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Joint Submission by

The Foundation for Law and International Affairs (FLIA)

and

The Coalition for Peace and Ethics (CPE) on the

Call for inputs - Report of High Commissioner –
"Civil society space in multilateral institutions"





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Joint Submission FLIA and CPE May 1, 2017

May 1, 2017

Via email: BSmith@ohchr.org

BRADFORD SMITH
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Palais des Nations
CH-1211 Geneva 10, Switzerland

Dear Bradford Smith,

The Foundation for Law and International Affairs (FLIA) and the Coalition for Peace and Ethics (CPE) welcomed the invitation, from the Office of the High Commissioner for Human Rights, for contributions from national human rights institutions, civil society and other stakeholders for the forthcoming report of the High Commissioner for Human Rights, pursuant to Human Rights Council resolution 32/31 on civil society space. In connection therewith, FLIA and CPE hereby submit the following contribution.

In its Resolution 32/21 on Civil Society Space, adopted on 1 July 2016, in its paragraph 18 the Human Rights Council requested the High Commissioner to:

> prepare a report compiling information on the procedures and practices in respect of civil society involvement with regional and international organizations, including United Nations bodies, agencies, funds and programmes, and the contribution of civil society to their work and challenges and best practices, and in that regard to continue to engage with and seek input from those organizations and entities, as well as the views of States, national human rights institutions, civil society and other stakeholders, and to submit the compilation to the Human Rights Council at its thirty-eighth session.

FLIA and the CPE are honored to have an opportunity to provide their views on the premises, structures and frameworks within which it might be possible to speak to effective civil society involvement with regional and international organizations. Those premises, in turn, are grounded in the core principle that such engagement must be undertaken in a contextually relevant way. More importantly, such participation should contribute to the continued development of the political, religious and societal systems within which civil society operates to ensure that such systems remain true to their own principles and fulfill their own aspirations. It is in that context only that one might effectively speak to the established and official ways in which independent groups of global citizens linked by a common interest can:

(a) obtain access to United Nations bodies, other regional and international organizations, programmes and funds;

(b) work in coordination with regional and international organizations, included United Nations bodies, in order to reach their respective goals, and bring a meaningful contribution to the overcoming of shared challenges;

(c) come to the aid of United Nations bodies in order to contribute to developing established and official methods of participatory governance, which are accepted as being effective and correct by the majority of the persons and institutions who take part to global governance, or else are in any way affected by it.

FLIA and the CPE start from the important principle that the aspirational goals Resolution 32/21 strives towards are dependent upon reaching a consensus about the notion of a *civil society space*. The United Nations' *A Practical Guide for Civil Society – Civil Society Space and the United Nations Human Rights System*,[1] defines civil society spaces as:

> the place civil society actors occupy within society; the environment and framework in which civil society operates; and the relationships among civil society actors, the State, private sector and the general public.

1 Office of the High Commissioner for Human Rights, *A Pratical Guide for Civil Society, Civil Society Space and the United Nations Human Rights System.* Geneva, at p. 5. Available from http://www.ohchr.org/Documents/AboutUs/CivilSociety/CS_space_UNHRSystem_Guide.pdf

Any definitional enterprise presents the inherent challenge of resulting in the placing of conceptual borders and limitations on the object one attempts to define. To a certain extent, the conceptual borders any definition entails are designed and then placed around the *definiendum*, in ways coherent with the *Weltanschauung* of those who choose the *definiens*. This *Weltanschauung*, in turn, is the product of specific societal and historical forces, which are active in some societal and geographical domains, and do not always extend beyond them. If unmet, this challenge may delay or preempt reaching the goals of Resolution 32/21. To that end, the procedures and practices in respect of civil society involvement with regional and international organizations, including United Nations bodies, agencies, funds and programmes, and the contribution of civil society to their work and challenges and best practices must be built on the following core contextually based principles: (1) civil society space as an aspirational space; (2) civil society space as a multilateral space; and (3) civil society space admits of diversity and dialogue. Each is discussed below.

Civil Society Space as an Aspirational Space

A space is an area which is continuous, available, unoccupied or free. Notions of a space as an area delimited by frameworks, already occupied by a number of actors, and segmented by the relationships existing among them - whether these relationships are inclusive or exclusive, domestic or international - are coherent with the goals of Resolution 32/21. Civil society space is an aspirational space, marked by a strong element of normativity. In this sense, **a civil society space ought to go beyond:**

(a) *"the place civil society actors occupy within society"*

The position global citizens occupy within their respective societies is determined by variables and processes beyond the immediate control of any global citizen and civil society actor. Where variables and processes are such that only a minority of the public of developed countries can enjoy access to the educational and other intangible resources needed to gain an awareness of the existence of the MDGs,[2] the space civil society actors occupy within developed societies becomes fragmented. Fragmentation presents its own challenges and opportunities. For developed countries, these challenges involve re-stitching a social tapestry which is coming undone. For developing countries and emerging powerhouses of globalization, like China, the opportunity lies in avoiding constructing a social space prone to such fragmentation.

(b) "*the environment and framework in which civil society operates"*

Civil society does not operate within any single environment and regulatory framework. Civil society operates across multiple environments and multiple regulatory frameworks. Each one of these environments and regulatory frameworks shape the concrete forms, denominations, definitions, and functions of 'civil society'. The construction of a civil society space calls for acknowledging the legitimacy of each one of these environments and regulatory frameworks, insofar as they allow for the existence of various forms of dialogue and the coexistence of multiple forms of regulatory governance. A civil society space which is truly transparent and based on

2 The transnational NGOs Five Talents, for instance, reported how according to "surveys found that in September 2015 only 4% of the UK public had heard of the MDGs." See "Meet the Sustainable Development Goals", *Five Talents,* available at https://www.fivetalents.org.uk/un-sustainable-development-goals/ According to its own description, Five Talents is an organization working in rural areas of East Africa to enable those who have no access to financial services to set-up and grow the small, often vulnerable, businesses they depend on.

dialogue, pluralism and tolerance can exist only if variations in the social, institutional, and regulatory frameworks within which civil society operates are seen as the norm.

(c) "*the relationships among civil society actors, the State, private sector and the general public*."

In any society, the general public is the very source from which will emerge persons who will establish civil society organizations, or become members thereof; persons who will create entities in the private sector, or become members thereof. In this sense, a civil society space involves no rigid distinction between the general public and civil society. Where such a distinction exists, it is merely a functional one, and based upon the consideration that civil society organizations are first and foremost "active in trying to resolve problems and address issues that are important to society",[3] as these issues are perceived by those directly affected by them. Civil society, the State and the private sector are a product of the general will of the public, or sectors thereof. Civil society organizations' failure to address issue of relevance to those affected will lead to further fragmentation of the space within which civil society operates.

Civil Society Space as a Multilateral Space

A space is an area which is continuous, available, free or unoccupied. As an aspirational space, civil society space extends above and beyond the place civil society actors occupy within society, the environment and framework in which civil society operates, and the relationships among civil society actors, the State, private sector and the general public.

As an operational space, one which already sees the existence and the activity of the most diverse forms of civil society organizations, civil society space is already:

(a) **Continuous**

The continuity of civil society space exists whenever two or more civil society organizations establish links between themselves, operating across regions, sectors, and countries. Continuity should not be understood as calling for the abolition of national borders, and of regulatory mechanisms necessary to ensure a healthy development of civil society. The continuity of a civil society space is functional. It refers to the provision of services which help maintain the social fabric and moral fiber of a society intact. Continuity is also geographic, and refers to the existence of civil society organizations which help fostering links among citizens, states, private and public actors involved in processes of transnational economic integration.

(b) **Available**

A transnational civil society space is already available to all those sectors of the general public who are enjoying the fruits of processes of transnational economic integration, and contributing to them according to their own ability. The availability of this space, however, is distinct from its accessibility. While a transnational civil society space exists, this space, as well as all the development opportunities it offers, are not yet accessible to all the members of the general public who are entitled to an adequate standard of living, health, education, housing, science, culture as rights which are unversal, and indivisible from their civil and political rights.

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3 Office of the High Commissioner for Human Rights, *A Pratical Guide for Civil Society, Civil Society Space and the United Nations Human Rights System.* Geneva, at p. 4. Available from http://www.ohchr.org/Documents/AboutUs/CivilSociety/CS_space_UNHRSystem_Guide.pdf

(c) **Free**

Freedom is a necessary condition for the existence of a civil society space that remains faithful to itself. In domestic legal orders, there exist restrictions on civil society – or else domestic civil society organizations are coming to be seen as agents of subversion of European countries' economic development.[4] In the broader order of globalization, however, such restrictions are absent. By its own nature, globalization is a multilateral, transnational process which cannot be captured by any single regulatory instrument. Rather, globalization can be regulated only by a multi-lateral system of rules. This multi-lateral system of rules is democratic: its creation sees the meaningful participation of all the entities – citizens, civil society organizations, enterprises, states, international organizations – who wish to contribute to global peace and prosperity. Also, while these actors may differ as to their institutional form, resources, principles and policies, they are morally equal.

(d) **Unoccupied**

Civil society space is a transnational space which works for global peace, stability, and prosperity. This space is not a geographical space: it is a space made by the webs of bilateral and multilateral rules created by states, by the transnational links created by civil society organizations, and established by global citizens. Such a space is potentially unlimited, and will continue to exist and expand as long as civil society organizations, citizens, enterprises, and national states will continue to cooperate in all those forms which best serve mutually beneficial goals.

Civil Society Space Admits of Diversity and Dialogue

Diversity can display various dimensions. At the individual level, diversity it is instantiated in the existence of identities which are plural, and unique. At the aggregate level, the level of a civil society space which is multilateral and populated by individuals and entities which cannot be easily classified within any single category, diversity has a different meaning.

In a transnational and multilateral civil society space, diversity refers to the unique nature of the form civil society organization can take, to the unique organizational architecture of enterprises, and to all those features which are unique to national states, and derive from their culture, history, tradition, and developmental choices. Plurality in organizational, cultural, political, historical, and ideological identities ought to be considered as the engine of a democratic, vibrant civil society space. At a minimum, a civil society space exists in order to enable a harmonious interaction among persons, civil society organizations, enterprises, and states who are willing to reject any theory, or hypothesis, about an inevitable clash between cultures or civilizations. Such a civil society space belongs to the international community as a common forum for cooperation, and as a space to avoid fundamentalism, fragmentation, and segregation.

Diversity in all its forms can be acknowledged, appreciated, and preserved only through dialogue. The process of globalization has been enormously accelerated by the availability of new

4 Giuseppe di Lorenzo, "Here's how NGOs want to use migrants to destabilize Italian economy" (Così le ONG vogliono destabilizzare l'economia italiana coi migranti), *Il Giornale,* 27 April 2017, available from http://www.ilgiornale.it/news/politica/cos-ong-vogliono-destabilizzare-leconomia-italiana-con-migranti-1390533.html See also "Italy Migrant Crisis: Charities 'colluding' with smugglers", *BBC,* 23 April 2017, available from http://www.bbc.com/news/world-europe-39686239 Bethan McKernan, "Charities saving refugees in the Mediterranean are 'colluding' with smugglers, Italian prosecutor claims", *The Independent,* 24 April 2017, available from http://www.independent.co.uk/news/world/europe/refugee-boat-rescue-charities-medicins-sans-frontieres-save-the-children-mediterranean-sea-migrants-a7699571.html

information technologies and new means of communication. The rapid development of global communications presents a wealth of opportunities to promote dialogue across civil society organizations, national states, and political systems. Such a dialogue can, and does, occur through multiple platforms and in multiple venues. Traditional fora for dialogue are being sidelined, if not replaced, by the dynamism of global citizens, civil society organizations, and national states. Such a pluralism, which is at once cultural and institutional, is no longer an expression of domestic policies geared towards social cohesion. Ironically, increasingly fragmented societies where notions of identity have prevailed upon an appreciation of diversity in all its forms, are producing global citizens eager to enjoy a broader range of dialogue options, which are open to everyone, and perhaps not always available in their domestic contexts.

Diversity, in this sense, is an essential part of an enabling environment for civil society. As a broad label for civil, political, social, economic and cultural rights considered in their inseparability, diversity is an integral part of the rights of every human person. Thus, the flourishing of a civil society space calls for the respect not only for the cultural identities of their participants, but also of the identities of the groups – social, political, economic – as well as the societies composing the human race. These complex, multi-layered identities are increasingly being forged through cross-border interaction among the most diverse individual and institutional actors. They include not only lifestyles, traditions and beliefs, but also value systems.

Civil society space is highly vulnerable, and it is shrinking fast especially in those contexts where artificial limitations are being placed upon the activities of independent groups of global citizens. These limitations are indeed regulatory and, as such, are present in all the different guises a regulatory mechanism can take. Some of these guises consist of legislative limitations placed on civil society organizations. Others, and far more insidious, involve limitations to the more intangible rights, goods and opportunities to enable individuals to enjoy their right to participate in democratic determination about the future shape of a truly global, multilateral civil society space. These limitations involve knowledge-production, dialogue, and education. Only when these latter limitations have firmly been put into place can limiting legislation, ideologies, or policy approaches be introduced.

In the interest of global peace and development, the procedures and practices in respect of civil society involvement with regional and international organizations, including United Nations bodies, agencies, funds and programmes should continue to embody the consideration that an aspirational space for civil society can more effectively be constructed if premised on the values of democracy, multilateralism, respect for diversity, and dialogue.

Steps Going Forward

From this discussion of first principles, FLIA and CPE suggest that there can emerge a better framing of the procedures and practices in respect of civil society involvement with regional and international organizations, including United Nations bodies, agencies, funds and programmes, and the contribution of civil society to their work and challenges and best practices. FLIA and CPE offer the following steps that move that project forward:

To states:

(1) Every state should ensure that it has clearly developed, within its own political, social and religious context, a clearly stated and relevant framework which constitutes a state protected aspirational and multilateral space within which civil society might develop strong structures for diversity and dialogue.

(2) Every state must affirmatively declare and embed in its constitutional order, the objective of recognizing and protecting its civil society in a manner appropriate to the political order in which the obligation is realized.

(3) Every state should develop, within its own domestic legal orders, an institutional architecture through which citizens and residents, organized as civil society, can be protected. In addition, this institutional architecture ought to be structured in a way that permits the state to meet its obligations to its citizens through an appropriately tailored petitioning process against violation of civil society space by public and private officials.

(4) Every state must make provision for the exercise of criticism and self-criticism in the project of meeting its own obligations to protect a civil society space within the structures of its political order.

(5) Every state should strongly consider the establishment of special tribunals for the purpose of ensuring that its national and legal obligations are met with respect to civil society.

(6) States must recognize that civil society is not confined to the borders of a state and that individuals may join with others across the globe with respect to shared interests and objectives. The mere fact that civil society may be globally connected should not, standing alone, affect the status or operations of civil society within a state.

To international organizations:

(1) International organizations have the principal obligation of fostering dialogue that helps frame and develop the notions of civil society space as aspirational space.

(2) International organizations must undertake the difficult task of providing states, and civil society organs, the technical assistance necessary for states and others to realize both the nature and extent of their obligations within their respective constitutional systems and the means through which these obligatory aspirations may be realized.

(3) International organizations must undertake the difficult task of calling their members ot account for deviations from consensus standards and international legal and normative obligations, contextually applied. Likewise, international organizations should be at the forefront of praising those states and methods that contribute to the attainment of a vibrant and relevant civil society engagement.

(4) Every civil society organization ought to undertake to review its own internal operations and methodologies to ensure that each vigorously implements international standards for the embedding of civil society within its operations.

(5) The Office of the High Commissioner should undertake to work with all of the international organizations within the U.N. system to seek to develop tool kits that may

make coherent the policies of all international organizations with respect to their affirmative engagement with civil society. The object of this exercise is to ensure that the United Nations, through its organizations, acts consistently and uniformly in its engagement with civil society.

(6) International organizations and political life are substantially different in scope and operation, from that of the nation states that compose its principal membership. It is inappropriate to transpose national predilections, national ideologies, and national practices to the international sphere. To that end the United Nations ought to undertake a broad review of those constraints and restrictions that make participation by civil society in the work of the organs of the United Nations burdensome or that unduly restrict access by such organizations to the work of U.N. organizations.

(7) Until the United Nations practices what it preaches, as an autonomous set of organizations, separate from the various states that comprise it membership but which do not, singly or in groups control or dominate it, it will be difficult for it to set the high aspirational standards that should serve as a model for its members. At the same time, the United Nations owes its members a substantial margin of appreciation to embed civil society in a manner consistent with national political organization.

(8) In the face of impunity and complicity, it may be necessary for the international community to amend the Rome Statute and expand the jurisdiction of the International Criminal Court, to include all acts of violence against civil society members who do not otherwise offend national or international standards.

To civil society:

(1) Civil society must undertake the difficult task of articulating its own framing responsibilities. These include fundamental responsibilities to respect the state and state systems in which they operate and also to ensure that they legitimately serve the interests of those individuals and causes they represent. Such obligations ought to be clearly articulated and closely monitored.

(2) Where civil society undertakes efforts that challenge the legitimacy of states or state systems, it engages in activity that can only be protected to the extent that it does not threaten the existence of the state. Beyond that point civil society might act, but it becomes a political and revolutionary actor, and subject to relevant international law.

(3) Civil society must be prepared to act in accordance with the standards of transparency they would apply to states, enterprises and international organizations.

(4) Civil society should have unfettered access to the workings of international organizations, but that access ought to give rise to an obligation to engage with states and international organizations in ways that are appropriate in context.

(5) Civil society ought to be able to rely on the application of all international law and norms in its interactions with international organizations without fear of retaliation either through international organizations or by home or host states. International organization space ought to be protected space; if international organizations cannot maintain the safety of their own spaces they also fail in their fundamental mission to serve as a protected nexus

point where states and other actors may meet to engage, and thus engaged to reduce the threat to world peace and stability.

The Foundation for Law and International Affairs (FLIA) is an independent, nonpartisan, nonprofit organization mandated to promote academic and public discourse at the intersection of law and international affairs. The core vision of FLIA is to promote international cooperation and public dialogue through the development of new ideas and collaboration with various academic, governmental and civil actors.

The Coalition for Peace & Ethics (CPE), founded in 2006, is an independent, non-profit, non-partisan, tax-exempt research and information focused organization. CPE avoids ideology, adopts no specific political or religious doctrine, and owes allegiance to no master. We are engaged in a series of projects based on the production and dissemination of knowledge that is meant to empower people to take control of their own lives for personal and societal betterment in ways that are respectful to individuals and the communities in which they belong.