedom-world/2016/burkina-faso>

50 Interview with individuals from the U.S. embassy in Burkina Faso.

51 Ibid.

52 Ibid.

53 Julie N. Snyder, interview with Augustin Loada, l’Université Ouaga II, Ouagadougou, Burkina Faso, October 2, 2017.

54 Human Rights Watch, “Mali: Unchecked Abuses in Military Operations,” September 8, 2017, <https://www.hrw.org/news/2017/09/08/mali-unchecked-abuses-military-operations>; Amnesty International, “Burkina Faso: No Amnesty for Soldiers Who Killed Unarmed Civilians,” October 14, 2015, <https://www.amnesty.org/en/latest/news/2015/10/burkinafaso-no-amnesty-for-soldiers/>.

55 Interview with individuals from the U.S. embassy in Burkina Faso.

56 This legislation includes a particularly strong law on returning foreign fighters. See more here: <https://www.unodc.org/we-standcentralafrica/en/2016-04-29--burkina-terrorism.html>; also note that despite being noncontroversial, it is still possible that the language of these laws could be used to crack down on civil society.

57 Ibid.

funds, there is no further action taken on potentially suspicious activities.⁵⁸

Civil Society in Burkina Faso

Burkina Faso enjoys a strong tradition of active and politically engaged civil society. Even during Compaoré's attempt to remain in power, CSOs galvanized and strengthened their solidarity, unified by Compaoré's authoritarianism. In the current, more democratic context, they are more fractured, and there is some concern that some of them may be coopted by political parties or politically ambitious individuals. The operating environment for CSOs in Burkina Faso, though generally free and vibrant, is complex and occasionally blurs the line with political parties. Space has remained relatively unrestricted, with "opposition political parties, the press, and a variety of active organi[z]ations covering youth, the legal profession, women, human rights, farmers and labor unions maintained a lively presence throughout."⁵⁹ For instance, in the 1960s to the 1980s, political leaders used CSOs to fight the government, which led to the first popular uprising in 1966.⁶⁰ Blaise Compaoré, however, effectively used CSOs to prevent uprisings and key political parties to advance his own agenda.⁶¹ Several interviewees noted that Compaoré's party would quietly fund fledgling CSOs to garner public support for its platforms and sow discord in Burkinabè civil society.

Despite the lively and unrestricted environment, CSOs have faced pressure both from the government and from their domestic constituencies. Several of those interviewed noted that some CSOs have overt ties to political parties, fueling mistrust of civil society, which sometimes escalates to retaliations on social media or during protests.⁶² CSOs with a specific human rights focus or with ties to opposition parties were abused by security forces and occasionally had their property damaged or destroyed during and immediately after the transition.⁶³ Invoking the protection of public order, representatives from CSOs, journalists, and human rights defenders were charged with defamation, which is criminalized in the penal code. The UN Human Rights Committee raised its concerns about the allegations that "some media outlets, journalists, opposition figures and human rights defenders have been subjected to threats, harassment and intimidation, as well as the excessive restrictions on freedom of expression imposed by the Higher Council for Communication[.]"⁶⁴ The committee asked the government to take effective measures to protect the freedom of expression and to prevent security forces from using excessive force.⁶⁵

Afraid of losing integrity, many CSOs are reluctant to engage in political debates as others already blur the line between civil society and political par-

58 Julie N. Snyder, interview with Augustin Loada, Commissary of Police, Ouagadougou, Burkina Faso, September 29, 2017; see also LOI N° 016-2016/An Relative a La Lutte Contre Le Blanchiment De Capitaux Et Le Financement Du Terrorisme Au Burkina Faso

59 Herman J. Cohen, "Civil Conflict, Civil Society: A History of Political and Social Change in Burkina Faso," Peace Insight, February 4, 2015, <https://www.insightonconflict.org/es/blog/2015/02/civil-conflict-civil-society-history-political-social-change-burkina-faso/?en=1>.

60 Interview with Bernard Zongo.

61 Ibid.

62 Interview with Bernard Zongo.

63 Ibid.

64 The UN Human Rights Committee, "Burkina Faso Concluding Observations," 2016, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fbFA%2fCO%2f1&Lang=en.

65 Ibid.

ties.⁶⁶ Therefore, they take precautions to maintain their principles. Meanwhile, the personalistic nature of civil society prevents collective action and allows for cooptation—while organizations agree on the end objective, individual organizations concentrate on the minor differences in tactics to accomplish these shared goals.⁶⁷

Civil society also played an important role in the direction of the transition after Compaoré's regime failed. After the uprising, political parties, the military, and civil society led the discussions and created the charter of the transition.⁶⁸ And the Economic Community of West African States contributed by facilitating the political dialogue among the different actors and avoiding the sanctions of the international community.⁶⁹

Poorly trained and often lacking in neutrality and resources, Burkinabè CSOs find themselves on uncertain ground. For a long time, CSOs only focused on one or two issues, namely ousting the Compaoré regime and seeking justice for murdered journalist Norbert Zongo, becoming largely irrelevant after the insurrection.⁷⁰ Though civil society in Burkina Faso ranks well in terms of sustainability, several of those interviewed noted that some CSOs become defunct as they rely on one-off projects funded by international do-

nors.⁷¹ Often they do not have concrete strategies or plans to execute their mission; if they do, they lack the appropriate advocacy tools to interface with the government.⁷² Civil society organizations have proliferated as a means of industry and have thus fueled suspicion and distrust about their true intentions. Furthermore, civil society can and should play an important role in holding each other accountable and to higher standards, particularly as the sector faces new threats.

Recently, a 2016 law imposing significant restrictions on civil society activity raised concern across the country, though it has rarely, if ever, been exercised.⁷³ The law gives the government the authority to delay the process of granting registration for a civil society organization, which in turn hinders its ability to undertake activities.⁷⁴ It also calls for the establishment of a government mediation commission to resolve conflict, which is considered a state intrusion in civil society's work. The law further establishes a database on CSOs information and activities that could be accessed by interested parties. CSOs fear the misuse of this information. Furthermore, in October 2017, the mayor of Ouagadougou refused to authorize a peaceful protest over a number of issues, including the detention of two generals accused of participating in the 2015 uprising, citing "dis-

66 Peace Insight, "Who Guards the Guardians in Burkina Faso?," 2016, <https://www.peaceinsight.org/blog/2016/07/who-guards-the-guardians-in-burkina-faso/>.

67 Interview with Bernard Zongo.

68 Julie N. Snyder, interview with Aminata Kassé, National Democratic Institute, Ouagadougou, Burkina Faso, September 28, 2017.

69 Ibid.

70 Interview with Michel Rabo.

71 U.S. Agency for International Development, "2015 CSO Sustainability Index for sub-Saharan Africa," <https://www.usaid.gov/africa-civil-society>.

72 Julie N. Snyder, interview with Jacob Yarabatioula, Université de Ouagadougou, Ouagadougou, Burkina Faso, September 30, 2017.

73 CIVICUS Monitor, "Civil Society Fears Effects of NGO Legislation and Mandatory Re-registration," August 17, 2016, <https://monitor.civicus.org/newsfeed/2016/08/17/civil-society-fears-effects-ngo-legislation-and-mandatory-re-registration/>.

74 LOI N° 064-2015/Cnt Portant Liberte D'association. Jo N°07 Du 18 Fevrier 2016 <https://www.ilo.org/dyn/natlex/docs/Electronic/101523/122351/F-1724755500/BFA-101523.pdf>.

turbing public order.”⁷⁵ And a journalist critical of President Kaboré was threatened and attacked in January 2017.⁷⁶

The new government and civil society are still trying to determine how to interact with one another, and post-transition civil society continues to grow and develop. Burkina Faso’s complicated relationship with its security forces has caused many CSOs to self-censor and hesitate to engage in direct conversations with government on sensitive topics, notably security force abuses. Since October 2014, the political landscape continues to shift as Burkina Faso seeks a new equilibrium. After Compaoré was ousted, unconfirmed reports began surfacing that suggested that many CSOs had been corrupted by an influx of funding from the transition government.⁷⁷ In the current political climate, transparency among CSOs is difficult to find. Suspicion fueled by the former regime still abounds that many CSOs that participated in the popular uprising have been funded by U.S. philanthropy.⁷⁸ However, generally speaking, CSOs are far more trusted by the public than the government is.⁷⁹

Many CSOs work comfortably on issues related to countering violent extremism (CVE), such as improving resilience, encouraging tolerance, and reinforcing social cohesion, yet lack a common discourse necessary to discuss the threat of violent extremism outside of abstract discourse.⁸⁰ Many of those

interviewed, both in and outside of government, lamented the lack of research conducted on violent extremism in Burkina Faso by Burkinabè experts.⁸¹ Researchers with experience working on this issue note the paucity of funding and volatile security conditions as significant barriers.

However, the actors involved acknowledge this fundamental challenge and are taking steps to address it. At the end of October 2017, the Burkinabè government held a security forum in Ouagadougou that convened military, police, French and American diplomatic representatives, and members of Burkinabè civil society. Several key recommendations from the conference were forwarded to the national defense and security council to finalize the national security strategy, including the inclusion of nonstate actors in the security system, the supervision of local security initiatives, and the creation of a scientific laboratory and Technical Judicial Police.⁸² Though positive developments, many interviewees are hesitant to expect much forward movement coming from these recommendations.

Although there is no direct impact of counterterrorism measures and legislation on the operation of Burkinabè civil society, the lack of effective rule of law could pose a potential risk for civic space in Burkina Faso. The vaguely worded counterterrorism legislation could also lead to potential abuse by law enforcement agencies. In both security and space for civil society, a weak and lackadaisical judiciary sys-

75 CIVICUS Monitor, “Peaceful Protests Prohibited by Authorities,” October 27, 2017, <https://monitor.civicus.org/news-feed/2017/10/27/peaceful-protests-prohibited-burkina-faso/>.

76 CIVICUS Monitor, “Journalist Attacked and Threatened in Burkina Faso,” March 16, 2017, <https://monitor.civicus.org/news-feed/2017/03/16/burkina-faso/>.

77 Interview with Bernard Zongo.

78 Ibid.

79 Ibid.

80 Interview with Jacob Yarabatioula.

81 There are several experts in Burkina Faso who have conducted initial work on violent extremism, such as Augustin Loada at the Centre pour la Gouvernance Democratique. See more here: <http://www.globalcenter.org/wp-content/uploads/2014/07/BF-Assessment-Eng-with-logos-low-res.pdf>.

82 Julie N. Snyder, email with Aminata Kassé, National Democratic Institute, Washington, DC, November 10, 2017.

tem is highly dangerous. On the other hand, a robust, empowered judiciary in the pocket of the government would be equally troubling. Without setting a just and fair legal precedent for these cases, the judiciary leaves the door open to insidious and ineffective approaches to counterterrorism that could threaten civil society.

Conclusions and Paths Forward

Burkina Faso is at a tipping point. Its government will continue to struggle with meeting the needs of its people, rebuilding its relations with civil society and the public, and fighting off dangerous forces along Burkina Faso's borders. At one end of the spectrum, it could choose to adopt and implement increasingly restrictive counterterrorism laws as a reaction to increasing insecurity. This reaction will only close space for civil society, making vulnerable Burkinabè even more susceptible to the allure of violent extremism. On the other end, it could seize this moment as an opportunity to engage with civil society and jointly develop and implement a comprehensive strategy for CVE.

Ill-trained and outnumbered security forces have caused northern communities to turn to traditional militia for their safety in best-case scenarios; in worst-case scenarios, they have fueled grievances, pushing civilians toward violent extremist groups for survival. Furthermore, CSOs cannot operate effectively in such volatile areas. Partner governments should focus on both long-term professionalization of Burkinabè security forces and short-term deployment of rapid-response teams to the northern border areas to establish security in the most isolated areas.

Burkinabè civil society is strong and vibrant; however, an influx of funding from donors committed

to free and open societies, increased capacity, and improved coordination and solidarity among CSOs would provide a needed boost to their credibility. Encouraging Burkinabè civil society to take the lead on U.S.- and EU-funded efforts is integral.

Weak rule of law and a feeble judiciary pose a significant threat to civil society. Without appropriate oversight and accountability mechanisms in place, alleged terrorists will continue to languish in prison. International partners such as the European Union and the United States should heed this threat accordingly and recommit to improving access to justice across Burkina Faso, with an emphasis on including civil society in shaping discussions about the rule of law. Great care should be taken in ensuring that the implementation of antiterrorism laws does not take a turn for the worse.

The Tablet Affair

Burkinabè civil society has had previous successes in holding the government accountable and upholding the sanctity of the law. After signing off on a lucrative deal with Taiwanese technology giant Huawei to improve Internet access in the remote areas of Burkina Faso, the Burkinabè government was gifted 130 tablets in 2016.⁸³ They were in turn given to the 127 legislators of the national assembly. However, upon hearing this development, a network of anticorruption CSOs named REN-LAC sounded the alarm, as this gift was a violation of law n°04-2015/CNT of March 3, 2015, on the prevention and reduction of corruption in Burkina Faso.⁸⁴ A series of Burkinabè media outlets continued to raise the issue until the legislators returned the tablets to the government.⁸⁵

83 Interview, U.S. Embassy in Burkina Faso, Ouagadougou, Burkina Faso, September 27, 2017.

84 "Le RENLAC et l'Affaire des Tablettes des Députés: Il y a Bel et Bien Eu Violation de la Loi Anticorruption!," L'Observateur, November 20, 2016, <http://www.observateur.bf/index.php/politique/item/5769-le-renlac-et-l-affaire-des-tablettes-des-deputes-il-y-a-bel-et-bien-eu-violation-de-la-loi-anticorruption>.

85 Ibid.

Because of the highly variable challenges within Burkina Faso, the following recommendations are meant to improve security and keep space for civil society open:

To the Burkinabè government

- Deploy rapid-response teams in the border areas of northern Burkina Faso to enhance security, partnering with the international community.
- Deepen community ties and work toward improving community policing around all of Burkina Faso. Treating civilians with respect not only builds social cohesion and trust, but can also provide useful intelligence and reduce grievances that can fuel radicalization.
- Follow through on the prosecution of Blaise Compaoré and others implicated in abuses to demonstrate a strong commitment to justice and accountability.
- Continue to work with CSOs at each level of government to establish common and constant dialogue on issues of mutual concern.
- Desist from using militias as support for counterterrorism operations.
- Investigate and prosecute security forces involved in violations committed during the course of counterterrorism operations.

To civil society actors

- Establish an independent, nongovernmental ombudsman to develop standards and guidelines for funding, ethics, and accountability for CSOs operating in Burkina Faso.
- Continue funding for the monitoring and reporting of human rights violations by all sides—jihadist, security forces, and militias—to help ensure greater respect for rule of law.

- Develop a common language and discourse around violent extremism. This should be done jointly with the Burkinabè government and international partners—establishing a CVE working group with a concrete structure and deadline to accomplish this could be useful. After agreeing upon the language, actors should agree on—and implement—the overall national strategy on CVE.
- Consider alternative business models to garner funding support from other sources.⁸⁶

To the international community

- Connect Burkinabè CSOs working on social cohesion, peace, tolerance, and human rights (among other issues) to likeminded organizations in other countries to share lessons learned and strategies to best accomplish their goals.
- Encourage Burkinabè CSOs to take the lead on advocacy efforts on improving professionalization of security forces with the government and build their capacity to do so effectively.
- Allocate funds and expertise to strengthening the judicial system in partnership with Burkinabè civil society.
- If agreed upon with the Burkinabè government, increase U.S. efforts for professionalization of both military and police forces across Burkina Faso. These efforts should be coupled with contextualized, capabilities-based human rights training with an emphasis on civilian protection.
- Continue to develop Burkinabè intelligence and law enforcement capabilities, with an eye toward respect for civil liberties.

⁸⁶ See “Civil Society at a Crossroads: Exploring Sustainable Operating Models” by Shannon N. Green, for an in-depth discussion on these models: https://csis-prod.s3.amazonaws.com/s3fs-public/publication/171012_Green_CivilSocietyCrossroads_Web.pdf?CLFnrWYASKYtcID48YQ9liLNb1mK1RSc.

- Guide G5 Sahel partner countries to develop and commit to realistic yet ambitious goals of restoring security to the region, through funding requests, training, and security force commitments.

ELASTIC INTERPRETATION OF NATIONAL SECURITY

CLOSING CIVIC SPACE IN HUNGARY

Sohini Chatterjee and Péter Krekó

Background

Hungary—with Viktor Orbán’s Alliance of Young Democrats (Fidesz) in power—has used nationalism and security concerns to sustain Fidesz’s power and pass restrictive legislation that aims to silence or marginalize opposition factions. Fidesz’s strategy to suppress civil society is characterized by two fundamental principles: (1) characterizing migration as a national security threat; and (2) vilifying the civil society sector as migrant-friendly and therefore at odds with Hungarian security and stability. Civil society organizations (CSOs), especially those that advocate for the rule of law and human rights, have been flagrantly attacked and delegitimized to fuel the creation of what Prime Minister Victor Orbán calls “an illiberal state.”¹

The party has disseminated a narrative of dualism to the people of Hungary. On one side of this narrative are the “nationalists” embodied by Fidesz, self-designated as the protector of Hungary and its culture; on the other side are the enemies of Hungary—migrants, George Soros, and civil society—all of whom are portrayed as security threats. Fidesz has promoted, directly through taxpayer-funded government campaigns and indirectly through media outlets loyal to the party, the idea that liberal-leaning enemies want to turn Hungary into a bastion for terror.

Since the 2010 elections when Fidesz gained a parliamentary super-majority, it has enjoyed virtually unchecked political power. Fidesz drafted new media and electoral laws under the Fundamental Law, Hungary’s new constitution. Collectively, these legislative acts helped Fidesz maintain the party’s dominance over Hungarian political and civic life. Formerly independent institutions were filled with individuals loyal to the government. Meanwhile, the Constitutional Court’s competences were curbed and it was explicitly banned from reviewing constitutional amendments except for procedural errors. Under this new system, the electoral law heavily favors the party in power in general and Fidesz in particular.

Though the Constitution protects civil liberties, Fidesz has maneuvered around the law to pass and implement new legislation that contradicts these rights. The new legislation is implemented so the media’s messages are bent to the Hungarian government’s will. At present, most state institutions that are responsible for providing checks on the power of the governing party have become unable (or unwilling) to effectively balance Orbán’s power.

Fidesz’s recent attack on CSOs, the law on the transparency of organizations funded from abroad,

1 Csaba Tóth, “Full Text of Viktor Orbán’s Speech at Baile Tusnad of 26 July 2014,” *The Budapest Beacon*, July 29, 2014, <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

requires CSOs receiving more than 24,000 EUR funding from foreign donors to reregister as a “civic organization funded from abroad” and to put this label on every publication.² Amnesty International’s director for Europe, John Dalhuisen, comments,

*“Attempts to disguise this law as being necessary to protect national security cannot hide its real purpose: to stigmatize, discredit and intimidate critical NGOs and hamper their vital work.”*³

Indeed, this attack appears to be the embodiment of Fidesz’s national security strategy as it relates to CSOs.

Counterterrorism in Context

Immigration in Hungary as a National Security Threat

There is widespread opposition to immigration in Hungary, which is an ethnically homogenous country. Fifty-eight percent of respondents answered in a survey in 2011 that they expect an ethnic group to settle in Hungary in large numbers in the foreseeable future. The polling institute Tárki has been measuring the level of xenophobia in Hungary since 1992, dividing Hungarians into three groups: (1) xenophilic (willing to accept all immigrants); (2) xenophobic (willing to accept no immigrants); and (3) “willing to consider” allowing immigrants to come to Hungary based on individual circumstances. Its polling shows a remarkable increase in anti-immigrant sentiment

over the past few decades. In 1992, 15 percent of Hungarians were xenophobic, 12 percent were xenophilic, and 73 percent were “willing to consider.” Before the Orbán government’s anti-immigration campaign started in 2015, 39 percent of Hungarians were xenophobic and 10 percent xenophilic. In 2016, a supermajority of the population (56 percent) were found to be xenophobic, and only 1 percent were categorized as xenophilic.⁴

The intolerance of groups thought to be threats rose in the summer of 2015, when refugees and migrants flocked to Europe en masse.⁵ This crisis gave the government an opportunity to transform Hungarians’ distrust of immigrants into a tangible and imminent national security threat—and has then used that to solidify and expand its power.⁶ Through a series of large-scale public campaigns, the government connected the surge of asylum seekers in 2015 and 2016 to crime and terrorism and positioned itself as the only entity that could keep Hungarians safe from the looming danger. The government has argued: “Where there are numerous immigrants in Europe, there are more crimes being committed and public safety decreased, there are more muggings, thefts, batteries, cases leading to grievous bodily injuries, rapes and murders”; it has also contended that the connection between terrorism and asylum-seekers is “obvious.”⁷

Orbán rallied against Brussels’ planned mandatory refugee relocation plan, claiming that all im-

2 Amnesty International, “Hungary: NGO law a vicious and calculated assault on civil society,” June 13, 2017, <https://www.amnesty.org/en/latest/news/2017/06/hungary-ngo-law-a-vicious-and-calculated-assault-on-civil-society/>.

3 Ibid.

4 Ádám Kolozi, “Sosem Látott Mértékű a Magyarországi Idegenellenesség,” *Index*, November 17, 2016, http://index.hu/tudomany/2016/11/17/soha_nem_latott_merteku_az_idegenellenesseg_magyarorszagon/. See also: Tóth “Full Text of Viktor Orbán’s Speech.”

5 Attila Juhász, Bulcsú Hunyadi, and Edit Zgut, “Focus on Hungary: Refugees, Asylum and Migration,” *Heinrich Böll Stiftung*, 2015, https://www.boell.de/sites/default/files/2015-focus-on-hungary_refugees_asylum_migration.pdf.

6 Ibid.

7 Dorottya Vekony, “A menekültek mint politikai ellenség Orbán Viktor Beszédeiben,” *Electronic Periodicals Archive & Database*, 2016, http://epa.oszk.hu/02600/02692/00003/pdf/EPA02692_politanulmanyok_2016_21-29.pdf.

migrants “are prone to committing terror attacks” and that the distribution of asylum-seekers in the EU would equate to spreading terrorism in Europe.⁸ With the dissemination of this self-serving narrative, Fidesz has managed to successfully hold on to its power.⁹

The Charlie Hebdo Attacks

Just as Fidesz was losing popularity among Hungarians, the January 2015 terrorist attack on the French magazine *Charlie Hebdo* in Paris provided a lifeline to the struggling party.¹⁰ Immediately after the attacks, the Hungarian prime minister declared that the “advance of terrorism in Europe is a reality today” and claimed that “Europe is under attack.”¹¹ Fidesz inflated the notion of an imminent security threat both to solidify its brand as a protector of the Hungarian people and to turn the public’s attention toward the urgent need for a security fence on the Hungarian border. The fence was sold as necessary to protect the country from illegal migrants and terrorists, which it claimed posed a grave danger to the Hungarian people.¹² Coupled with the fence, the Hungarian government put in place a law that restricts access to asylum for those who enter from Serbia; allows authorities to close border crossing points; and criminalizes irregular entry, where those who

cross the border illegally could be imprisoned, deported, and barred from reentry.¹³

Fidesz also used the Paris attacks to launch a profoundly racist anti-immigration campaign in Hungary. The campaign included billboards and posters with inflammatory messages linking asylum seekers and refugees, terrorism, and Muslims. These messages, such as one billboard that claimed, “The Paris attacks were committed by Migrants,” were intended to create a climate of fear among Hungarians and create a common enemy.¹⁴ The strategy worked. Not only did this environment of alarm come to fruition, Fidesz also managed to cement its hold on power and regain its popularity: “[T]he [Prime Minister] boasted that the anti-immigration campaign successfully diverted public attention from numerous scandals in early 2015, which had severely eroded domestic support for his party.”¹⁵

The Reality of the Migration Situation in Hungary

Fidesz cynically exaggerated the magnitude of the migration and terrorist threat to Hungary for political gain. Although Hungary received 70,000 asylum applications in 2015 to 2016 (during a strong influx during the mass migration crisis), the number of

8 Ibid.

9 Sohini Chatterjee, interview with Andras Jakab, Hungary Academy of Sciences, Budapest, Hungary, July 25, 2017.

10 Ibid.

11 “Orbán Viktor: Az Európai Ember Áll Támadás Alatt,” *Magyar Nemzet*, January 11, 2015, <https://mno.hu/belfold/Orbán-viktor-az-europai-ember-all-tamadas-alatt-1267170>.

12 Sohini Chatterjee, interview with Andras Lederer, Helsinki Committee, Budapest, Hungary, July 28, 2017.

13 Human Rights Watch, “Hungary: New Border Regime Threatens Asylum Seekers,” September 19, 2015, <https://www.hrw.org/news/2015/09/19/hungary-new-border-regime-threatens-asylum-seekers>.

14 Eszter Zalan, “Hungary steps up campaign on migration referendum,” *EU Observer*, July 20, 2016, <https://euobserver.com/political/134430>.

15 András Rácz, “A Calculated Non-Action Miscalculated: Hungary’s Migration Crisis,” *Visegrád Revue*, October 20, 2015, <http://visegradrevue.eu/a-calculated-non-action-miscalculated-hungarys-migration-crisis/>. See also, “Nem támogatandó a gazdasági bevándorlás,” *Fidesz.Hu*, January 16, 2015, <http://www.fidesz.hu/hirek/2015-01-16/nem-tamogatandoa-gazdasagi-bevandorlas/>.

people intent on staying was much lower.¹⁶ Hungary was a transit country, rather than a destination country for migrants. In fact, the majority of asylum-seekers left Hungary for Western Europe immediately after registering with Hungarian authorities. Moreover, by December 2015, legislation approved by the Fidesz-dominated National Assembly had made it virtually impossible to receive refugee status in the country. In other words, the size of the Hungarian asylum-seeker and refugee community barely grew during and since the crisis.¹⁷

There have been no terrorist attacks in Hungary committed by Muslims and there is no significant Muslim presence in the country. The RAND Corporation's database on terrorist incidents counts 11 terror attacks in Hungary between January 1, 1990, and December 31, 2010, most of which were politically motivated, including four that were committed on the same day by the extremist "Arrows of Hungarians" terror organization.¹⁸ At most, there are 33,000 Muslims in the country and the 2004 Yearbook of the National Security Office—the predecessor of today's internal security service, the Constitution Protection Office—declared that the country's Muslim population is "nonradical."¹⁹

Counterterrorism Legislation, Measures, and Other Tactics Used to Close Civic Space

Expansion of National Security Powers and Counterterrorism Laws and Measures

The Orbán government founded the Hungarian Counter-Terror Center (TEK) in 2010 to protect the prime minister and the president and, above all, to prevent terrorist acts from being committed in Hungary—tasks that previously were assigned to the country's domestic intelligence service. Orbán justified the creation of TEK by claiming that, since the 9/11 attacks in the United States, the main security challenge in Hungary had been terrorism.²⁰ When TEK was established, the EU's antiterrorism coordinator Gilles de Kerchove commended the Hungarian government for recognizing the need for an integrated counterterrorism institution.²¹ After the *Charlie Hebdo* attacks, the government also reestablished the Counterterrorism Committee to aid with the "coherent implementation of counter terrorism activities" and modified the terror threat level indication system.²²

16 Phillip Connor, "Still in Limbo: About a Million Asylum Seekers Await Word on Whether They Can Call Europe Home," Pew Research Center, September 20, 2017, <http://www.pewglobal.org/2017/09/20/a-million-asylum-seekers-await-word-on-whether-they-can-call-europe-home/>.

17 Rácz, "A Calculated Non-Action Miscalculated: Hungary's Migration Crisis."

18 RAND, "Database of Worldwide Terrorism Incidents," <http://smapp.rand.org/rwtid/search.php>. Hungary's terrorist threat stems from an entirely different source. In 2015, 22 percent of the radical right-wing Jobbik party's voters agreed that "under some conditions terrorism is the only means to express one's political opinion," while the share of those approving terrorism was 12 percent among all adult Hungarians. A court of first instance sentenced the head of the above-mentioned Arrows of Hungarians to 13 years in prison without the chance for parole for "committing a terrorist act as co-perpetrator" and other crimes. During the sentencing, the judge emphasized that there is no established practice in Hungary for adjudicating terrorist acts, stating that no decisions had been made in terrorism-related cases previously.

19 László Csicsmann, "A Magyarországi Muszlim Kisebbségek Társadalmi Integrációjának Kihívásai Az Európai Tapasztalatok Tükrében," *Támop Speciál*, 2011, http://archiv.uni-nke.hu/uploads/media_items/a-magyarorszag-i-muszlim-kisebbsenek-tarsadalmi-integraciojanak-kihivasai-az-europai-tapasztalatok-tukreben.original.pdf.

20 Hetek, "Orbán Testőre Vezeti a Terrorrelhárítási Központot," March 3, 2010, http://www.hetek.hu/belfold/201009/Orban_testore_vezeti_a_terrorrelharitasi_kozpontot.

21 Index, "Megalakult a Terrorrelhárítási Központ," September 1, 2010, http://index.hu/belfold/2010/09/01/megalakult_a_terrorrelharitasi_kozpont/.

22 Dorottya Vekony, "A menekültek mint politikai."

In 2016, during the refugee and migrant crisis, the Orbán government set up a Counterterrorism Information and Criminal Analysis Center (TIBEK), tasked to compile the most comprehensive assessment of Hungary's terror threat and provide the government with analysis on terrorism.²³ While TIBEK has so far played no role in the government's anti-immigration rhetoric, TEK was a key player in a case that helped the government further antagonize CSOs.

In addition to the creation of new counterterrorism institutions under the control of the state, the government has taken legislative steps to expand its authorities. The expansion is justified by terrorism concerns and their effect has been to enhance the executive branch's authority.

The legal definition of terrorist acts is set forth in Section §314 (1) of Act C of 2012 of the Penal Code. It states, "Any person who commits a violent crime against persons or commits a crime that endangers the public... in order to: (a) coerce a government agency, another state or an international body into doing, not doing or countenancing something; (b) intimidate the general public; (c) conspire to change or disrupt the constitutional, economic or social order of another state, or to (d) disrupt the operation of an international organization; is guilty

of a felony punishable by imprisonment between ten to twenty years, or life imprisonment."²⁴ The law defines "terrorist group" as a group of at least three people "operating in accord for an extended period of time whose aim is to commit acts of terrorism."²⁵

A 2016 amendment of the Penal Code allows for the prosecution of minors between the ages 12 and 14 for terrorist offenses as long as they have the capacity to understand their actions. Moreover, the amendment also states that "any person who raises support for terrorism in public or publishes pro-terrorist propaganda commits a felony, punishable by imprisonment."²⁶

The Case of Ahmed H.

In 2016, TEK apprehended a 39-year-old Syrian carrying nine passports, who, according to Fidesz MP Bence Tuzson, was a member of an organization posing a terrorist threat in the EU.²⁷ The Syrian was charged with "committing a terrorist act to coerce a state institution."²⁸ Viktor Orbán proclaimed two days after his arrest: "We caught a terrorist."²⁹ A court of first instance sentenced Ahmed H. to a 10-year prison sentence.³⁰ Amnesty International called the sentence "absurd."³¹ A court of second instance found the previous court had failed to account for numerous relevant factors and overturned

23 Hvg.hu, "Mint Kés a Vajon: Átment a Parlamenten a Kormány Összes Terorellenes Intézkedése," June 7, 2016, http://hvg.hu/itthon/20160607_Mint_kes_a_vajon_atment_a_parlamenten_a_kormany_osszes_terorellenes_intezkedese.

24 CSIS, "Database of Legislation on the Definition of Terrorism," <https://www.csis.org/programs/international-consortium-closing-civic-space-icon/aligning-security-and-civic-space-0>.

25 Ibid.

26 Council of Europe, "Profiles on Counter-Terrorist Capacity: Hungary," November 2016, <https://rm.coe.int/1680641011>.

27 Róbert Baranya, "Világos a Magyar Kormány Álláspontja a Kvótarendszerről," *Magyar Hírlap*, September 29, 2015, http://magyarhirlap.hu/cikk/36552/Vilagos_a_magyar_kormany_allaspontja_a_kvotarendszerrol.

28 Bence Horváth, "Tényleg Terrorizmus Gyanúja Miatt Javasol Vádemelést a Rendőrség a Röszkénél Megafonba Beszélő Szír Férfi Ellen," *444*, January 27, 2016, <https://444.hu/2016/01/27/tenyleg-terrorizmus-gyanuja-miatt-javasol-vademelest-a-rendorseg-a-roszkenel-megafonba-beszelo-szir-ferfi-ellen>.

29 HVG.hu, "Orbán: 'Fogtunk Terroristát,'" September 18, 2015, http://hvg.hu/itthon/20150918_Orban_Fogtunk_terroristat.

30 *444*, "Orbán a Röszei Ítéletről: 'Megmontuk Előre, Teleplakátoltuk az Országot,'" December 1, 2016, <https://444.hu/2016/12/01/orban-a-roszkei-iteletrol-megmontuk-elore-teleplakatoltuk-az-orszagot>.

31 *444*, "'Ha Ahmed Terrorista, Akkor Én is az Vagyok' - Tüntettek a Röszei Ítélet Ellen," December 3, 2016, <https://444.hu/2016/12/03/ha-ahmed-terrorista-akkor-en-is-az-vagyok-tuntettek-a-roszkei-itelet-ellen>.

the previous ruling.³² The Office of the Prosecutor general declared the court of second instance's sentence "illegal" and turned to Hungary's top court, the Curia, to annul the decision.³³ Ahmed H.'s case is still pending before the courts, and he remains in prison.

The government has explicitly added terror as a justification to declare a state of emergency.³⁴ As stipulated in Article 51(a), in the case of a significant and direct threat of a terror attack, the government may invoke a "state of terror threat" with the approval of two-thirds of MPs sitting in the National Assembly, allowing the Orbán cabinet to issue decrees suspending the enforcement of laws, deviate from legislation, and introduce other extraordinary measures.³⁵

The provisions of the state of emergency procedures in the Constitution were—as previously written—legally adequate to respond to a potential terrorist threat under the "unexpected attack" provisions, which were crafted and interpreted very broadly.³⁶ Constitutional law and security experts in Hungary agree that the recently enacted constitutional amendment was more of a public relations tactic than a legitimate response to a legal deficiency in the text of the Constitution.³⁷

The government has also used arguably flawed data to justify "a state of crisis due to mass migration" under the Asylum Act; such a "state of crisis" has been in effect since March 2016.³⁸ This provides a legal justification for an expansion of government and police power, especially against migrants and organizations working with migrants.³⁹ During a "crisis due to mass migration," the Hungarian government and local authorities are afforded expanded rights; it can pass hasty legal and logistical measures that it deems necessary to handle the migration crisis.⁴⁰ After a protracted legal battle, the Hungarian Helsinki Committee was finally able to obtain the data on which the government was justifying this ongoing threat. According to that data, the state of crisis was based on immigration patterns in Greece and Macedonia and did not contain evidence of a migration-related threat in Hungary.⁴¹

An even greater expansion of authorities justified by terrorism went into effect in March 2017. The new legislation, entitled "On the amendment of certain acts related to increasing the strictness of procedures carried out in the areas of border management," amends the following acts: the Act on Asylum, the Act on the Admission and Right of Residence of Third-Country Nationals, the Act on State Border,

32 444, "Hatályon kívül helyezték a Terrorizmusról Szóló Ítéletet a Röszei Zavargás Miatt Vádolt Ahmed H. Ügyében," June 15, 2017, <https://444.hu/2017/06/15/hatalyon-kivul-helyeztek-a-terrorizmusrol-szolo-iteletet-a-roszkei-zavargas-miatt-vadolt-ahmed-h-ugyeben>.

33 Márk Herczeg, "Polt Péter a Kúriához Fordult, Amiért Hatályon kívül Helyezték a Terrorizmusról Szóló Ítéletet a Röszei Zavargás Miatt Vádolt Ahmed H. Ügyében," 444, August 25, 2017, <https://444.hu/2017/08/25/polt-peter-a-kuriahoz-fordult-amiert-hatalyon-kivul-helyeztek-a-terrorizmusrol-szolo-iteletet-a-roszkei-zavargas-miatt-vadolt-ahmed-h-ugyeben>.

34 "Terrorveszély: megvan az alaptörvény hatodik módosítása," *Magyar Nemzet*, July 7, 2016, <https://mno.hu/belfold/terrorveszely-megvan-az-alaptorveny-hatodik-modositasa-1345940>.

35 Hvg.hu, "Mint Kés a Vajon: Átment a Parlamenten a Kormány Összes Terorellenes Intézkedése," June 7, 2016, http://hvg.hu/itthon/20160607_Mint_kes_a_vajon_atment_a_parlamenten_a_kormany_osszes_terrorellenes_intezkedese.

36 Sohini Chatterjee, interview with Andras Lederer, Helsinki Committee, Budapest, Hungary, July 28, 2017.

37 Ibid.

38 Hungarian Government, "Hungarian government declares state of emergency due to mass migration," March 9, 2016, <http://www.kormany.hu/en/ministry-of-interior/news/hungarian-government-declares-state-of-emergency-due-to-mass-migration>.

39 Sohini Chatterjee, interview with Andras Lederer, Helsinki Committee, Budapest, Hungary, July 27, 2017.

40 Tibor Sepsí, "Why does Orbán want the army in the refugee crisis?," *V4 Revue*, September 7, 2015, <http://visegradrevue.eu/why-does-orban-want-the-army-in-the-refugee-crisis/>.

41 Sohini Chatterjee, interview with Andras Lederer, Helsinki Committee, Budapest, Hungary, July 27, 2017.

the Act on Minor Offenses, and the Act on Child Protection and Guardianship Management.⁴² Under the current state of crisis, these new provisions allow Hungarian law enforcement to automatically detain and summarily remove asylum-seekers to the Serbian side of the fence, without allowing access to the Hungarian asylum procedure.⁴³ According to the Helsinki Committee, the effect of this bill on asylum seekers and would-be asylum seekers is significant: “These . . . legal changes, which are extreme and flagrant violations of European Union asylum law and European and international human rights standards and European values, warrant an immediate and definite response by the European Commission and other EU institutions.”⁴⁴ The legislation seems to violate not only European Union asylum law, but also international refugee law. The restrictive measures proposed in this bill would allow the government to institute and sustain the state of crisis indefinitely with virtually no justification.⁴⁵

In the wake of the March 2016 attack in Brussels, the government adopted a new Counterterrorism Action Plan leading to a constitutional amendment and changes to 13 laws (e.g., National Security Act, Police Act).⁴⁶ As a consequence of the amendments, the police can now introduce high-level security

measures for up to 144 hours (72+72) and even extend this period in certain cases.⁴⁷ Additionally, the police may now place video recorders at state institutions of high importance, and personal data acquired while monitoring entry and exit to such institutions may be kept by police for as long as 30 days.⁴⁸ The police may also handle the personal data of individuals entering Hungary from a third country for up to five years.⁴⁹ The new Action Plan additionally authorizes the Hungarian Defense Force to help the TEK execute counterterrorism activities. Finally, it requires communication service providers to ensure the continuous operation of call numbers used by certain organizations.⁵⁰ These expanded capabilities further aid the government’s crackdown against migrants and refugees. This could pose a dangerous threat to CSOs already being targeted by Fidesz.

Anti-Money Laundering and Combating the Financing of Terrorism Legislation

It is important to note that the Hungarian National Assembly also approved Act LIII of 2017 on preventing and stopping money laundering and terrorism financing.⁵¹ This law was intended to codify the EU’s fourth anti-money-laundering directive into Hungarian law.⁵² The text of this legislation

42 Hungarian Helsinki Committee, “Hungary: Government’s New Asylum Bill on Collective Push-backs and Automatic Detention,” February 15, 2017, <http://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-New-Asylum-Bill-15.02.2017.pdf>.

43 Human Rights Watch, “Joint Letter to Commissioner Dimitris Avramopoulos,” February 27, 2017, <https://www.hrw.org/news/2017/02/27/joint-letter-commissioner-dimitris-avramopoulos>.

44 Hungarian Helsinki Committee, “Hungary: Government’s New Asylum Bill”; and Sohini Chatterjee, interview with Andras Lederer.

45 Ibid.

46 Ibid.

47 Ibid.

48 Ibid.

49 Ibid.

50 Ibid.

51 Wolters Kluwer, “2017. Évi LII. Törvény a Pénzmosás és a Terrorizmus Finmanszírozása Megelőzéséről és Megakadályozásáról,” May 26, 2017, https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700053.TV×hift=ffffff4&txrefer=00000001.TXT.

52 Bálint Tóásó, “Kihirdették a pénzmosás elleni szabályokat tartalmazó új törvényt,” KPMG Blog, June 2, 2017, <http://blog.kpmg.hu/2017/06/kihirdettek-a-penzmosas-elleni-szabalyokat-tartalmazo-uj-torvenyt>.

does not pose any immediate threat to the civil society sector.

However, Hungary was found to be only in partial compliance with the Financial Action Task Force (FATF) Recommendation 8, which aims to prevent terrorist abuse of the civil society sector.⁵³ Specifically, Hungary was recently evaluated by MONEYVAL, an associate member within FATF and a permanent monitoring entity of the Council of Europe.⁵⁴ In its Mutual Evaluation Report, MONEYVAL concluded that there were significant transparency issues in Hungary's implementation of FATF.⁵⁵ In particular, it found that Hungary had erroneously foregone a formal review of the civil society sector to identify which segment(s) of the sector were at risk for terrorist financing and whether and how the legal and policy environment in Hungary affects that risk.⁵⁶

MONEYVAL argues in its evaluation report that the Hungarian national risk assessment (NRA) lacks sufficient breadth and depth with respect to the assessment of potential money laundering and financial terrorism threats and vulnerabilities and their consequences.⁵⁷ MONEYVAL also found that the NRA failed "to identify sources, causes and interdependencies of money laundering (ML) ML risks, as well as the most salient ML risks... [and] does not

demonstrate characteristics of a comprehensive assessment based on a robust methodology."⁵⁸

The report concluded that Hungary should undertake a sectoral risk assessment of the civil society sector to ensure compliance with FATF Recommendation 8.⁵⁹ The Hungarian Ministry for National Economy is tasked with implementation of the Mutual Evaluation Report recommendations; the status of a new sectoral risk assessment, if it has begun, is unknown.⁶⁰ Additionally, FATF Recommendation 8 has been subject to abuse by states, oftentimes leading to the passing of restrictive legislation on civil society.⁶¹ Considering Hungary's recent actions taken to close civic space, civil society could be in danger of the government's manipulation of FATF's recommendations.

The Demonization of the Civil Society Sector in the Name of National Security

The first to feel the wrath of the Orbán government was the civil society sector, in particular those working on refugee issues or receiving support from George Soros, Hungarian-American philanthropist. In September 2016, Fidesz instituted national security inspections of CSOs "cooperating with the So-

53 Global NPO Coalition on FATE, "The Platform," <http://fatfplatform.org/>. Recommendation 8—regarding the potential susceptibility of CSOs to terrorist finance—was recently revised to better safeguard the legitimate operations of CSOs and more precise targeting of terrorist activity.

54 Sohini Chatterjee, interview with Eszter Hartay. See also: Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism of Europe, "At a Glance," Council of Europe, <https://www.coe.int/en/web/moneyval>.

55 Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism of Europe, Hungary Fifth Round Mutual Evaluation Report, Council of Europe, September 2016, <http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/MER-Hungary-2016.pdf>.

56 Sohini Chatterjee, interview with Eszter Hartay. See also, Hungary Fifth Round Mutual Evaluation Report.

57 Hungary Fifth Round Mutual Evaluation Report.

58 Ibid.

59 Ibid.

60 Sohini Chatterjee, interview with Eszter Hartay.

61 Ben Hayes, *The impact of international counter-terrorism on civil society organizations: Understanding the role of the Financial Action Task Force*, Bread for the World, April 2017, https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis_68_The_impact_of_international_counterterrorism_on_CSOs.pdf.

ros-network.” After this request was made, 22 organizations were identified and then claimed to have “openly violate[d] Hungarian and European laws,” as they participate in politics with “black money.”⁶²

Fidesz’s most explicit attempts to depict critical or dissenting CSOs, and especially those funded by George Soros, as serving foreign interests were in 2014. Prime Minister Orbán has argued that Soros-funded organizations “constitute a background power” and that the Hungarian political opposition’s strength is behind Soros’s unelected activist network.⁶³

The government has claimed that George Soros is trying to implement his pro-migration scheme by financing “pseudo-NGOs” in Hungary that work to achieve his illegitimate aims. The government claimed that these organizations were encouraging immigrants to break Hungarian laws and offer training to refugees with the intent to overthrow the Hungarian government.⁶⁴ In 2013, government-organized media, including the weekly *Heti Válasz* and the daily *Magyar Nemzet* controlled by former Fidesz ally Lajos Simicska, published lists of CSOs allegedly “kept” by George Soros.⁶⁵ The government has since attempted to portray these entities as supporters of

terrorism and crime and a potential threat to Hungarian security.

Through large-scale messaging campaigns, the government argues that Soros wants to “flood Europe with Muslims” and destroy nation states by “getting rid of the ethnical basis of Christian Europe.”⁶⁶ It has publicly accused Soros as the mastermind behind a global pro-migration scheme, arguing that he would spend billions of dollars to achieve this goal. On November 6, 2015, a Fidesz coalition partner sent an open letter to a number of Open Society Foundations (OSF)-funded CSOs; the letter argued that George Soros’s task was to eliminate the borders of sovereign countries so that refugees could have easier access to Europe.⁶⁷

The demonization of Soros-supported organizations had its intended impact. In April 2017, 64 percent of respondents told the polling organization Publicus Institute that Soros is a potential threat to Hungary, while 57 percent said foreign-funded organizations should not take part in domestic politics.⁶⁸ Informal polls have also found that Hungarian support for Soros has declined drastically since the Fidesz-backed campaign was launched.⁶⁹

62 Hungarian Helsinki Committee, “Timeline of Governmental Attacks against Hungarian NGO Sphere,” February 22, 2017, http://www.helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_22022017.pdf.

63 The Hungarian Government prime minister, “We deserve more respect from the United States,” May 20, 2016, <http://www.kormany.hu/en/the-prime-minister/news/we-deserve-more-respect-from-the-united-states>.

64 Tóth “Full Text of Viktor Orbán’s Speech.”

65 Hungarian Helsinki Committee, “Timeline of Governmental Attacks.”

66 Ákos Keller-Alánt, “A Fidesz Története Soros Györgyről: Változatok Idiotizmusra És Gonoszságra,” *Magyar Narancs*, June 15, 2017, <http://magyarnarancs.hu/belpol/valtozatok-idiotizmusra-es-gonoszsagra-104725>.

67 Hungarian Helsinki Committee, “Timeline of Governmental Attacks.”

68 György Nagy, “Az Oroszokkal Tolták El - A Reprezentatív Publicus-Kutatás Adatai!,” *Vasárnapi Hírek*, April 22, 2017, http://www.vasarnapihirek.hu/fokusz/az_oroszokkal_toltak_el.

69 Although anti-Semitism is widespread among Hungarians, allegations that the Orbán government’s anti-Soros campaign was motivated by anti-Semitism is unlikely, although it clearly invokes such sentiments. In fact, Viktor Orbán explicitly stated that among its many offenses, the Soros network could “import” anti-Semitism into Europe by ushering in Islamic radicalism and Muslim migrants. The minister for the prime minister’s office, János Lázár, and government spokesman, Zoltán Kovács have also drawn explicit attention to the anti-Semitism among Muslims and have claimed that immigration is likely to import such attitudes. In other words, Fidesz vilifies Soros and NGOs because they pose a threat to his power rather than as a result of Soros’s religious background. In fact, in-person interviews revealed that Fidesz is trying to enhance its appeal to the Jewish community. Government spokespeople suggest that the Jewish community in Hungary should rally behind Fidesz, as Muslim immigration and terrorism pose a distinct threat to their religious freedom in Hungary.

In 2012, the government created the National Cooperation Fund (NEA), a new state institution tasked with distributing state funding to CSOs. By taking control of this institution, the government can withhold money from any organizations that criticized the Orbán government. It clearly favors “nationally oriented,” nationalist, or conservative CSOs.⁷⁰

The government also launched a widespread investigation into nonloyalist CSOs. The Hungarian prime minister ordered the Government Control Office (KEHI) to carry out a large-scale governmental examination of the CSO grants program and its “institutional system.”⁷¹ In spite of the government’s public accusations that the CSOs in question engaged in illegitimate financial activities, misappropriation of funds, and budget fraud, the investigations were all closed without any indictments.⁷²

In January 2018, the Hungarian government drafted a legislative package entitled “Stop Soros,” which seeks to list organizations supporting illegal immigration, obliges them to pay a 25 percent tax on foreign donations, and allows the government to potentially ban Hungarian citizens from entering the 8-kilometer-wide area

from the southern border fence.⁷³ Although the draft law claims that CSOs themselves would have to declare that they support illegal migration, Minister for the Cabinet Office of the Prime Minister Antal Rogán told state-owned Kossuth Radio that the “Hungarian government, the Hungarian authorities naturally have a list of the organizations who do such activities [as support migration].”⁷⁴ The actual wording of the draft is vague, its definitions are incomplete, it is unconstitutional,⁷⁵ and it clearly serves propaganda purposes.

Fidesz’s Recent Attack on CSOs: Lex-NGO

Fidesz has used taxpayer funds to send out a highly politicized “national consultation” survey, entitled “Stop Brussels,” to every Hungarian household.⁷⁶ The data yielded by the questionnaire proved deficient and partial, as a public opinion poll found that it was mostly supporters of Fidesz that sent the questionnaires back.⁷⁷

Citing the national consultation data, Fidesz justified its one of most substantial attack on civil society, the so-called Lex-NGO (Act LXXVI on the transparency of organizations funded from abroad). This law was submitted to the National Assembly in April 2017 and approved in June of the same year.⁷⁸

70 András Becker, “Itt a Civil Támogatások Listája: A Kormány Mellett Demonstrálni Menő,” *Atlaszo.Hu*, October 22, 2012, <https://atlaszo.hu/2012/10/22/itt-a-civil-tamogatások-listája-a-kormány-mellett-demonstrálni-menő/>.

71 *Ibid.* See also: Gergely Nyilas, “Nagy Semmi Lett Lázár János Norvég Hadjárataól,” *Index*, April 8, 2016, http://index.hu/belfold/2016/04/08/nagy-semmi_lett_a_norveg_alap_elleni_haboru_vege/.

72 Sohini Chatterjee, interview with Vera Mora.

73 Fábrián Tamás, “Stop Soros néven új kormányzati törvénycsomag készült,” *Index*, January 17, 2018, https://index.hu/belfold/2018/01/17/soros_akcioterv_kormanyules.

74 “Stop Soros: ‘nem hiszem, hogy van olyan tisztességes bíró, aki ezt alkalmazná,’” *ATV*, January 22, 2018, <http://www.atv.hu/belfold/20180122-az-elsok-kozott-vonatkozhat-soros-gyogyre-a-tavoltartasi-vegzes>.

75 Dávid Dercsányi and Judit Windisch, “Zavaros, alkotmányellenes, uniós jogot sért, kommunikációs trükk’ – a ‘Stop Soros mérlege,” *HVG*, January 17, 2018, http://hvg.hu/itthon/20180117_Zavaros_alkotmanyellenes_unios_jogot_sert_Stop_Soros_gyors_merlege.

76 European Commission, “‘Stop Brussels’: European Commission responds to Hungarian national consultation,” April 27, 2017, https://ec.europa.eu/commission/publications/stop-brussels-european-commission-responds-hungarian-national-consultation_en.

77 Ádám Kolozi, “Csak a Fideszesek Konzultálnak a Kormánnyal, a Többséget Zavarja az Egész,” *Index*, May 12, 2017, http://index.hu/belfold/2017/05/12/csak_a_fideszesek_hajlandoak_konzultalni_a_kormannyal_a_tobbseget_zavarja_az_egesz/.

78 See Adopted Law LXXVI of 2017 on the transparency of organizations supported from abroad, translated by the Hungarian Helsinki Committee. See also, *Magyar Közlöny*, June 19, 2017, <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK17093.pdf>.

Lex-NGO requires NGOs that receive over HUF 7.2 million (USD \$28,000) from foreign sources to register at a court as an “organization funded from abroad” and to display this on all of their publications and media materials.⁷⁹ Lex-NGO is justified by claims that foreign-funded CSOs’ activities “could threaten the country’s political, economic interest” and the law allegedly contributes to international efforts against money laundering. The “general reasoning” for the law focuses specifically on Hungary’s national security.⁸⁰

Although the Hungarian government claimed that these measures were necessary to ensure that CSOs are transparent, many of the organizations in question were already publishing the sources of their income on their websites.⁸¹ Moreover, the Hungarian law is extremely broad and labels a wide range of organizations as agents of foreign influence, simply for receiving foreign funding. Foreign agents, as defined by the law, include the Hungarian Red Cross and Rex Animal Shelter Foundation, among others. Notably, there was very little public outcry in response. In a survey, 54 percent of those who had heard about Lex-NGO said it makes CSOs more transparent and 45 percent approved of the fact that an organization could be dissolved if it fails to obey this piece of legislation.⁸²

However, both members of Parliament (MPs) and domestic CSOs have resisted Lex-NGO. A group of 50

MPs, including from the leftist Green Party and the Radical Right Jobbik party, filed a claim in the Constitutional Court arguing that the law, as written, is unconstitutional.⁸³ However, it is unclear how long it will be before the Constitutional Court takes up this case, as Fidesz-nominated judges have been a majority in the Constitutional Court since April 2013. In the past, the government-controlled court has ruled heavily in favor of the government or has stalled ruling in politically sensitive cases.⁸⁴ At present, there are 17 opposition motions before the Constitutional Court—the oldest of which was submitted in March 2015.⁸⁵ Constitutional judges, theoretically one of the strongest checks on the government’s power, may be unwilling to make decisions on cases that thwart Fidesz’s political strategy—including its legislation restricting civic space.

The “Civilization Campaign,” a consortium of CSOs, has been collectively pushing back against Lex-NGO. A subset of CSOs has decided that it will not comply with the law and is willing to be fined for noncompliance.⁸⁶ A legal battle is anticipated once those parties (the noncompliant CSOs) have a legal and jurisdictional basis for their claim (e.g., the fine imposed by the government).⁸⁷ The Civilization Campaign plans to pursue legal redress in both domestic and international forums, including the Hungarian Constitu-

79 Ibid.

80 Ibid.

81 Sohini Chatterjee, interview with Goran Budioski, Open Society Foundations, Budapest, Hungary, July 25, 2017. See also: Civil Szervezetek Beszámolóival Kapcsolatos Tudnivalók, Civil Információs Portál, <http://civil.info.hu/szamviteli-beszamolok-letetbe-helyezese>.

82 Erdelyi, “A Magyarok 3 Százalékának Jut Eszébe Soros György, Ha Civil Szervezetekről van Szó,” 444, August 6, 2017, <https://444.hu/2017/08/06/a-magyarok-3-szazalekanak-jut-eszebe-soros-gyorgy-ha-civil-szervezetekrol-van-szo>.

83 Interview with Bernadett Szel, Member of Hungarian Parliament, Budapest, Hungary, July 27, 2017.

84 Péter Magyar, “Öt Ábra, Amiből Berlinben Levezették a Magyar Demokrácia Válságát,” 444, March 9, 2017, <https://444.hu/2017/03/09/ot-abra-amibol-berlinben-levezettek-a-magyar-demokracia-valsagat>.

85 András Sereg, “Tizenhét Ellenzéki Indítványon Ül az Alkotmánybíróság,” Zoom.hu, July 25, 2017, <https://zoom.hu/2017/07/25/tizenhet-ellenzeki-inditvanyon-ul-az-alkotmanybirosag>.

86 Sohini Chatterjee, interview with Dalma Dojczak, Hungarian Civil Liberties Union, Budapest, Hungary, July 27, 2017.

87 Ibid.

tional Court, the European Court of Justice, and the European Court of Human Rights.⁸⁸

Importantly, the European Commission has taken a strong position against the NGO law. On July 13, 2017, the European Commission launched an infringement procedure against Hungary's Lex-NGO, formally stating that it violates rights protected by European Law.⁸⁹ In a letter dated September 18, 2017, the European Commission stated: "The new registration, reporting and transparency obligations introduced by the law constitute unjustified and disproportionate restrictions on the free movement of capital, as outlined in the Treaty on the Function of the European Union. They also constitute undue interference with fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union, namely the right to freedom of association and the right to protection of private life and personal data."⁹⁰ Hungary sent a formal response to the European Commission in August of 2017, which is now under review.⁹¹ The Council of Europe Venice Commission has also indicated that the draft Lex NGO law may be used as a pretext to control or restrict NGOs.⁹² It expresses specific concerns surrounding the rationale behind the law and the arbitrary three-year period when civil society organizations cannot receive foreign funding, among other items.⁹³

Countering Terrorism and Closing Civic Space

Legislation in Hungary, including Lex-NGO and Hungary's counterterrorism law, is being passed more and more quickly without meaningful public consultation.⁹⁴ At one time, the Hungarian Civil Liberties Union (HCLU) would monitor pending legislation and provide comments, which were often considered by government officials prior to the adoption of the final text.⁹⁵ Now organizations like HCLU are entirely disengaged from the process of drafting and adopting legislation.⁹⁶

The Civilization Campaign and the sector as a whole should consider ways to broaden domestic constituencies and enhance outreach to Hungarians regarding the vital role of civil society in a democratic polity. While the Civilization Campaign is working to counter Fidesz's negative depiction of the sector, CSOs' appeal to the Hungarian populace remains tenuous. Absent further efforts to strengthen its outreach, especially in rural areas, the sector remains in danger of being severely weakened.

Fidesz also recently passed legislation in April 2017 with the intention to close the Soros-founded Central European University (CEU). However, this legislation faced significant backlash, which has been much more effective and widespread

88 Ibid.

89 Benjamin Novak, "European Commission: NGO law is in violation of fundamental rights," *Budapest Beacon*, October 3, 2017, https://budapestbeacon.com/european-commission-ngo-law-violation-fundamental-rights/?utm_source=facebook.com&utm_medium=referral&utm_campaign=osffbpg.

90 Ibid.

91 Ibid.

92 Council of Europe, Hungary: on the draft law on the transparency of organizations receiving support from abroad, June 20, 2017, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)015-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)015-e).

93 Ibid.

94 Sohini Chatterjee, interview with Dalma Dojczak.

95 Ibid. See also: Eötvös Károly Policy Institute, "Analyses on the Constitutional Changes in Hungary," <https://sites.google.com/site/ruleoflawinhungary/>.

96 Sohini Chatterjee, interview with Dalma Dojczak.

when compared to the resistance to the NGO law. This outcry led to Fidesz supporters and advisers admitting this move was a political miscalculation.⁹⁷ The Hungarian population's allegiance to CEU and academic freedom was radically underestimated by Fidesz—in spite of the connection between Soros, who funds the university. After CEU complied with Hungarian regulation, the Orbán regime amended the higher education law once again to extend the deadline for compliance with the new regulations by one year. The Budapest university recently announced its reaccreditation in Hungary and, though this secures its future, it will no doubt be subject to more attacks from Fidesz.⁹⁸ Nevertheless, this incident illustrates that broadened constituencies and enhanced public support and reactions can sometimes successfully push back against Fidesz's increasingly authoritarian measures.

Conclusion

Despite its progress and EU membership, Hungary continues to impose restrictive measures against civil society in an effort to maintain a single-party-controlled political system. Slowly, the country is creeping toward authoritarianism.

Invoking Hungarian nationalism, Fidesz has, seemingly successfully, employed an elastic interpretation of terrorism and broader national security issues to effectively link these threats with the migration crisis. Fidesz has used a variety of tactics to maintain this narrative and stifle critical opposition voices, including civil society. By expanding its counterterrorism powers, executing negative public messaging campaigns, and conducting debilitating investigations and monitoring, the government has made gains to delegitimize and dis-

able civil society's operations. Yet, civil society's voice is needed now more than ever to push back against Fidesz's authoritarian advances.

The strategy of claiming that Hungary may become a playground for terrorists has been highly successful, despite the fact that these claims are blatantly misleading. Fidesz is presently leading the polls comfortably, by over 10 percent.⁹⁹ Prime Minister Orbán appears poised to win the 2018 general election by a landslide.

Recommendations

To the Hungarian government

- Implement the Council of Europe's recommendations in relation to the Lex-NGO law.
- Restart dialogue and consultations with civil society when designing and implementing new legislation. Organizations such as the Hungarian Civil Liberties Union had previously submitted comments to be considered by government officials. Efforts should be made to mend this relationship.
- Amend counterterrorism legislation and state-of-emergency powers to be precise, specific, reasonable, and consistent with international law.

To civil society actors

- Continue and amplify outreach into rural communities and expand awareness-raising campaigns.

To the international community

- Support legitimate investigative reporting and independent media.
- Support civil society organizations, civil soci-

97 Sohini Chatterjee, interview with Balazs Orbán, Migration Research Institute, Budapest, Hungary, July 24, 2017.

98 Palko Karasz, "Hungary's Soros-Backed University Is Reaccredited," *New York Times*, February 28, 2018, <https://www.nytimes.com/2018/02/28/world/europe/ceu-hungary-soros.html>.

99 Közvélemény-kutatók, "Pártpreferencia a választásra jogosultak körében," <http://kozvelemenykutatok.hu/partpreferencia/>.

ety solidarity initiatives such as the Civilization Campaign, and other forms of ideational freedom, such as CEU.

CIVIC SPACE IN INDIA BETWEEN THE NATIONAL SECURITY HAMMER AND THE COUNTERTERRORISM ANVIL

Lana Baydas

Background

India is considered the most populous democracy. It has functioning institutions—to a certain degree—and transparent elections,¹ as well as a vibrant civil society.² The values of sovereignty, secularism, justice, liberty, equality, and fraternity are enshrined in the Constitution. India has a three-tier federal system of governance. At the national level, there is the union government. At the regional level, there are 29 states and seven union territories. At the local level, there are local government bodies, namely, panchayats and municipalities in rural and urban areas respectively. Indian society is diverse in terms of religion and ethnicity.

However, political dynamics in India have been entrenched along religious and ethnic lines. Colonial authorities, in order to retain power, reinforced these divisions. The anticolonial struggle naturally used religion, ethnicity, and caste as part of its mobilization process. Later, political par-

ties continued utilizing identity politics to garner support among the country's population. Former Prime Minister Indira Gandhi stirred nationalist sentiments to consolidate her power and that of her party until she took an authoritarian turn. She lost her post in the 1977 general elections after imposing a state of emergency from 1975 to 1977, curtailing fundamental civil and political rights.

With the Bharatiya Janata Party (BJP) achieving a landslide win in the 2014 general elections,³ and securing 31 percent of the vote, Narendra Modi acceded to power as BJP's candidate for prime minister. The BJP further consolidated its authority after gaining a majority of seats in the 2017 legislative elections in Uttar Pradesh and Uttarakhand, rising to prominence on a platform closely associated with Hindu nationalism. Leveraging “centrally controlled programs that state residents see as having an impact on their daily lives,”⁴ the BJP added to its wins the state of Himachal Pradesh

- 1 The first prime minister of India, Jawaharlal Nehru of India, during his 17 years in power, strengthened institutions and democratic processes unlike many postcolonial countries where democracy was given a short shrift. See generally, Ragini Nayak, “Jawaharlal Nehru: a legacy revisited,” *The Hindu*, November 16, 2014, <http://www.thehindu.com/opinion/open-page/open-page-jawaharlal-nehru-a-legacy-revisited/article6603356.ece>.
- 2 Sumit Ganguly, “India's Democracy at 70: The Troublesome Security State,” *Journal of Democracy* 28, no. 3, (July 2017): 117–126.
- 3 Prashant Jha, *How the BJP Wins: Inside India's Greatest Election Machine* (New Delhi: Juggernaut, 2017).
- 4 Kartikeya Singh, “Modi Machinery Gains Momentum in Latest Indian State Elections,” CSIS, December 18, 2017, <https://www.csis.org/analysis/modi-machinery-gains-momentum-latest-indian-state-elections>.

and Prime Minister Narendra Modi's home state of Gujarat in December 2017.⁵

Prime Minister Modi has exploited identity politics in an unprecedented way,⁶ advancing Hinduism in place of pluralism, raising concerns about "the health of democratic checks and balances."⁷ This approach dominates the behavior of the government and its allies, as "[r]eligious conservatives have quietly displaced India's old, privileged secular elite at the helm of universities and other state institutions."⁸ Advocating for "India First," Prime Minister Modi defined his approach: "[w]hatever you do, wherever you work, India should be the top priority for all its citizens."⁹

The discourse in the country has become increasingly nationalist and intolerant. Prime Minister Modi promoted his party's vision of "an exclusionary Hindu view of nation, state, and collective identity."¹⁰ Hindu nationalism, also known as Hindutva, is by definition an ideological threat to non-Hindu minorities like Muslims and Christians.¹¹ It presents a view of

India as a Hindu nation, with favored people who are deserving of rights and opportunities and "others." The Hindu majoritarianism advanced by the BJP has resulted in anti-Muslim mob violence and a rise of killings in the name of protecting cows (held holy by some Hindus). "The problem is not simply that these divisive and sometimes violent transgressions undermine individual freedom and rule of law—it is that the state has granted such attacks moral legitimacy."¹² The union government turned a blind eye to attacks conducted by nonstate actors.¹³ As Pratap Bhanu Mehta, the former president of the Center for Policy Research, pointed out, "it is using nationalism to crush constitutional patriotism, legal tyranny to crush dissent, political power to settle petty scores, and administrative power to destroy institutions."¹⁴ In this vein, the government has been mobilizing its constituents against individuals, minority groups, and institutions that do not "subscribe to its right-wing Hindu ideology. It terms anyone who raises a dissenting voice as "antinational."¹⁵

5 Ibid.

6 Rameez Abbas, "Jihad Comes to India?," *Foreign Affairs*, September 10, 2014, <https://www.foreignaffairs.com/articles/india/2014-09-10/jihad-comes-india>.

7 Milan Vaishnav, "India's Opposition Heads for the Hills: A Golden Age for the BJP," *Foreign Affairs*, August 3, 2017, <https://www.foreignaffairs.com/articles/india/2017-08-03/indias-opposition-heads-hills>; and Ashutosh Varshney, "Narendra Modi's illiberal drift threatens Indian democracy," *Financial Times*, August 17, 2017, <https://www.ft.com/content/0015a59e-80e2-11e7-94e2-c5b903247afd>.

8 "The elephant in its labyrinth: In the race with its tricky neighbor, India has recently been winning," *The Economist*, July 22, 2017, <https://www.economist.com/news/special-report/21725104-india-becoming-more-nationalist-and-more-authoritarian-race-its-tricky>.

9 Darshan Desai, "'India first' is Modi's new mantra," *The Hindu*, March 10, 2013, <http://www.thehindu.com/news/india-first-is-modis-new-mantra/article4494238.ece>.

10 Subrata K. Mitra, "India's Democracy at 70: Civil Society and Its Shadow," *Journal of Democracy* 28, no. 3 (July 2017): 106–116, 113.

11 Sohini Chatterjee, "India Research Trip," Internal document, CSIS, May 2, 2016.

12 Madhav Khosla and Milan Vaishnav, "India at 70: The World's Biggest Democracy Celebrates Its Birthday," *Foreign Affairs*, August 16, 2017, <https://www.foreignaffairs.com/articles/india/2017-08-16/india-70>.

13 Bilal Quershi, "How it felt to be Pakistani in India during the triumph of Hindu nationalism," *Washington Post*, August 27, 2017, https://www.washingtonpost.com/outlook/how-it-felt-to-be-pakistani-in-india-during-the-triumph-of-hindu-nationalism/2017/08/24/d06f1780-8451-11e7-b359-15a3617c767b_story.html?utm_term=.52d4487f0b0e.

14 Pratap Bhanu Mehta, "An act of tyranny: 'Modi government threatened democracy; that is the most antinational of all acts,'" *The Indian Express*, February 16, 2016, <http://indianexpress.com/article/opinion/columns/jnu-sedition-case-kanhaiya-kumar-arrest-afzal-guru-event/>.

15 Sanjay Kumar, "Modi's New Mantra: 'If You're Not With Me, You're Anti-National,'" *The Diplomat*, February 18, 2016, <http://thediplomat.com/2016/02/modis-new-mantra-if-youre-not-with-me-youre-antinational/>.

The Indian government actively uses this discourse to define what constitutes a threat to national interests and economic prosperity. The overly broad concept of “national security” combined with counterterrorism legislation and measures, has adversely impacted India’s civic space.

Counterterrorism Legal Framework

India has a long history of terrorism and violence based on separatist and secessionist movements, as well as ideological and religious conflict. This led to the enactment of numerous antiterrorism laws to address new challenges and gaps in the legal framework. The first antiterror law was the Unlawful Activities (Prevention) Act of 1967 (UAPA). The act was adopted following the Sino-Indian War and in reaction to calls by the Dravida Munnetra Kazhagam (DMK) party in Tamil Nadu for secession.¹⁶ It was used to declare associations that supported the idea of secession from India as “unlawful.”

UAPA continued to be the main antiterror law until after the assassination of former Prime Minister Indira Gandhi when calls for stricter provisions were high. The Terrorist and Disruptive Activities (Prevention) Act (TADA) was passed in 1985 (lapsed in 1995). Part II (3) of TADA stipulated that a terrorist is:

[w]hoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs,

dynamite or other explosive substances or inflammable substances or lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.¹⁷

During the BJP government of 1999 to 2004, party leaders sought to exploit various terrorist attacks in the country and abroad to push for new counterterrorism legislation that targets minority groups, particularly the Muslim community. Despite efforts by India’s Muslims to assert their patriotism and distance themselves from terrorist groups,¹⁸ the BJP was able to leverage societal suspicion of Muslims and link them to global terrorist groups.¹⁹ In March 2002 following the Gujarat train attack,²⁰ the Prevention of Terrorism Act (POTA) became law. Chapter II (3) of 2002 POTA introduced broader language reflecting the influence of the nationalist narrative in India. It defined the act of terrorism as:

[an] intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does [sic] any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or

16 The state political party of Tamil Nadu and Pondicherry calls for the state of Tamil Nadu. See further: <http://dmk.in/english>.

17 Terrorist and Disruptive Activities (Prevention) Act, 1987, South Asia Terrorism Portal, <http://www.satp.org/satporgtp/countries/india/document/actandordinances/Tada.htm>.

18 Rameez Abbas, “Jihad Comes to India?: Why Zawahiri Vowed to Take His Fight East,” *Foreign Affairs*, September 10, 2014, <https://www.foreignaffairs.com/articles/india/2014-09-10/jihad-comes-india>

19 Jude Howell, “Counter-terrorism Policy Post-9/11 and the Selective Impact on Civil Society: The Case of India,” in *Civil Society Under Strain: Counter Terrorism Policy, Civil Society and Aid Post- 9/11*, eds. Jude Howell and Jeremy Lind, (West Hartford, CT: Kumarian Press, 2009), 127, 130.

20 Noted in Sohini Chatterjee, “India Research Trip,” Internal document, CSIS, May 2, 2016.

other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature *or by any other means whatsoever*, in such a manner as to cause, or likely to cause, *death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services* essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defense of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act.²¹ [emphasis added]

POTA, until it was repealed in 2004, was abused by the authorities to harass political opponents and target particular communities such as tribes, religious and ethnic minorities, trade unionists, and Dalits.²² The sweeping definition in POTA inappropriately encompasses a large number of non-violent forms of political protest, such as peaceful demonstrations disrupting rail services or ports, or industrial action in a large range of industries. It gives authorities the ability to classify political opponents and a broad range of peaceful opposition movements arising from regional, ethnic, or religious grievances, as terrorist or antinational.²³ In June 2005, the POTA review committee reported

that there were 11,384 persons wrongfully charged under POTA who instead should be charged under the regular law.²⁴

In the aftermath of the November 2008 attacks when a series of 12 coordinated shooting and bombing attacks lasting four days were carried out by Pakistan-based terrorist group in Mumbai, the lower house of the Indian parliament passed the Unlawful Activities (Prevention) Amendments Bill. The 2008 amendments of UAPA included POTA's language on the definition of terrorism.²⁵ In addition, the UAPA empowered the government to outlaw groups as a "terrorist organization," "terrorist gang," or "unlawful association." The amendments expanded those powers by increasing the number of criminal offenses linked to association with or membership in a terrorist organization or gang, terms defined by reference to the vague and overbroad definition of "terrorism." A number of terrorist organizations were named and included in UAPA itself.²⁶ Additionally, amendments introduced to UAPA in 2012 further expanded the already vague definition of a "terrorist act" to include offenses that threaten the country's economic security. UAPA was amended again in 2004 to criminalize terrorist financing, and in 2008 to align with the requirements of the United Nations Convention on the Suppression of the Financing of Terrorism.

In addition to these laws, the Armed Forces Special Powers Act (AFSPA) was enacted in 1958 as an emergency measure to allow the deployment of

21 South Asia Intelligence Review, *The Prevention of Terrorism Act, 2002*, <http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm>.

22 Human Rights Watch, "Back to the Future: India's 2008 Counterterrorism Laws," 2010, https://www.hrw.org/sites/default/files/reports/india0710webwcover_0.pdf.

23 Jude Howell, "Counter-Terrorism Policy Post-9/11," 127, 134.

24 U.S. State Department, "Human Rights Report: India," March 8, 2006, <https://www.state.gov/j/drl/rls/hrrpt/2005/61707.htm>.

25 *The Unlawful Activities (Prevention) Act, 2008*, http://mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/UAPA-1967.pdf.

26 Government of India Ministry of Home Affairs, *Banned Organizations*, <http://mha.nic.in/bo> Government of India Ministry of Home Affairs, *Banned Organizations*, <http://mha.nic.in/bo>

the army to counter a separatist movement in the northeastern Naga Hills. However, it has remained in force in several northeast states for five decades and in Jammu and Kashmir since 1990. The AFSPA grants the armed forces the power to shoot, to kill in security situations, to arrest without warrant, and to detain people without time limits. The law forbids the prosecution of soldiers without approval from the central government, which is rarely granted. This act has often been used against human rights defenders (HRDs) and organizations for the rights of marginalized people, that is, Dalits, Adivasis, and religious minorities. A 2012 report of the UN special rapporteur on the situation of HRDs indicated that they were often targeted by security and police forces under the pretext that they were Naxalites, terrorists, militants, insurgents, or antinationalists.²⁷

Further, states, at the regional level, can adopt acts to address situations in their respective jurisdiction. Following the Naxalite attacks in 2005,²⁸ the Chhattisgarh assembly, dominated by BJP, passed the state's Special Public Safety Act that widened the net of civil society groups that could be labeled as unlawful or engaging in terrorist activities.²⁹ The act defines "unlawful activities" as ones "which constitute a danger or menace to public order, peace and tranquility." It defines an unlawful organization as "any such organization, which is directly or indi-

rectly involved in committing any unlawful activity or the objective of which is to encourage or give assistance or assist or induce unlawful activity by any medium, means or otherwise."³⁰

Similarly, the Jammu and Kashmir Public Safety Act, which is also an administrative detention law, is criticized by the United Nations and human rights organizations for the lack of due process guarantees and for its discriminatory use against people protesting the government's actions.³¹ These acts contain vague and overbroad terms such as "security of the state" and "public order" that could provide authorities with a convenient justification to target human rights activists and unionists.³² Invoking the Jammu and Kashmir Public Safety Act, local authorities, for example, arrested Khurram Parvez, a prominent human rights defender, on "vague accusations of alleged "anti-India" activities, aimed at disrupting the public order."³³ In 2016, 400 individuals, mostly minors, were arrested in Jammu and Kashmir, India's only majority Muslim state, following protests and violent clashes that erupted after the killing of a leader of the armed group Hizbul Mujahideen.³⁴

National Security and Shrinking Civic Space

Rights to freedom of expression, association, and peaceful assembly are guaranteed in the Indian con-

27 United Nations, "Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya," A/HRC/19/55/Add.1, February 6, 2012, 6, <http://www.ohchr.org/Documents/Issues/Defenders/A-HRC-19-55-Add1.pdf>.

28 "General designation given to several Maoist-oriented and militant insurgent and separatist groups that have operated intermittently in India since the mid-1960s," noted in <https://www.britannica.com/topic/Naxalite>.

29 Chhattisgarh's Special Public Safety Act, 2005, https://cpjc.files.wordpress.com/2007/07/cspsa_english.pdf.

30 Ibid.

31 United Nations, "UN experts urge release of prominent human rights defender after month-long detention," October 19, 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20697&LangID=E>.

32 Cholpon Orozobekova, "India Uses Public Safety Act for Its Crackdown on Dissent," *The Diplomat*, October 20, 2016, <http://thediplomat.com/2016/10/india-uses-public-safety-act-for-its-crackdown-on-dissent/>. See also: Ajoy Ashirwad Mahaprasasta, "Activists Probing Encounter Killings in Bastar Sent to Prison Under Public Safety Act," *The Wire*, December 26, 2016, <https://thewire.in/89692/bastar-activists-public-safety-act/>.

33 United Nations, "UN experts urge release of prominent human rights defender after month-long detention."

34 Human Rights Watch, "India: Cease Wrongful Detentions in Jammu and Kashmir," October 15, 2016, <https://www.hrw.org/news/2016/10/15/india-cease-wrongful-detentions-jammu-and-kashmir>.

stitution. Article 19 (1) of the constitution stipulates that “[a]ll citizens shall have the right (a) to freedom of speech and expression; (b) to assemble peaceably also and without arms; (c) to form associations or unions [or co-operative societies]; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; [and] (g) to practice any profession, or to carry on any occupation, trade or business.”

Interaction between the union government and civil society actors has always been complex. On one hand, civil society actors are perceived as foreign agents—sentiments fueled by government officials; on the other hand, they are considered core partners to fill socioeconomic gaps, particularly in the field of service delivery.³⁵ Despite this ambivalent relationship, the Indian civil society scene is vibrant, encompassing social movements, trade unions, community-based organizations, and national and international nongovernmental organizations (INGOs). The mere fact that the fulfillment of basic needs and social justice was not addressed by political parties but by civil society organizations (CSOs) propelled hopes that civil society would serve as an alternative to the nonperforming state and an unresponsive party system. This has impacted how Indians perceive civil society actors.

After a strained relationship during BJP’s rein from 1998 to 2004, civil society regained its influence with the government and initiated rights-based policies in India during the days of the United Progressive Alliance (UPA) government. India’s civil society has played a crucial role in advancing legislation, like

the Right to Information Act, the National Rural Employment Guarantee Act, and the Forest Rights Act through advocacy with the National Advisory Council (NAC), and through strategic litigation in the Supreme Court.³⁶

However, former Prime Minister Manmohan Singh began to instate again a strained relationship with civil society, and begin the drumbeat, signaling the end of civil society-government engagement golden era. The rise of the BJP accelerated the process. In June 2014, the Intelligence Bureau submitted to Prime Minister Modi a confidential report—that was later leaked to the media—indicating the negative impact of certain foreign-funded NGOs on India’s development. It alleged that these groups lowered GDP growth by 2 to 3 percent.³⁷ The report defined development as a national security issue, invoking a strong state with powers to repress in the name of growth. This report shaped the relationship between the union government and civil society. Since Modi’s ascension, the government has adopted a plethora of legal and administrative measures to curtail freedoms that are essential to civic space. Civil society actors, labeled as threats to national security, disruptive, and agents of foreign powers,³⁸ face various forms of harassment and intimidation, including travel restrictions, operational barriers, arbitrary arrests, and targeted killings. These threats are based on unsubstantiated accusations, and are often motivated by nationalist sentiments.³⁹ “[A]ny space for dissent and the middle ground for civil society to function erodes very fast and human rights defenders often come under attack by both state and

35 Howell, “Counter-Terrorism Policy Post-9/11,” 127, 131.

36 Axel Harneit-Sievers, “Limited Freedom of Speech, Monitored NGOs: India’s Civil Society under Pressure,” Heinrich Böll Stiftung, November 7, 2016, <https://www.boell.de/en/2016/11/07/limited-freedom-speech-monitored-ngos-indias-civil-society-under-pressure>.

37 “Foreign-funded NGOs stalling development: IB report,” *The Times of India*, June 12, 2014, <https://timesofindia.indiatimes.com/india/Foreign-funded-NGOs-stalling-development-IB-report/articleshow/36411169.cms>.

38 CIVICUS, “Year in Review: Civil Society and the New Democratic Crisis,” 2017, <http://www.civicus.org/documents/reports-and-publications/SOCS/2017/year-in-review/new-democratic-crisis.pdf>.

39 Human Rights Watch, “India: Events of 2016,” *World Report 2017*, 2017, <https://www.hrw.org/world-report/2017/country-chapters/india>.

non-state actors. The human rights defenders are thus profiled, harassed, intimidated, ill-treated and subjected to hateful abuse.”⁴⁰

The killing of Gauri Lankesh, a prominent journalist and critic of Hindu nationalist militancy,⁴¹ and the 2016 arrest of the Jawaharlal Nehru University (JNU) Students’ Union President Kanhaiya Kumar who was charged with sedition for allegedly shouting “anti-India” slogans illustrate the forms of intimidation that civil society actors are subjected to.⁴² What is notable in India is the use of nonstate actors to troll, kill, harass, and intimidate civil society activists who are accused of being “antinational,” or perceived as threats to national security or national interests.⁴³ A number of incidents against dissenters, activists, and human rights defenders have been committed by “unidentified” persons.⁴⁴ Media outlets are also challenged by the government and its supporters, utilizing legal and administrative measures ranging from the withdrawal of government advertising to spurious tax raids, lawsuits on the basis of stringent rules, and harassment on social media.⁴⁵

The government curtails freedom of expression by invoking the various provisions of the Indian penal code that criminalize sedition and defamation, using an elastic interpretation of what could constitute a threat to

national security and public order. Section 124A of the code states that “[w]hoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be punished with life imprisonment.” Government officials and supporters have misused this provision to silence opposition. Mere criticism of state policy has been adequate reasoning for governments at different levels to act on a sedition charge.⁴⁶ The increase of sedition charges has prompted human rights activists to file a petition with the Supreme Court of India against the “misuse of sedition laws.”⁴⁷ The Supreme Court clearly indicated in its ruling that an act of sedition has to constitute an “incitement to violence or intention or tendency to create public disorder or cause disturbance of public peace.” It further stated that “[s]uppose somebody makes a strong criticism of the government . . . even a case of criminal defamation cannot be filed, let alone a case of sedition.”⁴⁸

The union government has increased the level of scrutiny over CSOs’ finances using the excuse of countering the finance of terrorism, and limiting the intervention of “foreign hands” in India’s domestic politics. It has used tactics that often impact the survival of CSOs. The pre-

40 CIVICUS, “Strict legal restrictions on foreign funding hit India’s NGOs,” <http://www.civicus.org/index.php/media-resources/news/interviews/2698-strict-legal-restrictions-on-foreign-funding-hit-india-s-ngos>.

41 Editorial Board, “The Murder of an Indian Journalist,” *New York Times*, September 7, 2017, <https://www.nytimes.com/2017/09/07/opinion/murder-indian-journalist.html>.

42 Human Rights Watch, “Stifling Dissent: The Criminalization of Peaceful Expression in India,” May 24, 2016, <https://www.hrw.org/report/2016/05/24/stifling-dissent/criminalization-peaceful-expression-india>.

43 Mathew Jacob, “No middle ground: the risks of being a human rights defender in India,” *Open Democracy*, May 31, 2016, <https://www.opendemocracy.net/openglobalrights/mathew-jacob/no-middle-ground-risks-of-being-human-rights-defender-in-india>.

44 CIVICUS and Human Rights Defenders Alert, “Joint Submission to India’s UN Universal Periodic Review,” October 6, 2016, <http://www.civicus.org/images/CIVICUS%20Joint%20India%20UPR%20Submission.pdf>.

45 “The elephant in its labyrinth.”

46 Examples of these cases include: Aseem Trivedi (a cartoonist who stood against corruption), SP Udayakumar (for anti-nuclear activism), folk-singer Kovan (against state-run liquor stores).

47 J. Venkatesan, “Supreme Court Warns Police That Criticism of Government Is Not Sedition,” *The Wire*, September 5, 2016, <https://thewire.in/64281/criticism-of-government-does-not-constitute-sedition-says-supreme-court/>.

48 Utkarsh Anand, “Strong criticism of govt isn’t defamatory or seditious, says SC, underlines 1962 verdict,” *The Indian Express*, September 6, 2016, <http://indianexpress.com/article/india/india-news-india/strong-sc-reminder-on-sedition-look-for-inciting-violence-not-criticism-of-govt/>.

vious Indian governments used the Foreign Contribution (Regulatory) Act (FCRA) in order to restrict the work of civil society. FCRA was first adopted in 1976 to prevent political opponents from receiving foreign funding during the state of emergency. The law regulates foreign funds to Indian NGOs, subjects them to the control of India's Ministry of Home Affairs, and bars activities of a "political nature"—a category that is broadly applied at the discretion of executive authorities. This law was never repealed and has since formed the framework for regulating all foreign funding of Indian CSOs.

In 2010, FCRA was revised by the Congress Party government to become more stringent as a tool to combat the financing of terrorism and money laundering.⁴⁹ However, the amendments went far beyond what is required for this purpose. It prohibited political parties, the media, and organizations "of a political nature" from receiving foreign contributions. Under the expanded law, social, religious, and educational organizations with foreign donors are required to obtain a permit and cannot receive funds that could be used for political or "antinational" activities. These organizations are obligated to renew their registration every five years. The restrictions on foreign funding are a handy weap-

on that can be employed by the state, with great discretion, against individuals and organizations opposing government policies.⁵⁰ Criticizing the illegality of FCRA, the former UN special rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, indicated that "[r]estrictions on the right to freedom of association based on national security concerns must refer to the specific risks posed by the association; it is not enough for the State to generally refer to the security situation in the specific area."⁵¹

In spite of the criticism, from 2011 to the end of 2017, 18,867 organizations had lost their FCRA registration.⁵² This figure includes a large number whose license was not renewed in 2015 due to delays in applying or processing. While exact data is not available, it is believed that between 50 and 100 NGOs⁵³ were denied licenses for their antinational or antinational security activities.⁵⁴ There is a general consensus that organizations critical of government's policies were the target of the FCRA regulations.⁵⁵ India's National Human Rights Commission (NHRC) issued a notice in November 2016, in which it held that the FCRA's license nonrenewal was neither legal nor objective and that it impinged upon the rights of human rights defenders with

49 Erica Bornstein and Aradhana Sharma, "The righteous and the rightful: The technomoral politics of NGOs, social movements, and the state in India," *American Ethnologist* 43, issue 1 (February 14, 2016): 76–90, <http://onlinelibrary.wiley.com/doi/10.1111/amet.12264/full>.

50 Rohini Mohan, "Narendra Modi's Crackdown on Civil Society in India," *New York Times*, January 9, 2017, <https://www.nytimes.com/2017/01/09/opinion/narendra-modis-crackdown-on-civil-society-in-india.html>.

51 UN special rapporteur on the rights to freedom of peaceful assembly and of association Maina Kiai, "Analysis on International Law, Standards and Principles Applicable to the Foreign Contributions Regulation Act 2010 and Foreign Contributions Regulation Rules 2011," UN Office of the High Commissioner for Human Rights, April 20, 2016, <http://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteIndia.pdf>.

52 Of these, 14,397 cancelations occurred between 2014 and 2017, under the NDA government. See the Ministry of Home Affairs, FCRA Registration Cancellation list, https://fcraonline.nic.in/fc8_cancel_query.aspx.

53 Information received from an anonymous source, November 2017.

54 "No FCRA registration renewal to 25 NGOs for 'antinational' acts," *The Tribune*, November 4, 2016, <http://www.tribuneindia.com/news/nation/no-fcra-registration-renewal-to-25-ngos-for-antinational-acts/318751.html>.

55 Jonas Wolff and Annika Poppe, *From Closing Space to Contested Spaces*, Peace Research Institute Frankfurt, 2015, https://www.hsfk.de/fileadmin/HSFK/hsfk_downloads/prif137.pdf.

regard to access to funding.⁵⁶ Upon the rejection of its license renewal under FCRA, the Center for Promotion of Social Concerns (CPSC) filed a complaint before the Delhi High Court. In response, the Ministry of Home Affairs filed a counter response, accusing CPSC executive director Henri Tiphagne of using “foreign contributions” to “project the image of India in a poor light” by providing information to the United Nations human rights protection mechanisms. Another example is when the government revoked the license of the Navsarjan Trust, a Dalits rights organization, on the grounds of “working against public interest.”⁵⁷

Greenpeace International, Cordaid, Amnesty International, and Action Aid are among the international organizations operating in India that have come under the scrutiny by the Intelligence Bureau, which accused them of “using people-centric issues to create an environment which lends itself to stalling development projects,”⁵⁸ and of being a threat to national security.⁵⁹ Invoking FCRA, the Intelligence Bureau “advised the government to cancel the registration of Greenpeace, re-assess its tax compliance and place all its international affiliates on a home ministry watch list.”⁶⁰ The Ford Foundation’s India office was included on the watch list in

2015. It was removed in 2016 after it complied with the government’s requirements and registered under the Foreign Exchange Management Act (FEMA) of 1999.⁶¹

Despite these stringent regulations, India received a low compliance rating regarding Recommendation 8 in the Financial Action Task Force (FATF) Mutual Evaluation review.⁶² FATF noted that Indian authorities consider the nonprofit sector low risk, and that they are only tracking those that receive foreign funding. Alleged cases of money laundering by the private sector were reported but were not investigated by the authorities. A risk-based approach would require, per FATF recommendations, that authorities prioritize investigation of those likely involved in money laundering and financing of terrorism, not just recipients of foreign funding. Following international pressure and to ensure compliance with FATF, India introduced amendments to the Prevention of Money Laundering Act (PMLA). This act placed nonprofit organizations under higher scrutiny by banks and financial institutions for large money transactions and suspicious transactions.⁶³ Such an act has provided another example of how compliance with FATF recommendations is used as a justification to adopt restrictive laws that

56 National Human Rights Commission, “NHRC issues notice to the Union Home Ministry on allegations of draconian approach over renewal of FCRA license to NGOs of Human Rights Defenders,” November 16, 2016, <http://nhrc.nic.in/dispatchive.asp?fno=34140>.

57 Rohini Mohan, “Narendra Modi’s Crackdown on Civil Society in India,” *New York Times*, January 9, 2017, <https://www.nytimes.com/2017/01/09/opinion/narendra-modis-crackdown-on-civil-society-in-india.html>.

58 India Intelligence Bureau (Ministry of Home Affairs), “Concerted Efforts by Select Foreign Funded NGOs to ‘Take Down’ Indian Development Projects,” 2014, <https://www.scribd.com/document/229493571/IB-Report-NGO>.

59 Ibid.

60 Ibid.

61 CIVICUS and Human Rights Defenders Alert, “Joint Submission.”

62 Financial Action Task Force, *Mutual Evaluation of India: 8th Follow-up Report and Progress Report on Action Plan*, (Paris, France: FATF, 2013), http://www.fatf-gafi.org/media/fatf/documents/reports/mer/India_FUR8_2013.pdf.

63 Ben Hayes, *The impact of international counter-terrorism on civil society organizations: Understanding the role of the Financial Action Task Force*, Bread for the World, April 2017, https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis_68_The_impact_of_international_counterterrorism_on_CSOs.pdf. Ben Hayes, *The impact of international counter-terrorism on civil society organizations: Understanding the role of the Financial Action Task Force*, Bread for the World, April 2017, https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis_68_The_impact_of_international_counterterrorism_on_CSOs.pdf.

provide the executive branch with “a wide discretion in deciding whether CSOs can be established and/or allowed to continue operating.”⁶⁴

Countering Terrorism and Shrinking Civic Space

The security picture varies considerably across regions, which in turn impacts the tactics used by the government to manage CSOs. In 2016, India ranked seven among the countries most affected by terrorism as indicated in the Global Terrorism Index.⁶⁵ Despite its scores showing improvement from previous years, terrorism continues to be a threat, particularly in conflict prone areas such as the State of Jammu and Kashmir, the central region, and the Northeastern region.⁶⁶ Kerala poses rising fear, especially after the Islamic State urged its supporters to launch lone wolf attacks in the region.⁶⁷ It is difficult to establish a causal link between shrinking civic space and the increase of violent extremism in the Indian context. One, however, cannot deny that people in terrorism-prone regions feel that they are discriminated against. Communities in these regions are often labeled “terrorists,” and right-wing politicians have accused those in Muslim communities of being loyal to Pakistan instead of India.⁶⁸ The Indian Ministry of Home Affairs confirmed these accusations in its annual report, indicating

that terrorist incidents in the State of Jammu and Kashmir in 2016 were “sponsored and supported from across the border, for more than two and a half decades.”⁶⁹

This narrative has subjected a number of CSOs and activists working in these regions or defending the rights of these communities to all forms of restrictive measures. Under the pretext of counterterrorism, these measures are implemented in a selective, discriminatory manner, including arresting individuals; denying them access to necessary resources and locations; and subjecting them to increased surveillance. According to Freedom House’s *Freedom in the World* report, “threats of government reprisal, including the detention of journalists under the Public Safety Act and the withdrawal of official advertising from publications, continue to intimidate the media [in Jammu and Kashmir]. Journalists also face threats from militant groups, and authorities sometimes impose internet blackouts in an attempt to prevent unrest.”⁷⁰ Invoking the Jammu and Kashmir Public Safety Act, authorities further monitored the research produced at Kashmiri universities.⁷¹ In 2015, Amnesty International faced charges of sedition following the release of its report examining the situation in Kashmir and criticizing the government for instating a culture of impunity among

64 Ibid, 21.

65 Institute for Economics and Peace, “Global Terrorism Index 2016,” <http://economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf>.

66 Ibid.

67 Bharti Jain and M. P. Prashanth, “Islamic State urges lone-wolf attacks on Kumbh, Kerala fest,” *Times of India*, November 16, 2017, <https://timesofindia.indiatimes.com/india/islamic-state-urges-lone-wolf-attacks-on-kumbh-kerala-fest/article-show/61665434.cms>.

68 Prime Minister’s High-Level Committee Cabinet Secretary, *Social, Economic and Educational Status of the Muslim Community of India*, Government of India, November 2006, http://mhrd.gov.in/sites/upload_files/mhrd/files/sachar_comm.pdf.

69 Ministry of Home Affairs, *Annual Report 2016-2017*, August 2017, http://mha.nic.in/sites/upload_files/mha/files/annual_report_18082017.pdf.

70 Freedom House, “Indian Kashmir,” *Freedom in the World*, 2016, <https://freedomhouse.org/report/freedom-world/2016/indian-kashmir>.

71 Ibid.

security forces that committed human rights violations in Jammu and Kashmir.⁷²

CSOs such as the People's Union for Democratic Rights (PUDR) and Coordination of Democratic Rights Organizations (CDRO) raised concerns regarding violations committed in the name of countering terrorism and nationalism in the region of Jammu and Kashmir. CDRO, in its 2016 report, calling for solidarity with Kashmiris, noted that “[a]ll the sufferings of the past have been aggravated by coming to power of RSS-BJP in India as the ruling party. [The Hindu nationalist group] has unleashed its vicious campaign and targeted Dalits and Muslims and everyone else who challenges their politics.”⁷³

Interviewees explain that the government's crackdown has not been felt evenly across the sector.⁷⁴ The government continues, for example, to provide funds to noncontroversial organizations or to those working on service delivery.⁷⁵ This capriciousness has divided the sector and prevented collective action. Despite the challenge to solidarity, some CSOs have pushed back against restrictive measures, including by protesting, utilizing legal processes and taking cases to the Supreme Court, and raising funds locally.

Conclusion

The closing of civic space in India is a multifaceted problem. Civic space has been adversely impacted by a combination of the broad concept of national security influenced by the nationalist rhetoric and the promulgation of vaguely worded counterterrorism legislation. This has given Indian authorities wide discretionary powers to target CSOs and silence activists and dissenters. The current discourse has created an intolerant public sphere, where organizations working on human rights and holding the government accountable are construed as a serious threat to national interest.⁷⁶ The union government has managed to garner sympathy among certain segments of society and polarize Indians along national versus antinational lines. The government ignores the fact that by alienating civil society actors, it harms India's security and hinders economic development.⁷⁷

Despite the unrelenting, negative campaign against civil society, 43 percent of Indians believe that human rights organizations are protecting the rights of the people in India, and two-thirds believe that they have a positive influence on how things are in the country.⁷⁸ The society still relies on CSOs to uphold human rights principles and standards, the

72 Poulomi Banerjee, “Space for civil society and dissent in India is shrinking: Amnesty India chief,” *Hindustan Times*, August 18, 2016, <http://www.hindustantimes.com/india-news/space-for-civil-society-and-dissent-in-india-is-shrinking-amnesty-india-chief/story-99QW7jXxBPH6envntfs0RO.html>.

73 Coordination of Democratic Rights Organizations, *Stand in Solidarity with the People's Struggle in Kashmir*, October 25, 2016, http://pudr.org/sites/default/files/pdfs/kashmir_parcha_eng.cdرو_.pdf.

74 Lana Baydas, Interviews with experts (who preferred to be anonymous) were conducted on October 3, 2017, October 11, 2017, October 16, 2017, November 6, 2017, and January 25, 2017.

75 Nana Darkoa Sekyiamah, Kamardip Singh, and Angelika Arutyunova, “Shrinking Civil Spaces: Backlash or Push Back?,” *Association for Women's Rights in Development*, August 12, 2015, <https://www.awid.org/news-and-analysis/shrinking-civil-spaces-backlash-or-push-back>.

76 CIVICUS, “Strict legal restrictions on foreign funding hit India's NGOs,” <http://www.civicus.org/index.php/media-resources/news/interviews/2698-strict-legal-restrictions-on-foreign-funding-hit-india-s-ngos>.

77 Mandeep Tiwana, “Squeezing civil society hurts India's economy and democracy,” *Open Democracy*, August 23, 2017, <https://www.opendemocracy.net/openindia/mandeep-s-tiwana/squeezing-civil-society-hurts-india-s-economy-and-democracy>.

78 Richard Wike and Caldwell Bishop, “Public Attitudes toward Human Rights Organizations: The Case of India, Indonesia, Kenya and Mexico,” *PEW Research Center*, October 2017, <http://www.pewglobal.org/2017/10/03/attitudes-toward-human-rights-organizations-india-indonesia-kenya-mexico/>.

rule of law, and good governance, as well as provide much-needed services.

Recommendations

To the Indian government

- Amend counterterrorism and anti-money laundering laws to be consistent with the principle of legality, reasonable, necessary, and proportionate, as required by international law, and called for by the United Nations and the special rapporteur on protecting human rights while countering terrorism.
- Introduce specific language to FCRA and eliminate broad and vague terms such as “political nature,” “scientific or economic interest of the State,” or “public interest” in order to eliminate any form of its abuse.
- Establish an independent review mechanism on the implementation of UAPA. It will provide the platform for regular review of UAPA’s implementation and its compliance with international standards.

To civil society actors

- Document measures and practices that violate the rights to freedom of expression, association, and peaceful assembly.
- Have a collective and non-discriminating voice on actions taken by the union and state governments as well as nonstate actors that infringe on the enjoyment of the rights to freedom of expression, association, and peaceful assembly.
- Utilize the Supreme Court by undertaking strategic litigation.
- Explore alternative funding models to ensure resiliency in the face of growing restrictions.

To the international community

- Provide strong support to India’s civil society through engaging with various institutions within the government of India, and providing concerted and consistent messages to align civic space with security.
- Link foreign assistance to progress on protecting civil society space and to training on rule of law matters that should be contingent upon open access to monitors.

CONCLUSION AND RECOMMENDATIONS

Lana Baydas and Lauren Mooney

According to the CIVICUS Monitor, just 3 percent of the world's population lives in countries with open civic space, while almost 1 in 10 people lives in a country with closed civic space and over a third of people live in countries with repressed civic space.¹ While reasoning for the restriction of civic space varies among countries, common threads are to consolidate power and to silence critical and dissenting voices. Fear of foreign interference and of civil society, especially one that poses a serious challenge to the government on “politically” or “developmentally” sensitive issues, are major factors that influence whether governments impose restrictive measures on civic space.

The heightened international focus on combating terrorism has exacerbated restrictions on civic space. Governments were quick in enacting a raft of legislation and measures that curtail civil and political freedoms, particularly in the aftermath of September 11, 2001.² Although there is no

scarcity of tactics to close civic space, it is evident that some governments have intentionally used the excuse of terrorism to roll back civic freedoms and human rights more broadly. In others, governments' restrictive measures on civic space and on freedoms have been “unintended byproducts of well-intentioned security packages,”³ or have simply responded to the threat of terrorism and to the global pressure to counter terrorism.⁴

As demonstrated by the case studies in this report, democratic and authoritarian governments often justify restrictions on civil society as necessary to maintain national security and public order. However, there is scant evidence that legal restrictions on civil society lead to the reduction of terrorist attacks.⁵ Based on the results of both correlational and causal multivariate statistical models on data from 148 countries from 2009 to 2016, a recent study failed to find a causal link between increased civil society restrictions and reduced acts of terror. However, the study did find

1 CIVICUS Monitor, “Findings,” April 2017, <https://monitor.civicus.org/globalfindings0417/>.

2 CSIS, “Database of Legislation on the Definition of Terrorism, 2017,” <https://www.csis.org/programs/international-consortium-closing-civic-space-icon/aligning-security-and-civic-space-0>.

3 World Economic Forum, “The Global Risks Report 2017,” 12th Edition, January 11, 2017, 29, http://www3.weforum.org/docs/GRR17_Report_web.pdf.

4 Ross Clarke and Araddhya Mehhta, “5 trends that explain why civil society space is under assault around the world,” Oxfam, August 25, 2015, <https://oxfamblogs.org/fp2p/5-trends-that-explain-why-civil-society-space-is-under-assault-around-the-world/>.

5 Amanda Murdie, *Do Civil Society Restrictions Reduce Terrorism?*, CSIS, forthcoming.

that torture and other physical integrity violations by government agents fueled more terrorist attacks. It is well recognized that human rights violations and repressing civil and political freedoms “could undermine social, political and economic stability and increase the risk of geopolitical and social conflict [,]”⁶ and make the recourse to terrorism more likely. Policymakers agree on the important role that civil society plays in fighting terrorism and countering violent extremism, but uncertainty and unwillingness still exist on how to strike the right balance between security and civic space.

The case studies brought light to the following trends:

States have purposefully or unknowingly conflated terrorism with broader (perceived or alleged) national security threats. The blurriness between these two threats is due to the lack of an internationally agreed-upon definition of terrorism and countries’ willful distortion of threats to serve their political agendas.

There are several distinctive elements that impact a country’s approach to security as it intersects with civil society. These two categories can be mixed and matched depending on whether a country exhibits high or low characteristics in either grouping. They are as follows:

- **Political will:** States have varying intentions that drive their counterterrorism approaches and relationship with civil society. At the low end of the spectrum, these governments blatantly use counterterrorism measures to crack down on civil society. At the other end exist countries that are more committed to human rights and civil liberties.
- **Strategy and capacity:** Levels of strategy and capacity as well differ from country to country. At the low end of the spectrum are states that lack the strategy, implementation, or enforcement capacity to execute a counter-

terrorism strategy that protects human rights and civic space. This may be due to weak institutions or rule of law. On the other end are countries that have high governmental capacity and have adopted a human rights-based approach to countering terrorism.

There is no “silver bullet” approach that effectively incorporates human rights and civil society concerns into national security and counterterrorism strategies. Strategies can and should differ in each context due to the varying nature of the terrorist threat, political will, and government and civil society capacity.

Each case study produced its own respective conclusions that enlighten and inform analysis of other contexts:

- Due to the imminent nature of the terrorist threat in Australia, the broad expansion of the government’s counterterrorism powers has been met with strong public support. However, this coincides with an infringement upon Australia’s human rights obligations under international law. It may very well lead to the erosion of democratic institutions and norms and have a chilling effect on civil society, if these authorities are abused by the current government or future leaders with authoritarian tendencies.
- Bahrain’s counterterrorism policies are in direct opposition to international laws and norms protecting human rights. The result is a closed civic space. Yet, if the international community is interested in Bahrain making democratic reforms, an empowered and revitalized civil society is crucial.
- Burkina Faso is at a critical juncture in its fight against terrorism, as terrorist attacks are on the rise and outstrip the government’s

6 World Economic Forum, “The Global Risks Report 2017.”

ability to respond. If the government is to design and execute a successful counterterrorism strategy, that respects human rights, it must partner with a strong and united civil society.

- Hungary’s far-reaching campaign against civil society includes many components, including the expansion of counterterrorism powers and the conflation of threats to national security with migration. As the country creeps toward authoritarianism,

the voice of Hungarian civil society should be amplified now more than ever.

- In India, rhetoric surrounding nationalism, national security, and terrorism has created an intolerant space for civil society, further pushing activists to the margins. However, the public still trusts civil society to uphold human rights and keep various actors accountable.

The following set of recommendations proposes a comprehensive process that governments, civil society, and the international community should undertake to change political will and find the way. As the case studies found, security situations in individual country contexts are multifaceted and intricate. As such, these recommendations are not meant to be a panacea but must instead be tailored per each context.

They are grouped under the following categories:

- **High Will-High Way:** The set of recommendations under this category will be applicable to a context in which the government has the political will and the necessary capacities to align security with civic space.
- **High Will-Low Way:** This category represents contexts in which the government has the political will but lacks the necessary capacities and resources to strike a balance between countering terrorism and protecting civic space.
- **Low Will-High Way:** The governments in this category have the needed resources and capacities, but lack the political will to design or implement a strategy that protects civic space while fighting terrorism.
- **Low Will-Low Way:** These recommendations target governments that have neither the political will nor the necessary resources to align counterterrorism approaches with civic space.

To governments

- ● ● ● **Undertake Legal Reform.** Governments should undertake efforts to review domestic counterterrorism legislation to ensure that the definitions of terrorist acts are narrowly crafted, covering only conduct that is “genuinely of a terrorist nature,” as set out by the UN special rapporteur on human rights and counterterrorism.⁷ With that, governments should assess all national laws (counterterrorism laws, media laws, NGO laws, and assembly laws) to ensure that they conform with international human rights obligations and principles.

⁷ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, “Ten Areas of Best Practices in Countering Terrorism, (A/HRC/16/51),” Paragraph 26, 2010, United Nations, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/178/98/PDF/G1017898.pdf?OpenElement>.

● High Will-High Way ● High Will-Low Way ● Low Will-High Way ● Low Will-Low Way

- Countries should use Australia’s precise definition as an example, as it clearly stipulates what a terrorist act is not: “a terrorist act does not include engaging in advocacy, protest, dissent, or industrial action where a person does not have the intention to urge force or violence or cause harm to others.”
- ● ○ ○ *Establish a National Independent Review Mechanism.* Governments should establish independent mechanisms for the regular review of the operation of national counterterrorism laws and practices and their compliance with international standards.⁸ These mechanisms should ensure the participation of representatives from security, judiciary, and civil society sectors.
- ● ○ ○ *Build and deepen partnerships with civil society.* When drafting national counterterrorism legislation, revising existing legislation, or developing counterterrorism strategy, governments should always solicit input from a wide range of civil society groups and actors.
- ● ○ ○ *Enhance coordination between countries.* This is to exchange knowledge and learning among states on aligning security and human rights.

To the international community

- ● ● ● *Link security assistance with civic space.⁹*
- ○ ● ●
 - Condition weapons and arms sales with open civic space and human rights protection. Establish a comprehensive framework that incorporates the assessment of human rights violations and civil society restrictions that in turn affects the amount of security-sector assistance provided. Withholding arms sales should not only be linked with gross human rights violations, but should also include countries that may commit human rights and civil society abuses in the course of their counterterrorism activities. Countries’ counterterrorism activities should be consistently monitored. The text of the legislation putting this initiative in place should be specific and reasonable, with a low threshold for human rights violations and civil society restrictions.
 - The U.S. government has passed a series of laws, including the Leahy laws, that prohibit or condition security assistance in contexts in which human rights violations have been committed. These violations need not be gross, but instead should show systematic tendencies that must be curbed. Within the breakdown of allocations for security assistance, some funds may be allotted for gender and human rights education, as is the case in Afghanistan.¹⁰
- ● ● ● • Partner with local civil society organizations to incorporate a greater focus on democracy, governance, and rule of law in security assistance programming. Civil society organizations

9 See more at Melissa G. Dalton, *Oversight and Accountability in U.S. Security Sector Assistance*, CSIS, February 2018, <https://www.csis.org/analysis/oversight-and-accountability-us-security-sector-assistance>; and Daniel Mahanty and Annie Shiel, *With Great Power: Modifying US Arm Sales to Reduce Civilian Harm*, Center for Civilians in Conflict, January 2018, <https://civiliansinconflict.org/publications/research/with-great-power/>.

10 Thomas N. Williams Jr., “FY2017 Security Cooperation/Assistance Legislation Recap,” Defense Institute of Security Cooperation Studies, http://www.discs.dscamilitary.com/documents/articles_of_interest/FY17_SC_Legislation_Recap_Final.pdf.

● High Will-High Way ● High Will-Low Way ● Low Will-High Way ● Low Will-Low Way

should also play an integral role in program design and evaluation.¹¹ Coordination between civil society partners and local and national security forces should be strengthened.

- • Provide training on the development and design of counterterrorism strategies that put human rights at the center.
- *Incentivize partners' governments to protect human rights and civic space.*
 - Link economic aid, and trade with the protection of human rights and civic space. The private sector has a vested interest in open civic space, as it creates a more reliable and conducive environment for business activity. This could include drafting trade agreements that include sections safeguarding human rights and civil society.¹²
 - Provide grants to further strengthen government institutions, including the defense and security sector.
- *Put an embargo on key exports, such as arms or technology, in the case of blatant human rights violations.* Allies should also pressure governments through economic and diplomatic sanctions.
- *Enhance public support for civil society,* especially in those countries in which it is restricted. This should be based on consultation with civil society organizations, and on a clear assessment of their needs and of appropriate approaches for intervention. This may include meeting with and highlighting civil society leaders during public speeches and international visits.

To civil society actors

- *Document measures and practices that violate human rights and restrict civil society.* Such documentation must be impartial and detailed to accurately reflect the situation on the ground to the international community.
- *Build networks and coalitions of diverse actors.* Civil society actors must build effective partnerships with stakeholders outside of their typical network. This may include the private sector, academia, donors, the public sector, and local constituencies. The network will serve as a bulwark and resource during tumultuous times.

11 Maria J. Stephan, "Responding to the Global Threat of Closing Civic Space: Policy Options," testimony before Tom Lantos Human Rights Commission, March 21, 2017, <https://www.usip.org/publications/2017/03/responding-global-threat-closing-civic-space-policy-options>.

12 Ibid.

The following set of recommendations is addressed to increase coordination and strengthen review mechanisms at the international level.

To civil society actors

- *Use the space offered by multilateral organizations effectively.* CSOs must band together in order to present a collective, unified voice at public forums. In advance of these meetings, CSOs must find platforms to engage and coordinate with each other.

To multilateral organizations and bodies

- *Consult with civil society representatives on global measures and strategies to combat terrorism.* This requires the revision of the Economic and Social Council (ECOSOC) NGO Committee's civil society accreditation process to ensure CSOs' access and participation in this dialogue.
- *Harmonize strategy and review processes.* Current transnational and national security strategies are unique to each context. Multilateral organizations have the opportunity to bring countries together to synchronize and review these strategies, highlight areas for cooperation, and exchange experiences on striking the right balance between countering terrorism and protecting human rights.
- *Include agenda items that focus on civil society issues in high-level meetings such as the World Economic Forum, and allow public consultations by CSOs in such forums.*

For the UN Counter-Terrorism Implementation Task Force

- Establish a legal review mechanism that would conduct a regular review of countries' counterterrorism laws to ensure consistency with their international human rights obligations, including freedoms of association, assembly, and expression. This should follow a model similar to the Universal Periodic Review.

For the Counter-Terrorism Committee Executive Directorate

- Establish an internationally agreed-upon definition for terrorism. Using the legal review mechanism, oversee the revision of national legislation to ensure that new laws and approaches reflect the agreed-upon definition.

ABOUT THE EDITORS AND AUTHORS

Lana Baydas is a senior fellow with the CSIS Human Rights Initiative. Prior to joining CSIS, she worked as both an academic and a practitioner in the fields of human rights, gender equality, development, and international humanitarian law for the last 15 years, holding posts with the United Nations, Crisis Action, the International Committee of the Red Cross, and the American University in Cairo. Dr. Baydas has worked intensively in the Middle East and North Africa (MENA) region in programs promoting gender equality and protecting human rights through the rule of law, good governance, and gender mainstreaming in public institutions at the national and regional levels. She has authored/coauthored multiple publications on human rights in MENA, and she has undertaken a number of field assignments addressing human rights and gender-related issues, working in Darfur, Sudan, Syria, Egypt, and Lebanon. She holds a Ph.D. and LL.M. in public international law from the University of Glasgow in Scotland and a B.A. in political science from the American University of Beirut in Lebanon.

Shannon N. Green is the senior director of programs at the Center for Civilians in Conflict. She has deep experience in international development, human rights, and violence prevention with 15 years in the U.S. government, academia, and the nonprofit sector. Ms. Green was previously the

director and senior fellow of the Human Rights Initiative at CSIS, where her research focused on addressing threats to democratic institutions and norms; enhancing justice and accountability in conflict and post-conflict environments; and improving security forces' respect for human rights. Prior to joining CSIS, Ms. Green was the senior director for global engagement on the U.S. National Security Council. In that role, she developed and coordinated policies and initiatives to deepen and broaden U.S. engagement with critical populations overseas. For nearly a decade, Ms. Green led strategic planning, program design, and policy engagement at the U.S. Agency for International Development (USAID) in the Center of Excellence on Democracy, Human Rights, and Governance. Ms. Green received her B.A. in political science and history from the University of Georgia and her M.A. in international peace and conflict resolution from American University.

Alma Abdul-Hadi Jadallah is a conflict prevention and mitigation specialist. She is founder, president, and managing director of Kommon Denominator, Inc., an organization committed to leveraging social science research in support of the peaceful resolution of conflict. She serves on the UN and EU-ERMES Roster of Experts. Dr. Abdul-Hadi Jadallah also serves as the Quaker International Affairs Representative to the Middle

East for the American Friends Service Committee (AFSC) since November 2016. She has also worked with the UN Special Envoy's Office on the engagement of civil society and women in the negotiation process in Syria. From 2014 to 2015, she served as the coordinator and regional expert on the Panel of Experts on Yemen pursuant to resolution 2140 (2014), Department of Political Affairs, and previously as a UN expert to the National Dialogue Conference in Yemen with the Office of the Special Advisor to the Secretary General, Jamal Ben Omar. She teaches graduate-level courses in the field of conflict analysis and resolution at George Mason University.

Sohini Chatterjee provides strategic advice to foundations, think tanks, and governments on global human rights and security issues. She served as an appointee in the Obama administration, working in the Policy Planning Bureau at USAID. She led multiple White House and Department of State initiatives and directives on global development, focused on mass atrocities and conflict, transnational organized crime, and strengthening civil society and the rule of law. Prior to that, she worked for the World Bank's Development Prospects Group on the economic and political effects of migration and long-term scenario planning. Previously, she was an attorney at Steptoe & Johnson LLP, worked on the first ever international trade case before the U.S. Supreme Court, and provided legal and strategic advice to various governments and companies on a wide array of international legal matters. She has consulted on international human rights and rule of law issues for Humanity United, the U.S. Department of State, Chemonics International, the Asia Foundation, the European Commission, Transparency International, Rand Corporation, and the World Bank. Ms. Chatterjee holds a law degree from Duke University, a master's degree in international relations and international eco-

nomics from the School of Advanced International Studies at Johns Hopkins University, and a B.A. from Columbia University.

Péter Krekó is a senior associate at the Political Capital Institute, a think tank in Budapest, and was previously a Fulbright visiting professor at the Central Eurasian Studies Department at Indiana University. He holds a Ph.D. in psychology and teaches courses in political science and social and political psychology. In Budapest, he served as an associate professor at the Eötvös Loránd University of Sciences. Dr. Krekó wrote his thesis on the social psychology of political transitions. He is an expert in the EU Radicalization Awareness Network Centre of Excellence and a presidency member of the Hungarian Political Science Association. His main research interests are populism and radicalism in Europe and Russian soft power influence in Europe. He has conducted several research projects dealing with the state of NGOs and think tanks in Hungary.

Lauren Mooney is the program manager and research associate for the CSIS Human Rights Initiative. Previously, she was the program coordinator for Executive Education and the Abshire-Inamori Leadership Academy at CSIS, where she provided support for the planning and implementation of leadership training and educational programs. Prior to joining CSIS, Ms. Mooney worked as executive program assistant at PartnersGlobal, an international development nonprofit that focuses on democracy and governance, citizen security, and civil society strengthening. In that role, she spearheaded the organization's strategic initiatives, including organizational development projects, communications, and operations. As an undergraduate, she interned for Meridian International Center and Atlas Corps, worked at the University of Dayton's Intensive English Program, and studied abroad for a semester in Lima,

Peru. She graduated from the University of Dayton with a B.A. in international studies and a minor in Spanish. Her research interests include democracy resilience, organizational development and sustainability, and the intersection of human rights and security.

Julie N. Snyder is a research and advocacy associate with the Center for Civilians in Conflict's U.S. Program. Ms. Snyder was a program manager and research associate with the Human Rights Initiative at CSIS, with a primary focus on the human rights and security nexus, protections and rights for LGBTI persons, and countering all forms of extremism. A graduate of the College of William & Mary, her research interests include conflict and human rights in postcolonial Francophone states; embedding human rights into U.S. national security policy; and the rehabilitation and reintegration of former extremists. She is an adjunct fellow with CSIS.

COVER PHOTO LUIS LIWANAG/AFP/GETTY IMAGES

CSIS | CENTER FOR STRATEGIC &
INTERNATIONAL STUDIES

1616 Rhode Island Avenue NW

Washington, DC 20036

202 887 0200 | www.csis.org