

COUNTER-TERRORISM,
'POLICY LAUNDERING'
AND THE FATF:

LEGALISING SURVEILLANCE, REGULATING CIVIL SOCIETY

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Preface

The Catholic organization for Relief and Development, Cordaid, has been following the effects of counter terrorism measures on civil society worldwide since 2008. We have organised international and regional conferences, commissioned a number of policy papers and engaged in security dialogues with policy makers in the UN, the EU and national governments.

Our research showed that the work and engagement of civil society in development, human rights, conflict prevention and peace building contribute significantly to preventing violent extremism. Lack of responsible and trustworthy governance and the existence of continuous underdevelopment, instability and violence are a driving force behind the attraction to extremist groups and their ideology. When the state fails society, people will resort to existing alternatives for livelihoods and a certain measure of stability. Violent extremists and their networks pretend to provide these.

Development and social inclusion – and hence an active and engaged civil society – are key to preventing terrorism. The UN Global Counterterrorism Strategy, launched in 2006, theoretically provides a holistic approach to prevent terrorism. The strategy initially focused almost entirely on international cooperation between governments. Six years later, a significant number of member states have supported civil society engagement. Cordaid with a number of civil society organizations and networks established a platform that engages with states and UN policy makers to expand the influence of civil society on the implementation of the framework.

However it also can't be denied that a number of counter terrorism measures (CTM) implemented by governments and international organizations have had a negative impact on the operational and political space of civil society. Autocratic or semi-autocratic regimes have always cut back on civil society but felt emboldened by the post 9/11 political environment of the war on terror and its rhetoric to further clamp down on civil society space. A number of governments that imposed stricter NGO laws, increased military and police actions against dissenting voices and opponents, and orchestrated targeted attacks against social activists, human rights defenders and peace builders, took less heat internationally as their measures were perceived and legitimised as part of the "war on terror".

While the CTM rhetoric undeniably lost its influence in the past years, a number of measures have become embedded in the overall security bureaucracy nationally and internationally. Countering terrorism has become a matter not so much of the use of military or hard power but of a systemic approach that aims among others to end financial flows to terrorists, promote counter narratives to terrorist ones through social media and the internet, and to impose sanctions against designated terrorists and their organizations through blacklisting and freezing of assets. This institutionalization of CTM through global implementation regimes and untargetted broad brush measures continue to have impact on the operational and political space of civil society world-wide.

Ben Hayes' study on *Counter-terrorism, Policy Laundering and the FATF (Financial Action Task Force): legalizing surveillance, regulating civil society* gives a thorough account of an important institutional phenomenon: the world of financial regulation of non-profit organisations (NPOs) in the post 9/11 era. The study provides civil society and other interested stakeholders with an analysis on why and how certain measures affect not-for-profit financial flows. Mr. Hayes has delved into numerous documents that show that the global reach of FATF's policy influence should be a matter of concern for civil society and the not-for-profit community in particular.

Cordaid specifically wanted to obtain a deeper understanding of the strategy behind global financial regulation of civil society. On what grounds was civil society considered to be vulnerable for terrorism financing; and has it been proven that it is vulnerable and by whom? We asked the researcher to go beyond an analysis of the technicalities of NPO surveillance and regulation and beyond a general discussion around accountability and transparency of not-for-profit organisations. These issues are significant, but the aim of this report was to clearly focus on the interests and policies of stakeholders that play decision making roles in NPO regulation. The study focuses in particular on the effects of Special Recommendation VIII (SR VIII) of the Financial Action Task Office (FATF), which targets non-profits that transfer funds to civil society. This flow of funds is considered by the FATF to be vulnerable for terrorism abuse and therefore requiring strict regulation. Both funders and recipients alike may be misused for terrorism but cutting funds at the funding end is perceived to be most effective.

The protagonist in the study is the Financial Action Task Force, an intergovernmental policy making body

established in 1990 by the then “G7” group with a mandate to enhance surveillance of the global financial system in order to combat money laundering and other crimes. In 2001 shortly after the “9/11” terrorist attacks, FATF issued eight Special Recommendations on combating the financing of terrorism, including by NPOs and a ninth was added in 2004. The FATF NPO agenda is intimately tied with the domestic and foreign policy objectives of the USA.

The way Special Recommendation VIII of the FATF works and how it has influenced the flow of vital NPO funds throughout the world is the centre piece of the research paper. Mr. Hayes introduces a deliberately provocative concept: “policy laundering” to explain the way FATF wields policy influence on a global scale. Like any top-down and broad policy by a transnational organisation, its influence and ultimate impact on the ground has yet to be seen.

The study shows that SR VIII has created a system of onerous rules and regulations that have great potential to subject NPOs to excessive state regulation and surveillance, which restricts their activities and thus the operational and political space of civil society organizations. In addition to other CTMs such as the blacklisting of designated terrorists and terrorist organisations, SR VIII provides governments with an instrument, to further cut back on the space of civil society, in this case on their freedom to access and distribute financial resources for development, conflict resolution and human rights work. SR VIII provides governments yet another tool that can be used against critical voices, which is supported and legitimised internationally. While repression of NPOs through SR VIII was surely not the intention of the governments that called for new measures to tackle terrorist financing, it has too often been the result.

Another report commissioned by Cordaid: “Friend not Foe: civil society engagement to prevent violent extremism” by the Kroc Institute (2011) states that the most effective CTMs are the ones that safeguard the operational and political space of civil society. The ones that are currently implemented curtail in many cases civil society space. SR VIII continues this counter-productive and contradictory approach. The contradictions are evident in the way that the US State department, on the one hand calls on other states to allow NGOs to function in “an environment free from harassment, intimidation and discrimination and to receive financial support from domestic, foreign and international sources” and on the other has pushed strongly for regulations of NPO funding

that have been used by autocratic governments to harass and discriminate.

The study emphasizes the need for proportionality and an approach which is context-specific when it comes to regulation of NPOs stipulated in SR VIII. Dr Hayes poses the vital question of whether the current institutionalized and over-broad approach has prevented NPOs and civil society from being abused for terrorist purposes. His analysis leads to a clear conclusion: it does not. To the contrary, SR VIII has in fact led to the implementation of measures that have unduly damaged the sector as a whole.

Countries, notably the USA, where NPOs are providing grants to international recipients in especially sensitive areas, have seen a decrease in this type of grant. This was not a consequence of NPOs found guilty of funding terrorism, but was rather a decision by NPOs who stopped funding projects in sensitive areas due to disproportionate accounting requirements, fear of possible consequences and reduced resources. Risk aversion has led these NPOs to opt for safer activities and to reduce their efforts in political advocacy. The withdrawal of significant NPO support for civil society in sensitive areas may in turn lead to increased space for extremists groups that fill the void of systemic underdevelopment and exclusion. An example is Somalia where increased violence by terrorists and international counter terrorism measures led to a reduced presence of (international) civil society on the ground. Those that have remained or wanted to provide support during the most recent famine in the Horn of Africa were restricted in their work, not only by Al Shabaab, but also by international counter terrorism regulations. Ultimately this has dire consequences for those that need support most.

In the conclusions and recommendations, the author puts forward the argument that FATF SR VIII may not be needed at all. A quote from a World Bank report seems to underscore this argument: “The rarity of instances of terrorism financing by NPOs, when contrasted against the enormous scope of the sector, does raise the question of whether, in and of itself, government regulation is the most appropriate response” (World Bank 2010). The World Bank says it does not want to belittle the significance of the issue, but rather questions the nature of the response. If FATF wants the implementation of SR VIII to become more effective, it should limit compliance to countries where there is a demonstrable problem of terrorism financing by NPOs.

An effective response has to be tailor-made and context specific. It should also factor in the complexity of linkages that exist between violent extremists, criminal networks and money laundering practices. Not surprisingly, there is growing evidence that terrorists are financed through money flows via (transnational) criminal activities and illegal transactions in which a number of legitimate national and transnational institutions may be complicit. The focus of FATF so far on government surveillance and regulation of non-profits therefore seems misdirected given the need to focus on the shadow world of criminal, terrorist networks and their intimate relations with what are perceived to be legal and legitimate institutions and persons. Ultimately other concepts and instruments need to be elaborated in starting to tackle a complex phenomenon.

The author emphasizes the urgency for transparency and accountability of FATF particularly when it comes to SR VIII. There is no mechanism in place yet that allows civil society to engage with FATF. Cordaid wholeheartedly supports Dr Hayes' recommendation that "The FATF should recognize the crucial role of civil society in developing effective and proportionate counter-terrorism policies, as set out in the UN Strategy and Security Council Resolutions and begin an active dialogue on SR VIII with NPOs and fundamental rights experts as a matter of urgency".

It is a timely report now that policy makers in the security and counter terrorism departments of the UN have started to welcome the involvement of civil society in different regional policy dialogues including that of NPO and civil society regulation in order to avoid terrorism abuse. These meetings provide an opportunity for engagement among and between different stakeholders. Ben Hayes' report provides civil society and NPOs a useful reference as they take part in these and other dialogues concerning the impact of counter terrorism regulations on their political and operational space.

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The Hague, March 2012

Executive Summary

How international rules on countering terrorist-financing are undermining freedom of association: an analysis of the impact of FATF 'Special Recommendation VIII' on non-profit organisations

This new report published by the *Transnational Institute* and *Statewatch* examines the global framework for countering-terrorist financing developed by the Financial Action Task Force (FATF) and other international law enforcement bodies. The report includes a thorough examination of the impact of FATF's 'Special Recommendation VIII' on countering the threat of terrorist financing said to be posed by non-profit organisations (NPOs).

Developed out of a G7 initiative in 1990, the FATF's '40+9' Recommendations on combating money laundering (AML) and countering the financing of terrorism (CFT) are now an integral part of the global 'good governance' agenda. More than 180 states have now signed up to what is in practice, if not in law, a global convention. The FATF is headquartered at the Organisation for Economic Cooperation and Development in Paris; a further eight regional FATF formations replicate its work around the world. The report argues that a lack of democratic control, oversight and accountability of the FATF has allowed for regulations that circumvent concerns about human rights, proportionality and effectiveness.

Countries subject to the FATF's Anti Money Laundering (AML)/ Counter Terrorism Financing (CFT) requirements must introduce specific criminal laws, law enforcement powers, surveillance and data retention systems, financial services industry regulations and international police co-operation arrangements in accordance with FATF guidance. Participating countries must also undergo a rigorous evaluation of their national police and judicial systems in a peer-review-style assessment of their compliance with the Recommendations. Developed out of World Bank and IMF financial sector

assessment programmes, this process significantly extends the scope of the Recommendations by imposing extraordinarily detailed guidance – over 250 criteria – on the measures states must take to comply with the 40+9 Recommendations. The rewards for FATF compliance are being seen as a safe place to do business; the sanctions for non-cooperation are designation as a 'non-cooperating territory' and international finance capital steering clear.

Special Recommendation VIII

FATF 'Special Recommendation VIII' (SR VIII) requires states to "review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism", stating that "Non-profit organisations are particularly vulnerable... countries should ensure that they cannot be misused" for terrorist financing purposes. The Recommendation is then significantly extended in scope by the FATF's interpretation, guidance, best practice and the evaluation process, which strongly encourage states to introduce government licensing or registration procedures for non-profit organisations, ensure transparency and accountability of NPOs, introduce financial reporting systems, exchange this data with law enforcement agencies, and impose sanctions for non-compliance.

This kind of regulation is not without its problems in countries where non-profit organisations form a free and integral part of the fabric of what has come to be known as 'civil society', but in countries where community organisations, NGOs, charities and human rights groups and others already face suspicion, coercion and outright hostility from the state, the SR VIII regime can have profound – if unintended – consequences. The hypothesis is simple: that when international bodies encourage states to adopt regulatory regimes that could be used in practice to 'clampdown' or unduly restrict the legitimate activities of non-profit organisations, then there is a very real risk that this is precisely how repressive or coercive states will enact and apply the rules in practice.

This report examined the FATF mutual evaluation reports on 159 countries with regard to their compliance with Special Recommendation VIII. The vast majority of reports (85% of those examined) rated countries as 'non-compliant' (42%) or only 'partially compliant' (43%) with SR VIII. Only five out of 159 countries (3%) were designated as SR VIII 'compliant' (Belgium, Egypt, Italy, Tunisia and USA).

Where countries fall short of full compliance, the FATF evaluation reports contain specific recommendations on the national reforms necessary to comply with each Recommendation. The state concerned must then report back to their regional FATF assessment body on the reforms they have introduced within two years. The country will then be assessed again in the next round of mutual evaluations, with each round taking around five years. This continued cycle of assessment and review emerges as a powerful force for imposing new standards of 'global governance'.

Legitimising coercion and repression

While this was obviously not the intention of the seven governments that established the FATF, its evaluation system has endorsed some of the most restrictive NPO regulatory regimes in the world, and strongly encouraged some already repressive governments to introduce new rules likely to restrict the political space in which NGOs and civil society actors operate.

Egypt and Tunisia – two of the five out of 159 countries rated 'compliant' with FATF SR VIII – have long enforced extremely prohibitive NPO regulatory frameworks. In both countries, the rules and regulations on NPOs were part a feared security apparatus that made it very difficult for organisations working on issues like human rights and democratic reform to operate, let alone play a meaningful role in society. Following the 'Arab Spring' revolutions, decades of repression and restrictions on civil society have been cited as an inhibiting factor for new social movements to challenge established power structures and achieve representation in subsequent legal and political processes.

The report also includes case studies on Burma/Myanmar, Cambodia, Colombia, India, Indonesia, Paraguay, Russia, Saudi Arabia, Sierra Leone and Uzbekistan – all of which have seen the imposition or proposal of rules that restrict or threaten the freedom of association and expression of NPOs and are endorsed or encouraged by FATF evaluators.

The global clampdown on civil society

Worldwide civil society organisations, human rights defenders and political opponents continue to face overt and covert restrictions by repressive governments including some that are supposedly 'democratic'. According to

a 2008 global study on the legal restrictions imposed on NPOs:

[M]any regimes still employ standard forms of repression, from activists' imprisonment and organizational harassment to disappearances and executions. But in other states – principally, but not exclusively authoritarian or hybrid regimes – these standard techniques are often complemented or pre-empted by more sophisticated measures, including legal or quasi-legal obstacles [...] subtle governmental efforts to restrict the space in which civil society organizations ("CSOs") – especially democracy assistance groups – operate.¹

As a result, civil society 'groups around the world face unprecedented assaults from authoritarian policies and governments on their autonomy, ability to operate, and right to receive international assistance'.²

In elaborating an international law enforcement framework that contains no meaningful safeguards for freedom of association and expression, this report argues that the current FATF regime is facilitating and legitimising these more nuanced forms NPO/CSO repression.

The report also strongly questions whether a top-down, 'one size fits all' approach to NPO regulation is an appropriate or proportionate response to the possible vulnerability and actual exploitation of NPOs for terrorist financing purposes. It calls for urgent reforms limiting the scope of FATF Special Recommendation VIII and clarifying its purpose and intent.

Wide-ranging reforms required

The report also links the FATF regime to the UN's over-broad terrorist 'blacklisting' and asset-freezing regime, global surveillance of the financial system, the prosecution of charities and NPOs for 'material support' for terrorism, and the outsourcing to private companies of 'AML/CFT' compliance systems.

Taken together, what emerges is a dense, global web of international law and policy transposed into national rules and regulations and endless bureaucracy. As the web has been expanded, the powers of state officials, prosecutors and investigators have been harmonised at a particularly high (as in highly coercive) level. At the same time, guarantees for suspects, defendants and 'suspect communities' have been largely disregarded. Caught in this global web are charities, development organisations,

NGOs, human rights defenders, community organisers, conflict mediators and others who find their work hampered or paralysed by onerous regulations or politically-motivated legal manoeuvres.

The egregious violations of law and principle embodied in Guantanamo Bay, the CIA's 'rendition' programme and the widespread use of torture rightly preoccupied the international human rights community as it marked a decade of 'war on terror'. At the same time, these apparently more mundane and technical aspects of the global counter-terrorism framework have quietly become embedded in international law and practice.

The workings of the intergovernmental bodies that developed and implemented these rules are largely shielded from public scrutiny; the 'international community' has accepted the rules uncritically while failing to subject the bodies that created them to meaningful scrutiny or democratic control. In turn the exceptional measures they introduced after 9/11 have become the norm. Without urgent reform, the often obtuse nature of a large tranche of international 'counter-terrorism' legislation will continue to serve as a pre-text for every day restrictions on the political space in which people exercise their democratic freedom to organise, debate, campaign, protest and attempt to influence those who govern them.

1 International Centre for Non-profit Law and World Movement for Democracy (2008) *Defending Civil Society*, available at: <http://www.wmd.org/projects/defending-civil-society/executive-summary>.

2 Tiwana, M. and Belay, N (2010), *Civil Society: The Clampdown is Real - Global Trends 2009-2010*, CIVICUS World Alliance for Citizen Participation, available at: <http://civicus.org/news-and-resources/reports-and-publications/234-civil-society-the-clamp-down-is-real>.

1 Introduction

Over the past decade, surveillance of the financial system and demands for increased regulation and financial transparency of non-profit organisations (NPOs) have become central counter-terrorism policies with the stated aim of reducing their vulnerability to abuse by terrorist organisations. This has happened because intergovernmental organisations have adopted the hypothesis that terrorist organisations use laundered money for their activities, and that charities and NPOs are a potential conduit for terrorist organisations. Non-profit organisations have been placed under surveillance, while charitable giving, development assistance and remittances from Diaspora communities have been intensively scrutinised by security agencies, particularly those organisations working with 'suspect communities' or in conflict zones. This shift to treating NPOs as objects of suspicion has been a dramatic one since the early 1990s when civil society organisations were widely praised 'as partners in a shared agenda of democratization, participation and service delivery'.¹

In Europe and the USA, financial surveillance policies have been opposed by civil liberty and privacy groups, and attempts to introduce binding rules on enhanced financial transparency of the non-profit sector have been resisted by charities, development organisations and other NPOs. But these policies are now spreading to other parts of the world, places where 'civil society' is much less able to make its voices heard. While there is growing awareness of these policies among civil society organisations, the international framework within which these policies have been developed, and the driving forces behind the political agenda, have been obscured from public scrutiny. This has undermined the capacity of NPOs to engage with the actors demanding tighter regulation of their sector.

This report examines the intergovernmental organisations and standard-setting bodies behind the emerging global regimes for financial surveillance and regulation of the non-profit sector, and the implications of these regimes for non-profit and civil society organisations. It begins by suggesting a critical lens through which these developments can be seen.

1.1 'Policy laundering' and intergovernmental organisations

The concept of 'policy laundering', after money laundering, describes the use by governments of intergovernmental forums as an indirect means of pushing international policies unlikely to win direct approval through the regular domestic political process.² According to the 2005 Policy Laundering Project (a joint initiative of the *Privacy International*, the *American Civil Liberties Union* and *Statewatch*), this technique had become a central means by which governments seek to overcome civil liberties objections to privacy-invasive policies pursued under the 'war on terror'.³ A critical feature of policy laundering is 'forum shifting', which occurs when actors pursue roles in intergovernmental organisations that suit their purposes and interests. Examples of controversial policies that critics suggest have been 'laundered' under the 'war on terror' include measures relating to the surveillance of telecommunications, the surveillance of movement, and the introduction of 'biometric' identification systems (specifically fingerprinting).

The concept of policy laundering does not amount to a comprehensive theory of intergovernmental decision-making. Rather, it is a useful tool for analysing how and why certain governments have shaped intergovernmental policy agendas to their own ends. What is crucial in this discussion is the eschewing of a deliberative process, the side-stepping of parliamentary democracy and the marginalisation of civil society.⁴ This report engages the concept of policy laundering not to accuse the FATF of deliberately circumventing democracy, but to explain how a wide-ranging set of global standards for countering-terrorism and surveillance of the financial system – many developed in the late 1990s – were rapidly adopted by a number of intergovernmental decision-making fora in the wake of 9/11. Almost certainly drafted by the U.S. government and subsequently adopted by the G7/8, UN, IMF and World Bank, these standards then passed quickly down through regional bodies such as the FATF (and regional FATF groupings) and regional multilateral development banks, before being transposed into binding regulations, laws and practices in nation states. Despite their enduring significance, this highly technocratic and largely unaccountable set of decisions has not received the critical attention from civil society it warrants.

1.2 Global enforcement regimes

Where 'policy laundering' describes the techniques used

by national governments to influence intergovernmental organisation (IGO) agendas, the concept of 'global enforcement regimes' can help explain the motives and outcomes, particularly in regard to law enforcement and counter-terrorism cooperation. Underpinned by international laws and conventions, global enforcement regimes are designed to criminalise certain behaviours at the international level and to facilitate the 'free movement' of investigations and prosecutions across the world by placing substantive obligations *vis-à-vis* criminal law and procedure upon the members of IGOs.⁵ Examples of global enforcement regimes include those enacted to suppress the production and trafficking of narcotic drugs (cf. the three main UN Drugs Conventions);⁶ to prevent and prosecute terrorist acts (cf. the dozen UN terrorism-related Conventions);⁷ to combat organised crime and 'illegal' immigration (cf. the UN Convention and three protocols on Transnational Organised Crime);⁸ and to tackle 'cybercrime' (cf. the CoE Cybercrime Convention, which is open for worldwide signature).⁹ These regimes function through the obligations on signatory states to criminalise certain acts, to facilitate cross-border investigations (by providing mutual legal assistance) and to assist in the prosecution of offences (by providing evidence and/or extraditing suspects).

While the Bush administration appeared to shun international law in favour of unilateral 'war on terror', it continued to shape the agenda of various IGOs in order to embed and legitimise key elements of its counter-terrorism strategy in international law and policy. The USA took the lead, for example, in developing the international regimes governing the prevention of terrorist financing and terrorist 'blacklisting', technical assistance for enhancing counter-terrorism in less developed states, and various international surveillance mechanisms, including for passenger and biometric data. The G7/8 and later the European Union (in particular the 'Transatlantic Dialogue' on counter-terrorism issues) became key partners in the 'war on terror' not because they offered meaningful operational assistance in tracking down the perpetrators of 9/11 – this was initially pursued bilaterally and militarily through NATO – but due to the influence that these organisations could wield in terms of global standard setting. Because the international community was much more likely to join counter-terrorism initiatives within existing multilateral systems, these channels became crucial mechanisms through which the USA and its allies could set the agenda of a host of intergovernmental bodies.¹⁰

Decisively, in the wake of 9/11, IGOs began to establish and bolster global enforcement regimes using so-called 'soft law' (Resolutions, principles, guidelines etc.), which could be agreed and ratified much more quickly than traditional intergovernmental conventions, which often took several years of more to agree (and even longer to ratify and enter into force). Academics have described this process as 'hard coercion through soft law',¹¹ suggesting that such measures may be *ultra vires*, or beyond the powers of the bodies that adopted them.¹² This report examines the global enforcement regimes established through FATF Recommendations on money laundering and counter-terrorism. Section 4 focuses specifically on the FATF's Special Recommendation on the non-profit sector, showing how the FATF's interpretation, guidance and compliance mechanisms have substantially extended the scope and impact of that Recommendation.

1.3 From NPO regulation to NPO repression?

Intergovernmental bodies are not the only forces shaping demands and outcomes in respect to financial transparency and NPOs regulation. Other factors include the broader global transparency movement, national policies and the actions of the NPO sector itself. In this context, moves toward greater NPO transparency can be seen as part of a 're-questioning by society of the rights, roles and responsibilities of all institutions in the light of globalization'.¹³ Campaigns for openness, transparency and accountability have gained significant momentum over the past two decades. Freedom of Information laws providing access to information held by governments and public bodies have been adopted around the world (although standards in many countries are weak), transparency has become a central part of the anti-corruption agenda and 'whistle blowing' about misconduct in various institutions features frequently on the mainstream news. Industry lobbyists are now under increasing pressure to declare their interests and activities and public accountability is seen as an increasingly important aspect of 'corporate social responsibility'.

This movement has already influenced the aid and philanthropic sectors, with governments and donors increasingly expected to 'publish what they fund'.¹⁴ Aid transparency is now seen as crucial to both anti-corruption and aid effectiveness (and is what led a former regional director of the World Bank to found the NGO *Transparency International* in the early 1990s). An *International Aid Transparency Initiative* was launched in 2008 to 'bring together donors, partner countries and

civil society to enhance aid effectiveness by improving transparency'.¹⁵

Quite independently of the global transparency movement and counter-terrorist measures, many countries have long had dedicated laws and regulatory frameworks governing the activities of non-profit organisations. These regimes vary widely but share broadly the same objectives: to ensure that NPOs do not abuse their charitable and/or tax-exempt statuses and provide mechanisms for Trustees and Directors to be held liable for actions like fraud and damages to third parties. Some regimes also include mechanisms to ensure that non-profit organisations stick to their mandates and/or charitable purposes, particularly those governing the activities of international NGOs operating in foreign territories. NPOs (together with non-governmental organisations (NGOs) and civil society organisations (CSOs)) have augmented the legal obligations upon them with various internal regulations, accountability mechanisms and through dialogues with governments and regulatory bodies.

It is in this self-regulatory context that NPOs have challenged attempts to impose top-down regimes such as the World Bank's 1997 'Draft Handbook on Good Practices for Laws Relating to NGOs'. After consultation with the NPO sector and a concerted lobbying effort by a range of NGOs, the Bank eventually decided that the Draft Handbook was not an appropriate tool for it to use or advocate.¹⁶ However, as this report explains, in subsequently adopting and helping enforce the FATF Recommendations on money laundering and terrorist financing, the Bank was soon pressing for minimum standards for NPO regulation in countries across the globe (see Sections 3 and 4, below).

Significant pressure to hold NGOs more accountable for their actions also came from right wing pressure groups and governments in the USA.¹⁷ This culminated in 2004 with the launch of *NGOWatch*, a joint initiative of the *American Enterprise Institute for Public Policy* and the *Federalist Society for Law and Public Policy Studies* (two of the most influential and well-funded 'think tanks' then serving the Bush administration) that stemmed from an earlier conference on the 'Growing Power of an Unelected Few'.¹⁸ *NGOWatch* focuses overwhelmingly on those organisations that advocate 'liberal' causes such as human rights, corporate accountability and environmental protection.¹⁹

It is important to recognise that regulatory frameworks can have both positive and negative impacts on the

non-profit sector. On the one hand they may increase public and government confidence in NPOs by enhancing transparency and accountability, but on the other they can also exert both coercive and normative pressures that 'constrain NGO behaviour by limiting their legal identities, permitted activities, and access to resources'. States can also use regulation to make NGOs 'behave in certain ways... by incentivising positive behaviours (from the point of view of the state) and making illegal and punishing negative behaviors'.²⁰ Increased scrutiny and regulation around NGO activities in conflict zones or NPO engagement with 'suspect communities', for example, can effectively introduce policing systems that – while clearly serving state counter-terrorism agendas – may also adversely constrain the 'political space' in which these organisations work. Commentators have thus expressed great concern that 'weaknesses in NGO accountability are being used as cover for political attacks against voices that certain interests wish to silence'.²¹

The mainly academic discourse on NPO regulation thus strongly emphasises the need to link frameworks for transparency and accountability to guarantees regarding freedom of expression and association. Experience suggests that states that fail to uphold human rights are much more likely to introduce or apply regulatory frameworks in a coercive or repressive manner than states with a strong human rights culture.²² According to a 2008 global study on the legal restrictions imposed on NPOs:

[M]any regimes still employ standard forms of repression, from activists' imprisonment and organizational harassment to disappearances and executions. But in other states – principally, but not exclusively authoritarian or hybrid regimes – these standard techniques are often complemented or pre-empted by more sophisticated measures, including legal or quasi-legal obstacles [...] subtle governmental efforts to restrict the space in which civil society organizations ("CSOs") – especially democracy assistance groups – operate.²³

As a result, civil society 'groups around the world face unprecedented assaults from authoritarian policies and governments on their autonomy, ability to operate, and right to receive international assistance'. Another report on global NPO regulation, published in 2010, found that civil society operates in restrictive environments 'due to harsh government legislation' in as many as 90 countries.²⁴ It is with this concern in mind that this report approaches the FATF's approach to the non-profit sector.

2 The Financial Action Task Force: structure, mandate and activities

This section examines the history and origins of the G7/8's Financial Action Task Force and its subsequent development into a global law enforcement, policy-making and compliance body. It looks at the structure, mandate and powers of the FATF in respect to money laundering and terrorist financing, and the mechanisms it uses to ensure compliance among its members. This analysis highlights the lack of political and democratic accountability around the FATF and the failure to consult non-profit organisations on recommendations that affect them.

2.1 Origins and development of the FATF

The decision to establish the Financial Action Task Force (also known as *Groupe d'Action Financière* (GAFI)) was taken at the Group of 7 Summit (G7) in Paris in 1989.²⁵ The G7 noted that the drug problem had 'reached devastating proportions' and stressed 'the urgent need for decisive action, both on a national and an international basis'. The G7 Resolution included measures to strengthen international cooperation in the War on Drugs including ratification and implementation of the 1988 'Vienna Convention' on illicit traffic in narcotic drugs and psychotropic substances and the creation of 'a financial action task force from Summit participants and other countries interested in these problems'. The mandate of the Task Force was 'to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance'.²⁶

The G7 countries, together with the European Commission (also represented on the G7/8) and another eight EU member states, convened the FATF and instructed it to examine money laundering techniques and trends, to review national and international counter measures, and to develop a comprehensive framework to combat money laundering. This was delivered in April 1990, less than a year after the FATF's creation, via a set of 40 detailed Recommendations. In 2001, following the '9/11' terrorist attacks, the development of standards in the fight against terrorist financing was added

to the FATF's mandate. An additional eight 'Special Recommendations' were produced shortly after, with a ninth following in 2004.

During 1991 and 1992, the FATF expanded its membership from 16 to 28 members. Between 2000 and 2003 it grew to 33 members, and between 2007 and 2010 it expanded to its present membership of 36. This includes 34 countries – the original 'EU15' member states²⁷ plus Argentina, Australia, Brazil, Canada, China (and Hong Kong), Iceland, India, Japan, Mexico, New Zealand, Norway, Russia, Singapore, South Africa, South Korea, Switzerland, Turkey and USA – together with two regional bodies: the European Commission and the Gulf Cooperation Council.²⁸ Some of these countries also participate in regional FATF formations (see further below). Twenty-three further bodies have 'observer status' at the FATF including the OECD, IMF, World Bank, regional development banks, United Nations law enforcement bodies such as UNODC, UNCTC and 1267 [Terrorist Sanctions] Committee, INTERPOL and the World Customs Organisation, and international 'umbrella organisations' dealing with the regulation of financial services.²⁹ No non-governmental organisations have Observer status at the FATF.

In addition to the 36-member FATF, eight further inter-governmental bodies replicate the work of FATF and enforce its Recommendations on a regional basis. These are:

- **APG** - Asia/Pacific Group on Money Laundering established: 1997 | HQ: Sydney, Australia | member countries: 40 ³⁰
- **CFATF** - Caribbean Financial Action Task Force established: 1996 | HQ: Port of Spain, Trinidad & Tobago | member countries: 29 ³¹
- **EAG** - Eurasian Group on money laundering and terrorist financing established: 2004 | HQ: Moscow, Russia | member countries: 8 ³²
- **ESAAMLG** - Eastern and Southern Africa Anti-Money Laundering Group established: 1999 | HQ: Dar es Salaam, Tanzania | member countries: 14 ³³
- **GAFISUD** - Financial Action Task Force on Money Laundering in South America established: 2000 | HQ: Buenos Aires, Argentina | member countries: 12 ³⁴

- **GIABA** - Inter Governmental Action Group against Money Laundering in West Africa
established: 1999 | HQ: Dakar, Senegal | member countries: 15 ³⁵
- **MENAFATF** - Middle East and North Africa Financial Action Task Force
established: 2004 | HQ: Manama, Bahrain | member countries: 18 ³⁶
- **MONEYVAL** - Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
established: 1997 | HQ: Strasbourg, France | member countries: 29 ³⁷

Taken together, the FATF and its regional bodies now cover more than 180 jurisdictions, all of which have committed themselves at ministerial level to implementing FATF standards and having their systems assessed through peer review mechanisms.

2.2 The FATF Recommendations

The 40 FATF Recommendations on money laundering and the nine FATF Special Recommendations on Terrorist Financing provide for a comprehensive global enforcement regime. Like international conventions, they are intended to be implemented at the national level through legislation and other legally binding measures while allowing states a degree of flexibility according to their particular circumstances and constitutional frameworks. The 40 FATF Recommendations of 1990 (as amended in 1996 and 2003) require states to, *inter alia*,

- implement international conventions on money laundering and organised crime;
- criminalise money laundering and enable authorities to confiscate the proceeds of money laundering;
- implement customer due diligence (e.g. identity verification), record keeping and suspicious transaction reporting requirements for financial institutions and designated non-financial businesses and professions;
- establish data retention regimes of at least five years for all financial transaction records (both domestic and international) and 'disclosure regimes' for 'suspicious financial transactions';

- establish a Financial Intelligence Unit to receive and disseminate suspicious transaction reports;
- cooperate internationally in investigating and prosecuting money laundering.

The FATF issued 8 Special Recommendations on Terrorist Financing in October 2001 and a ninth Special Recommendation in October 2004, requiring states to, *inter alia*,

- implement international conventions and Security Council resolutions on terrorist financing;
- criminalise terrorist financing and enable authorities to freeze confiscate and confiscate assets being used for terrorist financing;
- cooperate in international terrorism investigations and prosecutions;
- extend disclosure regimes and due diligence obligations to alternative remittance systems, wire transfers and individuals taking cash across borders;
- review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism, e.g. Non-profit organizations.

The development and implementation of these rules is discussed in more detail in the following sections of this report.

2.3 Structure, mandate and powers

The FATF is based at but ostensibly independent of the Organisation for Economic Cooperation and Development (OECD) in Paris, an intergovernmental body created in 1961 by 20 western nations with 'a commitment to democratic government and the market economy'.³⁸ Unlike most intergovernmental bodies, the FATF is not regulated by any international Treaty or Convention. In its own words: 'The FATF does not have a tightly defined constitution'.³⁹ Given the FATF now has a clear, global policy-making role (and indeed describes itself as a 'policy-making body') this poses an important challenge in terms of accountability. The FATF states that it is 'accountable to the Ministers of its membership' but in the absence of publicly agreed rules on, for example, decision-making, openness and transparency, access to information, budgetary scrutiny, parliamentary control or oversight mechanisms, the organisation can only claim to be democratically accountable in the narrowest sense.

While the FATF has a fairly proactive publication policy, and much information about its work can be found on its website,⁴⁰ there can be little doubt as Professor Peter Alldridge, Head of the School of Law at Queen Mary, University of London has argued that FATF decision-making structures are 'insufficiently transparent to warrant their own uncritical acceptance'.⁴¹

In addition to the permanent secretariat in Paris, the work of the FATF is driven by a seven-member Steering Group and a plenary. The plenary is chaired by a Presidency drawn from the FATF membership, supported by a vice-president, both of which rotate on an annual basis. The Steering Group, which is described as 'an advisory body for the President', includes the past, present and future presidencies. The other four members are unknown. Apart from a commitment to take into account the 'geography and size of the FATF' there are no evident rules governing the election, mandate or structure of the Steering Group.⁴² The author of this report requested further information about the composition and functioning of the Steering Group from the FATF Secretariat, but the request was refused. In the absence of a formal framework governing the activities and transparency of the FATF, there is no formal mechanism to challenge this kind of secrecy.

The current mandate for the FATF covers the period 2004-2012.⁴³ Following a ministerial level mid-term review in 2008, the FATF mandate was revised and expanded.⁴⁴ According to the 2004 mandate, the FATF should, *inter alia*:

- establish international standards for combating money laundering and terrorist financing;
- ensure that members and non-members adopt relevant legislation against money laundering and terrorism, including implementation of the 40+9 Recommendations 'in their entirety and in an effective manner' (through both mutual evaluations/peer reviews and self-assessment of compliance);
- enhance the relationship between FATF and FATF-style regional bodies, the Offshore Group of Banking Supervisors (OGBS) and non-member countries;
- intensify the study of the techniques and trends in money laundering and terrorist financing;
- further develop outreach mechanisms, including to parties affected by the FATF's standards, e.g.

financial institutions and certain non-financial businesses and profession.

The revised mandate, agreed in 2008, added the following competences to:

- intensify its surveillance of systemic criminal and terrorist financing risks to enhance its ability to identify, prioritise and act on these threats;
- Identify and respond to new threats, including 'high-risk jurisdictions';
- limited expansions of its field of action where it has a particular additional contribution to make.

Crucially, the revised 2008 mandate removed the onus on the FATF to consult with those non-financial businesses and professions affected by its standards. Instead, the FATF will simply 'deepen its engagement with the private sector'. This is particularly problematic in terms of the imposition of standards by the FATF affecting the non-profit sector, discussed in Section 4 (below). If such requirements are to be credible, effective and proportionate, then the regular dialogue that takes place between the FATF and the financial sector must be extended to NPOs and other stakeholders from civil society.

The latest periodic review of the FATF requirements was launched in October 2010, with requests for submissions from interested parties. The review was based on 55 questions in a 521 page document, but there was no mention of Special Recommendation VIII on the non-profit sector. As a result, NPOs were effectively excluded from the review process.⁴⁵ The FATF is due to present its findings and recommendations in the autumn of 2011.

2.4 Compliance mechanisms

The FATF is both a global policy-making and enforcement body; it sets global standards and uses several compliance mechanisms to ensure that they are implemented. One mechanism is the 'mutual evaluation' process, under which countries are 'peer-reviewed' and assessed for compliance with the 40 + 9 FATF Recommendations by teams of inspectors from IGOs and neighbouring states. A second mechanism is the list of 'Non-Cooperative Countries or Territories' (NCCTs), a 'blacklist' of failing states in respect to the global fight against money laundering and terrorist financing. The FATF also indirectly

encourages compliance through the publication of 'Best Practices' guidance on the implementation of specific Recommendations.⁴⁶

By 2001, 23 countries and territories had been designated as 'non-cooperative' and placed on the FATF blacklist.⁴⁷ The FATF hoped that other jurisdictions and financial sectors would take appropriate action to protect themselves from the risks posed by these countries, and that 'publicly pointing out problems... followed by a close engagement with affected jurisdictions [would] be highly effective in further stimulating and accelerating national compliance with the standards'.⁴⁸ By 2006 this strategy had been largely successful in FATF terms, and only Burma and Nigeria formally remained on the list, until they too were removed. The FATF continued to issue public statements on 'countries of concern' and currently lists Iran and North Korea as 'high risk and non-cooperative jurisdictions'.⁴⁹

The FATF's mutual evaluation/peer-review process is designed to 'assess whether the necessary laws, regulations or other measures required under the new standards are in force, that there has been a full and proper implementation of all necessary measures and that the system in place is effective'.⁵⁰ Self-assessment questionnaires are sent to the state being evaluated and then followed-up by inspection teams comprised of FATF, World Bank and IMF officials together with experts from national experts

on money laundering and terrorist financing (typically ministry officials, law enforcement specialists and prosecutors from other states).⁵¹ Participation in inspection teams may also be extended, on a reciprocal basis, to experts from other FATF Style Regional Bodies (FSRBs) that are conducting assessments (observers from bodies like the UN Counter-Terrorism Executive Directorate may also be considered 'on an exceptional basis').⁵²

The mutual evaluation process is crucial because it *de facto* extends the FATF Recommendations by imposing extraordinarily detailed guidance – over 250 criteria – on how states should comply with those Recommendations (see further the guidance on FATF SR VIII in Section 4, below).⁵³ On the basis of their evaluation, the FATF inspection team makes detailed proposals on the measures the evaluated state should implement in order to fully comply with the 40 + 9 FATF Recommendations. Under the current, third round of mutual evaluations, countries are required to provide a progress report 12 months after the adoption of their mutual evaluation report, based on a questionnaire prepared by the FATF Secretariat. Such reports are subject to routine updates every two years between evaluation rounds and FATF and national experts are available to advise states on reforms. This continued cycle of review, assessment and guidance emerges as a powerful force for imposing new standards of 'global governance'.

3 The FATF global enforcement regime

This section examines the development and implementation of the FATF's Recommendations and the way in which they have been tied-in to the broader international counter-terrorism and global governance agendas. It shows how a series of decisions adopted in the six weeks after 9/11 had profound implications in terms of globalising the FATF regime and extending its mandate to counter-terrorism and regulations governing non-profit organisations. These decisions have in turn had a significant effect on the international development and 'global governance' agendas.

3.1 Surveillance, data retention and disclosure regimes

The FATF's 40 Recommendations on countering money laundering, adopted in 1990, address national criminal justice systems and law enforcement powers, surveillance and regulation of the financial services industry and international co-operation. In respect to surveillance of the financial system – which has significant implications for all who avail themselves of financial services – the key FATF Recommendations are those on data retention and disclosure regimes. Specifically, Recommendation 4 requires financial institutions and other businesses and professions to take pre-emptive action to prevent money laundering (later extended to terrorist financing) and requires states to ensure that 'financial institution secrecy laws do not inhibit implementation of the FATF Recommendations'; Recommendations 5-12 impose 'customer due diligence and record-keeping' obligations on financial institutions, intermediaries and other designated non-financial businesses and professions, requiring the keeping of accounts and transactional records for at least five years; and Recommendations 13-16 require states to introduce legal obligations on financial institutions to report 'suspicious' financial transactions to the appropriate authorities (while not disclosing such reports to those they concern).⁵⁴

The way in which the EU has incorporated the FATF Recommendations into its legal order is demonstrative of their impact. The 1991 Directive (91/308/EC) assumes that any unexplained transaction of €15,000 or more (or several transactions totalling this amount that seem

to be linked) is 'suspicious' and obliges member states to ensure that the employees of credit and financial institutions:

cooperate fully with the authorities... by informing [them], on their own initiative, of any fact which might be an indication of money laundering [and] by furnishing those authorities, at their request, with all necessary information.⁵⁵

While the Directive concerned 'money laundering', states were free to develop policies that would allow 'this information ..[to].. be used for other purposes'. In applying the legislation, the UK went as far as creating a criminal offence of *failing to disclose* a potentially suspicious transaction, which is punishable by up to five years imprisonment.⁵⁶ In accordance with the FATF's Recommendations, the scope of the EU's anti-money laundering regime was later extended from financial institutions to auditors, accountants, tax advisers, estate agents, lawyers and notaries, dealers in high-value goods and casinos (Directive 2001/97/EC),⁵⁷ then to all cash purchases over €15,000 (Directive 2005/60/EC),⁵⁸ then to persons entering or leaving the EU with cash amounts of €10,000 or more (Regulation 1889/2005/EC),⁵⁹ and then to all 'wire transfers' (Regulation 1781/2006/EC).⁶⁰ All are now subject to suspicion, proactive disclosure and *post hoc* surveillance.

Another important FATF Recommendation concerns the establishment of Financial Intelligence Units (FIUs) to process Suspicious Transactional Reports (STRs) and assist police investigations requiring financial information. Specifically, Recommendation 26 requires the establishment of dedicated police intelligence units for the purposes of:

receiving (and, as permitted, requesting), analysis and dissemination of STR and other information regarding potential money laundering or terrorist financing. The FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of STRs [suspicious transaction reports, also known as Suspicious Activity Reports (SARs)].⁶¹

The first FIUs were established in the early 1990s. In 1995, on the initiative of the U.S. and Belgian FIUs, the 'Egmont Group of FIUs' was established as an 'informal' organisation for the 'stimulation of international cooperation', including 'information exchange, training

and the sharing of expertise'.⁶² The Egmont Group now has 116 members and a dedicated International Secretariat in Toronto, established in 2008. The EU also has its own dedicated rules on FIUs, adopted in 2000 (Decision 2000/642/JHA), which oblige member states to 'ensure' that their FIUs 'exchange, spontaneously or on request... any information that may be relevant' to another state.⁶³ A dedicated 'EU Financial Intelligence Units Platform' was established by the European Commission in 2006 to 'facilitate cooperation among the FIUs', again on an expressly 'informal' footing.⁶⁴

Taken together, the overall effect of the 40 FATF Recommendations has been to reverse the long-established principle of secrecy in financial transactions and introduce a much broader framework for the surveillance of financial systems. The lack of regulation of organisations like the Egmont Group and the EU Platform of FIUs raise substantial concerns about data protection, accountability and democratic control. According to the Serious Organised Crime Agency, which houses the UK's FIU, more than 200,000 Suspicious Activity Reports (SARs) are received every year.⁶⁵ In 2009 the UK House of Lords called on the Information Commissioner to 'review and report on the operation and use of the ELMER database [of SARs]' and 'consider in particular whether the rules for the retention of data are compatible with the jurisprudence of the European Court of Human Rights'.⁶⁶

The question of what happens to the mountain of data generated by the FATF retention and disclosure regimes is a crucial human rights matter. While the FATF has mandated an elaborate surveillance and reporting system, it has not addressed issues such as privacy, data protection and non-discrimination at all. States should of course ensure that national laws and policies implementing international standards comply with relevant international human rights laws, but a lack of scrutiny and understanding about financial surveillance coupled with an absence of guidance or best practice from the FATF renders substantial violations of the right to privacy much more likely. International jurisprudence requires all surveillance systems to be proscribed by law, to be proportionate to the need they purport to address, and subject to adequate judicial control.⁶⁷ Data protection convention further requires that personal data should only be collected and retained where strictly necessary, that access to that data should be kept to a minimum, and that data should only be used for the purpose for which it was initially collected.⁶⁸ Furthermore, individuals should be able to access their data files (subject to limited exceptions) and have recourse to mechanisms that

provide for the correction or deletion of incorrect data and damages claims where data has been used unlawfully. There should also be specific rules covering the onward exchange of data with external agencies and third states.

The FATF has failed to issue guidance on any of these issues. This is problematic because even countries with long traditions of data protection and relatively high-levels of privacy protection have failed to ensure that their post-9/11 surveillance systems comply with international law. These problems are only likely to be amplified in countries with much weaker levels of human rights protection.

3.2 From money laundering to counter-terrorism

The atrocities of 9/11 galvanised a whole host of intergovernmental bodies into taking decisive action in the field of counter-terrorism. Measures were rapidly adopted in quick succession across a host of intergovernmental fora. These measures were, however, more than a 'knee jerk' reaction to 9/11; they had long been on the agenda of powerful countries and IGOs.

The G7 began pursuing 'measures aimed at depriving terrorists of their sources of finance' in 1995 in response to events including the Tokyo subway attacks, the hostage crisis in Budennovsk, the bombing campaigns in France (by GIA) and Spain (by ETA), the assassination of Yitzhak Rabin, and the bombings at the U.S. military training centre in Riyadh and the Egyptian Embassy in Islamabad. It encouraged all states to 'take action in cooperation with other States, to prevent terrorists from raising funds that in any way support terrorist activities and explore the means of tracking and freezing assets used by terrorist groups'.⁶⁹ The following year, the G7 asserted that NGOs were being used for terrorist financing and called for action to:

counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have, or claim to have charitable, social or cultural goals, or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing, and racketeering [emphasis added].⁷⁰

A year later, in 1997, an identical provision appeared in a Resolution of the United Nations' General Assembly.⁷¹ The 'domestic measures' demanded by the G7 and now the UN included 'monitoring and control of cash transfers and bank disclosure procedures' and 'regulatory

measures in order to prevent movements of funds suspected to be intended for terrorist organizations'. These resolutions paved the way for the UN Convention on the Suppression of Terrorist financing, proposed by France in December 1998 and adopted a year later. States party to the Convention must criminalise the financing of terrorist activities, freeze and seize funds intended for this purpose, and cooperate in international terrorism investigations.⁷² These provisions were *de facto* extended to transnational organised crime in the UN Convention on that subject adopted in November 2000.⁷³

The USA was also pushing strongly for global standards. Its 'National Money laundering Strategy' of 1999 contained six Objectives and 27 Action Items to strengthen international cooperation, including universal implementation of the FATF 40 Recommendations; the development of FATF-style regional bodies; putting Counter-Money Laundering Issues on the International Financial Agenda; expanding membership of the Egmont Group of financial intelligence units; enhancing cross-border judicial cooperation and the exchange of law enforcement information; urging the G7 nations to harmonise rules relating to wire transfers; and enhancing understanding of alternative remittance systems.⁷⁴

Where the UN Terrorist Financing Convention introduced substantive obligations on states to cooperate with one another to prevent such activities, there was at that time no mechanism whereby suspected terrorists and their alleged associates and financiers could be named, targeted and sanctioned by the international community as a whole. This framework was instead developed out of the UN Sanctions framework. UNSCR 1267, adopted in October 1999, obliged UN states to freeze assets belonging to designated members of the Taliban in the hope that this would force them to hand over Osama bin Laden, who was by then wanted in connection with the 1998 attacks on the U.S. Embassies in Kenya and Tanzania.⁷⁵ In the aftermath of 9/11, the reach of this Resolution was steadily expanded to encompass a much wider circle of alleged terrorist groups, their members and supporters.⁷⁶

A G8 statement, issued on 19 September 2001 (eight days after the terrorist attacks in New York and Washington) called for 'expanded use of financial measures and sanctions to stop the flow of funds to terrorists' and 'the denial of all means of support to terrorism and the identification and removal of terrorist threat'.⁷⁷ The following week, G7 Finance Ministers announced that:

Since the attacks, we have all shared our national action plans to block the assets of terrorists and their associates. We will integrate these action plans and pursue a comprehensive strategy to disrupt terrorist funding around the world... [We] call on all nations of the world to cooperate in this endeavour... [by] more vigorously implementing UN sanctions on terrorist financing and we called on the Financial Action Task Force to encompass terrorist financing into its activities. We will meet in the United States in early October to review economic developments and ensure that no stone goes unturned in our mutual efforts to wage a successful global campaign against the financing of terrorism.⁷⁸

Five days later, on 24 September 2001, Executive Order 13224 was signed by President George W. Bush, expanding the USA's terrorist blacklisting regime, obliging financial institutions to freeze the assets of any individual or organisation designated by the Secretaries of State or Treasury, and criminalising the provision of any financial or 'material support' to those so designated.⁷⁹ These powers were consolidated two days later in the PATRIOT Act, which increased existing criminal penalties for knowingly or intentionally providing material support or resources for terrorism.⁸⁰ For international donors and grantmakers, these criminal statutes meant that they could now be found – despite their best intentions – to have knowingly or intentionally provided material support or resources for terrorism (see Box 1).

The substance of Executive Order 13224 was effectively replicated and outsourced to other jurisdictions through the UN Security Council Resolution 1373 adopted on 28 September 2001 and later described as 'the most sweeping sanctioning measures ever adopted by the Security Council'.⁸¹ The Resolution required states to implement the UN Terrorist Financing Convention (which at that time had forty-six signatures but only four ratifications, far too few for it to enter into force) by making the obligations in the Convention mandatory and binding on all UN members. Within a year over 130 countries had signed the Convention and 45 countries had ratified it.

UN Security Council Resolution 1373 also set up a parallel blacklisting system to that of UNSCR 1267 (above), requiring states to criminalise the support of terrorism by freezing the assets of suspected terrorists. Whereas Resolution 1267 had targeted specific individuals, Resolution 1373 did not specify the persons or entities that should be listed. Instead, it gives states the discretion to blacklist all those deemed necessary to 'prevent

Box 1 Kind hearts, long sentences: selected U.S. prosecutions of NPOs for 'material support' for terrorism

There are three U.S. Federal statutes prohibiting 'material support' or financing of terrorism. Two criminalise acts relating to the commissioning of actual terrorist offences, the other (U.S.C. 2339B) prohibits the provision of material support to designated terrorist organizations.⁸² Such material support is defined to include almost any kind of support for blacklisted groups, including humanitarian aid, training, expert advice, 'services' in almost any form, and political advocacy. The *Center for Constitutional Rights (CCR)* contends that these provisions violate fundamental rights because 'they criminalize activities like distribution of literature, engaging in political advocacy, participating in peace conferences, training in human rights advocacy, and donating cash and humanitarian assistance, even when this type of support is intended only to promote lawful and non-violent activities'.

In June 2010, the U.S. Supreme Court upheld a ruling that the *Humanitarian Law Project (HLP)* and others would be guilty of material support if they assisted the blacklisted *Kurdistan Workers' Party (PKK)* with conflict resolution and human rights monitoring activities in Turkey. HLP is a US-based NPO that advocates for the peaceful resolution of armed conflicts and worldwide compliance with humanitarian and human rights law. Also represented in the case were Tamil-American organizations seeking to provide medical assistance to tsunami victims and expertise to improve healthcare in northeast Sri Lanka, which would have required working with the *Liberation Tigers of Tamil Eelam (LTTE)*, another blacklisted organisation. According to CCR, the Supreme Court's ruling 'leaves it unclear whether publishing an *op-ed* or submitting an amicus brief in court arguing that a group does not belong on the list is a criminal act that is prohibited' and 'is likely to cast a broad chill over political speech and the activities of humanitarian groups and journalists'.⁸³

In May 2009, a Texan Court sentenced the two former heads of the *Holy Land Foundation (HLF)* to 65 years each in prison for providing aid to the blacklisted Palestinian group Hamas. Three other defendants received sentences of 15 to 20 years. HLF was founded in the 1980s and went on to become the largest Muslim charity in the United States. After 9/11, the Bush administration accused HLF of funding Hamas, shut it down by Executive Order, raided its offices and seized all records dating back to its establishment. However, after three years of investigations, prosecutors could not support the claims that the group funded Hamas. In 2004, the Attorney General instead accused the 'Zakat Committees' – which support charities in Palestine and other Muslim countries – and to which HLF was sending money, food, clothing, medical and school supplies – of supporting organisations controlled by or supportive of Hamas.

The first prosecution, in 2007, resulted in a mistrial, following an initial acquittal after prosecutors failed to persuade the jury that Hamas controlled the Palestinian charity groups, or Zakat committees, to which HLF donated money. At the second trial the prosecution presented unsigned documents seized in a raid on the Palestinian Liberation Organization, which the defence was not allowed to see, introduced through an unnamed Israeli soldier who was not present when the items were seized. The trial was also criticised for allowing inflammatory evidence such as pictures of the aftermath of suicide bombings. The defence pointed out that USAID was also providing supplies to Zakat Committees in 2004, but the five men were convicted on all 108 counts of material support. Lawyers for the five have appealed the judgement.⁸⁴

After the U.S. government shut down HLF and other US-based Islamic charities in 2001, concerned groups established *KindHearts for Charitable Humanitarian Development, Inc.* with the express purpose of providing humanitarian aid abroad in full compliance with the U.S. law. In February 2006, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) froze *KindHearts'* assets without notice or a hearing, based simply on the assertion that the charity was 'under investigation'. OFAC then threatened to designate *KindHearts* as a 'specially designated global terrorist' (SDGT) based on classified evidence, again without providing it with a reason or meaningful opportunity to defend itself. In August 2009, following a challenge by the American Civil Liberties Union, a Federal court ruled for the first time that the government cannot freeze an organisation's assets without obtaining a warrant based upon probable cause. The court also held that the government violated *KindHearts'* right to due process by freezing its assets without providing it adequate notice of the basis for the freeze or a meaningful opportunity to defend itself.⁸⁵

and suppress the financing of terrorist acts'. The decentralised nature of this regime effectively enables states to interpret the Resolution unilaterally and identify terrorist suspects in light of their own national interests.⁸⁶ The result is more than 200 national and international terrorist blacklists across the world and widespread problems in regard to due process, human rights and self-determination.⁸⁷

Lest there be any doubt about the intended effect of UNSCR 1373, the G7 Finance Ministers issued a further statement from Washington on 6 October 2001, announcing an 'integrated, comprehensive Action Plan to block the assets of terrorists and their associates'.⁸⁸ This called on states to 'freeze the funds and financial assets not only of the terrorist Usama bin Laden and his associates, but terrorists all over the world' and requested 'Governments to consider additional measures and share lists of terrorists as necessary to ensure that the entire network of terrorist financing is addressed'.

The G7 Action Plan also instructed the FATF to 'focus on specific measures to combat terrorist financing', including:

- Issuing special FATF recommendations and revising the FATF 40 Recommendations to take into account the need to fight terrorist financing, including through increased transparency;
- Issuing special guidance for financial institutions on practices associated with the financing of terrorism that warrant further action on the part of affected institutions;
- Developing a process to identify jurisdictions that facilitate terrorist financing, and making recommendations for actions to achieve cooperation from such countries'.

On 16 October 2001 the U.S. Mission to the European Union conveyed a formal request for cooperation in expanding the focus of Financial Action Task Force (FATF) and the Egmont Group of Financial Intelligence Units to include financial flows to terrorists – one of more than 40 specific counter-terrorism demands.⁸⁹ An extraordinary FATF plenary was convened in Washington at the end of October 2001 where the eight FATF Special Recommendations on terrorist financing were unveiled, requiring member states (and those of regional FATF bodies) to ratify and implement all relevant UN measures; to criminalise the financing of terrorism and associated money laundering; to enact measures to freeze and

confiscate terrorist assets; to establish reporting mechanisms for suspicious financial transactions related to terrorism; to enhance international co-operation; to establish disclosure regimes around alternative remittance and 'wire transfer' systems; and to review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism, especially non-profit organisations.⁹⁰ A ninth Special Recommendation, on disclosure regimes for people carrying cash across borders, was added in 2004.

So within just six weeks, UNSCR 1373 and the FATF Special recommendations extended the financial surveillance, data retention and disclosure regimes described above to terrorist financing, mandated an elaborate global terrorist blacklisting system, and put the surveillance of the NPO sector firmly onto the counter-terrorism agenda. While many observers view these measures as an understandable, if hasty, reaction to 9/11, the Bush administration clearly had its own agenda. Former Treasury Secretary Paul O'Neill, for example, described the rapid development of blacklisting and asset freezing in the post-9/11 context as 'setting up a new legal structure to freeze assets on the basis of evidence that might not stand up in court... Because the funds would be frozen, not seized, the threshold of evidence could be lower and the net wider'.⁹¹ As he acknowledged, 'freeze' is 'something of a 'legal misnomer – funds of Communist Cuba have been frozen in various U.S. banks for forty years'. The USA also took a unilateral approach in its surveillance of data processed by the SWIFT international financial transaction system, failing to notify its international partners that it was routinely accessing personal information about their citizens on a massive scale (see Box 2, over).

3.3 International law, international development and global governance

Taken together the FATF's 40+9 Recommendations and compliance mechanism amount to a comprehensive set of anti-money laundering and counter-terrorist financing conventions. As noted earlier, most international bodies in which a number of states participate have a formal structure and constitution contained in a treaty, convention or other agreement. This is not the case for the FATF, which is instead seen as a 'partnership between governments, accountable to the Ministers of its member Governments, who give it its mandate'.⁹² International lawyers contend that the FATF has effectively 'operated on an *ad hoc* and temporary basis for the last twenty years' and suggest that if it is to be a standing body, it should 'be

properly constituted and established by an international convention'.⁹³ This would be a welcome move in terms of addressing the concerns about accountability and human rights raised in this report.

The FATF and its 40+9 Recommendations have also had a significant impact on the international development and global governance agendas. Among the first IGOs to adopt the FATF standards were the International Monetary Fund and the World Bank. The G7 states had initially asked the two organisations to join their anti-money laundering efforts in July 2000, requesting them to prepare a joint paper on their respective roles in combating money laundering and financial crime. However, at this time 'there was also substantial resistance on the part of many member states, especially the developing countries, to making AML activities a formal part of Fund and especially Bank operations'.⁹⁴ The developing countries did not want the Bank and Fund to generate additional funding 'conditionalities' and some states objected to a lack of expertise on the part of the Fund and the Bank, which was among the arguments levelled at the World Bank's draft Handbook on laws relating to NGOs. After 9/11 this opposition melted away.

The IMF was first to announce the incorporation of the FATF standards into its Financial Sector Assessment Program and by August 2002 the Executive Boards of both the IMF and World Bank had formally adopted the FATF Recommendations. Together with the FATF, the two organisations also launched a pilot project to develop 'a comprehensive and unified methodology for assessing implementation of AML/CFT standards', resulting in the FATF 'mutual evaluation' system described in Section 2.4 (above).⁹⁵ With the establishment of effective domestic AML and CFT regimes now explicitly part of the World Bank's objectives, it also began to provide technical assistance (TA) to borrower countries for this explicit purpose. Between 2002 and 2004 the World Bank, together with the IMF, provided TA to 63 individual countries and 32 regional projects.⁹⁶ Technical assistance was directed at the establishment of AML/CFT laws and regulations, capacity building for financial sector supervisory and regulatory authorities, the establishment of Financial Intelligence Units, training programs in the public and private sectors, and support for regional FATFs to conduct their own compliance assessments. The original FATF members also provided financial support to the newly established regional FATF formations.

Almost all other bilateral aid development agencies followed the World Bank and IMF into AML/CFT work, as did

most of the other multilateral development banks (including the European, Inter-American, Asian and African Development Banks).⁹⁷ The UN Counter-Terrorism Committee (CTC) compiled a Directory of TA providers and the G8 established a dedicated Counter-Terrorism Action Group to support the CTC and increase donor coordination of TA.⁹⁸ In 2003, the FATF regime was also tied-in to the United Nations Convention against Corruption, which *de facto* obliged ratifying states to enact specific FATF Recommendations to prevent money laundering.⁹⁹

These developments can be situated within three broader trends. The first is the increasing priority attached to the integration of developing countries into the global economy via the opening of borders and the harmonisation of domestic regulatory regimes. Almost a decade after 9/11, major aid donors now support the global implementation of the FATF Recommendations as a matter of course, through both bilateral partnerships and multilateral technical assistance channels. The IMF now has a dedicated AML/CFT 'donor-supported trust fund' to finance technical assistance worth more than \$25.3 million,¹⁰⁰ while the 'Financial Market Integrity' (AML/CFT) programme is an 'essential element of the World Bank's development mandate'.¹⁰¹ The idea that poor countries must become trusted places to 'do business' has been firmly implanted on the development agenda; the threat of being branded 'non-compliant' ensures that governments in developing countries accept these requirements in their attempt to ensure access to development funding and attract private investment.

The second trend is the increasing use of aid from countries in the global North to support their national and international security agendas.¹⁰² While little evidence has been presented to suggest that these efforts actually benefit poor people in developing countries, Western security and counter-terrorism demands have moved steadily up the international development agenda over the past decade. In addition to the IMF and World Bank, the USA and EU have both provided generous financial support to expand and implement the FATF regime across the world. Critics argue that 'rather than fulfilling their mandate as development agencies', IGOs have 'become instruments in the creation of regimes of governance that respond to perceived threats to western security'.¹⁰³

It may also be noted that the 40+9 FATF Recommendations have also spawned a growing financial surveillance industry, with many private institutions now reliant on commercial service providers to ensure that they do not fall foul of their obligations under national and

international law.¹⁰⁴ International development and philanthropic organisations have been adversely affected by the burden of compliance as we will examine in more detail later,¹⁰⁵ while companies that supply sophisticated technologies for law enforcement agencies to identify and analyse suspicious financial transactions and other

datasets have seen their stock soar.¹⁰⁶ In August 2011 the U.S. security firm *Regulatory DataCorp* revealed that it held more than one million individuals and organisations on its 'anti-terror' database.¹⁰⁷ The company markets this asset to government and private-sector clients around the world as an AML/KYC 'compliance protection' service.¹⁰⁸

Box 2 The EU-US 'SWIFT Agreement' and the Terrorist Finance Tracking Programme

On 28 June 2006, Privacy International filed simultaneous complaints with Data Protection and Privacy regulators in 33 countries following an exposé in the *New York Times* of a private arrangement between the Brussels-based international bank transfer organisation SWIFT (Society for Worldwide Interbank Financial Telecommunication) and the U.S. Government.¹⁰⁹ SWIFT links more than 9,000 financial institutions in 209 countries and territories and facilitates more than 15 million financial transactions per day. The agreement between SWIFT and the USA involved the covert disclosure of millions of transactional records to the CIA as part of its Terrorist Finance Tracking Programme (TFTP).

Following the revelations, the European Parliament (EP) adopted a Resolution condemning the surveillance and 'strongly disapproving' of 'any secret operations on EU territory that affect the privacy of EU citizens'.¹¹⁰ The EP also declared itself 'deeply concerned that such operations should be taking place without the citizens of Europe and their parliamentary representation having been informed'. A Belgian court declared the transfers 'illegal' in October 2006; a view shared by European Data Protection Supervisors. But rather than censure SWIFT or the United States authorities for their actions, the EU entered into negotiations with the USA on a formal Treaty to legitimise the data transfers. In advance of the conclusion of that Treaty, the EU authorised continued access to SWIFT for U.S. authorities, subject to a number of unilateral assurances on enhanced data protection from the U.S. government.

An interim agreement between the EU and USA was signed on 30 November 2009. This was one day before the Lisbon Treaty entered into force. Lisbon included an enhanced co-decision procedure which would have prohibited signing such an agreement without prior approval of the Parliament. In February 2010, the European Parliament – unsurprisingly – decided to reject the interim EU-US agreement. Its Resolution called upon the EU to renegotiate the agreement taking full account of EU data protection law. Following a proposal from the European Commission, the EU Council adopted a new version of the SWIFT Agreement in June 2010. While this Agreement ostensibly limited U.S. access to SWIFT to data required for actual terrorist investigations, it still provided for the bulk transfer of transactional data, a data retention period of five years, and only vague guarantees regarding complaints and oversight mechanisms, all of which failed to meet the relatively stricter requirements of EU law. Despite these shortcomings, the new SWIFT Agreement was approved by the European Parliament in July 2010. Key to the EP's consent was the appointment of an EU supervisor, from EUROPOL, to monitor data searches by the U.S. and EU plans to develop its own TFTP system, which would end the need for bulk data transfers.

In March 2011, documents from EUROPOL suggested that U.S. requests for information were too vague and that the proposed oversight mechanisms had not been put into practice. The European Parliament accused EUROPOL of 'merely rubber-stamping' U.S. access.¹¹¹ 'After reluctantly having given our consent to this agreement, we feel betrayed in reading this report', said German Liberal MEP Alexander Alvaro, 'it's also about the credibility of the European Parliament and the EU itself'.¹¹² The EU is also negotiating a framework Treaty with the U.S. covering all exchanges of law enforcement data. MEPs have threatened to block the Treaty if their concerns are not addressed.

In July 2011, the European Commission outlined its plans for a dedicated EU Terrorist Finance Tracking Programme that would enable real-time monitoring of suspects' financial transaction data, direct searches of historical transactional data and the creation of a dedicated international communications system and database for suspicious transactions.¹¹³ While this would regulate U.S. access to European data, the legitimacy and proportionality of a global financial surveillance system is still a matter of much debate.

4 FATF Special Recommendation VIII and regulation of the non-profit sector

This section examines the development and implementation of the FATF's Special Recommendation VIII which states that 'Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism e.g. Non-profit organizations'. The analysis shows how SR VIII has been *de facto* extended by FATF interpretation, guidance and compliance mechanisms, significantly expanding the scope of the obligations on states to implement SR VIII and moving beyond addressing possible vulnerabilities in the NPO sector to outright regulation of the sector as a whole. These policies are potentially highly problematic in states where NPOs are already viewed with suspicion or hostility by authorities, and where new regulation coincides with already significant restrictions on the political and operational space of NPOs.

4.1 NPOs and the financing of terrorism

As noted above, the G7 first asserted that NPOs were involved in terrorist financing in 1996, calling for measures to combat those organisations which falsely 'claim to have charitable, social or cultural goals' or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing, and racketeering'.¹¹⁴ Post-9/11, counter-terrorism policies have since accused some NPOs of supporting terrorism in two ways: either as 'fronts' for terrorist organisations that raise funds, transfer money and provide logistical support, or as legitimate enterprises that indirectly or directly support the aims of terrorist organisations (see for example Box 1, above). According to the FATF's 2008 Terrorist Financing 'Typologies' Report:

Terror networks often use compromised or complicit charities and businesses to support their objectives. For example, some groups have links to charity branches in high-risk areas and/or under-developed parts of the world where the welfare provision available from the state is limited or non-existent. In this context, groups that use terrorism as a primary means

to pursue their objectives can also utilise affiliated charities as a source of financing that may be diverted to fund terrorist attacks and terrorist recruitment by providing a veil of legitimacy over an organisation based on terrorism.¹¹⁵

This thesis has been accepted and embraced by many national governments. For example, as Gordon Brown (then UK Chancellor of the Exchequer) said in a speech at Chatham House in October 2006, 'We know that many charities and donors have been and are being exploited by terrorists'.¹¹⁶

The actual extent of the problem is, however, strongly contested. A study commissioned by the European Commission, published in 2008, found 'limited abuse of foundations';¹¹⁷ the UK Charities Commission has reported that 'actual instances of abuse have proved very rare';¹¹⁸ and the U.S. Treasury has acknowledged that the vast majority of the 1.8 million U.S. charities 'face little or no terrorist financing risk'.¹¹⁹ The FATF's own 'mutual evaluation' reports also often acknowledge that terrorist financing in the NPO sector is an insignificant or non-existent problem for the country concerned, yet somewhat preposterously proceed to propose binding remedies that those states must implement in order to comply with Special Recommendation VIII (see further below).

According to a recent study commissioned by the World Bank, 'Despite the energy put into this effort [combating terrorist financing], we are not aware of examples in which measures proposed by individual countries in implementing SR VIII and the [Interpretative Note], or similar national legislation, have resulted in detecting or deterring cases of terrorism financing'.¹²⁰ In 2009, the Working Group on Tackling the Financing of Terrorism of the *United Nations Counter Terrorism Implementation Task Force* recommended that 'States should avoid rhetoric that ties NPOs to terrorism financing in general terms, because it overstates the threat and unduly damages the NPO sector as a whole'.¹²¹

4.2 SR VIII interpretation and guidance

SR VIII as adopted by the FATF plenary in October 2001 clearly limits the scope of the obligations on signatory states to 'reviewing the adequacy' of their domestic frameworks for NPO regulation to ensure that the sector cannot be exploited for their purposes of terrorist funding. The full-text of SR VIII is:

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- (i) by terrorist organisations posing as legitimate entities;
- (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

As suggested above, it would appear logical to link any remedial action as regards NPO regulation to the outcome of the actual reviews of the adequacy of existing laws and policies. However, the FATF's 'Interpretative Note' on SR VIII expressly links the 'adequacy' of measures relating to NPOs to a broader requirement to regulate the sector as a whole in order to 'preserve its integrity'. The note sets out 15 specific measures that states should implement in this regard, including 'clear policies to promote transparency, integrity and public confidence in the administration and management of all NPOs' and 'steps to promote effective supervision or monitoring of their NPO sector' (see Appendix A). In practice, this means that all 'countries should be able to demonstrate that the following standards apply':

(i) NPOs should maintain information on:

- (1) the purpose and objectives of their stated activities; and
- (2) the identity of the person(s) who own, control or direct their activities, including senior officers, board members and trustees. This information should be publicly available either directly from the NPO or through appropriate authorities.

(ii) NPOs should issue annual financial statements that provide detailed breakdowns of incomes and expenditures.

(iii) NPOs should be licensed or registered. This information should be available to competent authorities.

(iv) NPOs should have appropriate controls in place to ensure that all funds are fully accounted for and are

spent in a manner that is consistent with the purpose and objectives of the NPO's stated activities.

(v) NPOs should follow a "know your beneficiaries and associate NPOs" rule, which means that the NPO should make best efforts to confirm the identity, credentials and good standing of their beneficiaries and associate NPOs. NPOs should also undertake best efforts to document the identity of their significant donors and to respect donor confidentiality.

(vi) NPOs should maintain, for a period of at least five years, and make available to appropriate authorities, records of domestic and international transactions that are sufficiently detailed to verify that funds have been spent in a manner consistent with the purpose and objectives of the organisation. This also applies to information mentioned in paragraphs (i) and (ii) above.

(vii) Appropriate authorities should monitor the compliance of NPOs with applicable rules and regulations. Appropriate authorities should be able to properly sanction relevant violations by NPOs or persons acting on behalf of these NPOs.

According to the principles of the FATF's Interpretative Note, these measures should be 'flexible' and 'proportionate' so as not to 'disrupt or discourage legitimate charitable activities', but sufficient to:

promote transparency and engender greater confidence in the sector, across the donor community and with the general public that charitable funds and services reach intended legitimate beneficiaries. Systems that promote achieving a high degree of transparency, integrity and public confidence in the management and functioning of all NPOs are integral to ensuring the sector cannot be misused for terrorist financing.

Further guidance on the interpretation of SR VIII from the FATF is provided in an 'International Best Practices' document on 'Combating the Abuse of non-Profit Organisations', first issued in October 2002, which suggests additional measures that states should introduce in order to ensure financial transparency and oversight (see Appendix B). The Best Practice includes detailed guidance on financial accounting, programmatic verification and administration by NPOs, as well as the following 'oversight' mechanisms:

- Law enforcement and security officials should continue to play a key role in the combat against the abuse of non-profit organisations by terrorist groups,

including by continuing their ongoing activities with regard to non-profit organisations;

- [T]errorist financing experts should work with non-profit organisation oversight authorities to raise awareness of the problem, and they should alert these authorities to the specific characteristics of terrorist financing;
- Jurisdictions which collect financial information on charities for the purposes of tax deductions should encourage the sharing of such information with government bodies involved in the combatting of terrorism (including FIUs) to the maximum extent possible;
- [P]rivate sector watchdog[s] or accreditation organisations are a unique resource that should be a focal point of international efforts to combat the abuse of non-profit organisations by terrorists. Not only do they contain observers knowledgeable of fundraising organisations, they are also very directly interested in preserving the legitimacy and reputation of the non-profit organisations. More than any other class of participants, they have long been engaged in the development and promulgation of “best practices”.

A final set of guidance on SR VIII is provided in the Handbook for FATF assessors for the purposes of mutual evaluation (see Appendix C). Whereas the Interpretative Note and Best Practices suggested a ‘flexible, effective, and proportional’ approach to NPO regulation, the Handbook simply sets out a dozen criteria with which states are expected to comply in order to adhere with the Special Recommendation. These concern oversight mechanisms (including the licensing or registration of NPOs and five-year data retention regimes for NPO accounts), investigative measures (including law enforcement access to this data), and measures to facilitate cooperation with international police investigations concerning NPOs. The FATF’s guidance is crucial, because it effectively dictates how states will be evaluated by assessors and in turn the nature of the recommendations to which non-compliant countries will be subject.

As noted in the introduction, the imposition of extensive regulatory requirements in already repressive environments carries a significant risk that the freedom of expression and association of NPOs could be restricted. Licensing and registration requirements have already been widely used to prevent the formation or restrict the activities of critical NGOs. In other cases, it may be

counter-productive to encourage governments to impose such detailed financial transparency requirements and the routine monitoring of NPO activities. As lawyer and human rights analyst Patricia Armstrong has explained: ‘The development of regulatory systems for NGOs is a complicated process made more so when approaches are intended to be appropriate in diverse national, legal, cultural, political and social situations. There are no quick or easy solutions. The meaningful involvement of local NGOs is essential not only to the development of appropriate approaches, but also for the growth and development of the capacities of those groups’.¹²²

The *Center on Global Counterterrorism Cooperation* (an organisation that has worked extensively to prevent abuse of the non-profit sector for the purposes of terrorist financing) suggests that it is now ‘widely accepted that there can be no “one-size-fits-all” approach to regulating non-profit organizations’,¹²³ yet this is in essence what the FATF is promoting. In calling for ‘clear policies to promote transparency, integrity and public confidence in the administration and management of all NPOs’, the FATF may have unintentionally given repressive governments a broad mandate to monitor, disrupt and coerce charities and NGOs.

4.3 Assessing compliance with SR VIII

In order to better understand the impact of SR VIII, our research examined the mutual evaluation reports of 159 countries and territories in order to assess compliance ratings and recommended national actions in respect to SR VIII.¹²⁴ The research found that just five countries out of 159 evaluations have been assessed as ‘Compliant’ – Belgium, Egypt, Italy, Tunisia and the USA – meaning that the ‘Recommendation is fully observed with respect to all essential criteria’. A further 17 countries were found to be ‘Largely compliant’, meaning ‘only minor shortcomings, with a large majority of the essential criteria being fully met’. This included nine FATF member countries (Canada, China (including Hong Kong and Taipei, which were assessed separately), Denmark, France, Germany, Netherlands, Spain, Switzerland and the UK) and eight members of regional FATF bodies (Barbados, Israel, Oman, Qatar, Saudi Arabia, Singapore, St. Vincent and the United Arab Emirates). The vast majority of the 159 mutual evaluation reports that were examined – 85% – designated countries as only ‘partially compliant’ or ‘non-compliant’. ‘Partially compliant’ (66 of 159 countries, or 42%) signifies that the ‘country has taken some

substantive action and complies with some of the essential criteria' ; 'non-compliant' (69 of 159 countries, or 43%) means 'major shortcomings, with a large majority of the essential criteria not being met'. (It should be noted here that the FATF is currently nearing the end of its third round of mutual evaluations and many states have now been assessed twice for compliance with SR VIII).

Whereas six out of seven of the G7 members are rated as complaint or largely compliant, in South America, all 21 GAFISUD countries were found to be non-compliant or only partially compliant. It was the same for 26 out of 28 Caribbean (CFATF) countries; eight of 10 West African (GIABA) countries ; eight of 11 ESAAMLG (Eastern and Southern Africa Anti-Money Laundering Group) countries; seven out of eight of the Eurasian FATF Group (EAG) countries; and 24 out of 27 Asia/Pacific FATF Group (APG) were found to be 'non-compliant' or only 'partially compliant'.¹²⁵ The evaluation reports directed the overwhelming majority of assessed states to introduce stricter regulation of their non-profit sectors. As the following case studies show, however unintentionally, these recommendations can have a tremendously negative impact in countries where civil society already operates in a politically restrictive or authoritarian climate.

4.4 Country case studies

The case studies compare the findings of the FATF evaluators with the country assessments of the *International Center for Non-Profit law* (ICNL) and other independent observers.¹²⁶ Some show a direct link between FATF country evaluation reports and new national NPO regulations seen to adversely impact on civil society. Others show how the FATF regime is endorsing repressive NPO regulations and even proposing new laws and practices where civil society already faces severe restrictions.

4.4.1 USA: model NPO regulation?

The USA has played a central role in setting the international FATF standards and is one of the few countries of the world to have been designated 'complaint' by that organisation in respect to SR VIII.¹²⁷ It also has some of the strictest counter-terrorism-related NPO regulations in the world on its statute book, and has controversially prosecuted charities for 'material support'. In doing so, it has effectively outlawed the provision of any kind assistance that could be construed as 'material support' to 'terrorist' organisations, be it humanitarian assistance

for social projects connected to proscribed organisations, or human rights advice to non-state actors engaged in armed conflict (see Box 1, above). Under U.S. Treasury 'Anti-Terrorism Financing Guidelines: Voluntary Best Practices for U.S. Based Charities', first issued in 2002, NPOs should also introduce new due diligence practices, including the checking of all staff against the national and international terrorist blacklists.¹²⁸ The Guidelines also recommend that NPOs certify that they will not 'employ or deal with' anyone on these lists by placing conditions on the funds they provide.

The subsequent adoption of these guidelines by donor organisations led, for example, the *American Civil Liberties Union* (ACLU) to return a million dollar grant to the *Ford Foundation*.¹²⁹ The U.S. *Council on Foundations*, together with more than 70 foundations, charities, advocacy organizations, non-profit associations and legal advisers, has strongly opposed these measures and recently withdrew from any further negotiation with the U.S. Treasury, calling the Guidelines 'counterproductive' insofar as 'they impose excessively burdensome and impractical barriers to global relationships and grantmaking'.¹³⁰ The Council contends that the 'guidelines create confusion about legal requirements and make wrong assumptions about charitable activity by targeting particular regions or religious groups'. Research by the ACLU has also found that U.S. terrorism financing policies have undermined American Muslims' protected constitutional liberties, violating their rights to freedom of religion, freedom of association, and freedom from discrimination. The ACLU suggests the policies have produced a 'climate of fear' that chills American Muslims' 'free and full exercise of their religion through charitable giving, or Zakat, one of the 'five pillars' of Islam and a religious obligation for all observant Muslims'.¹³¹

4.4.2 Burma/Myanmar: FATF evaluation provides cover for clampdown on new social movements

In July 2008 the Asia-Pacific formation of the FATF (APG) found that Burma/Myanmar was only 'partially complaint' with FATF SR VIII. It called upon the Burmese authorities to 'Introduce explicit obligations requiring NPOs to maintain [their] records, for a period of at least five years', 'grant relevant authorities access to NPO books and accounts' and 'introduce administrative penalties in respect of non-compliance with reporting obligations or providing misleading information'.¹³²

In January 2011, the Burmese Junta announced that it was to increase scrutiny of NGOs' finances in an operation led by the national police force's Department Against Transnational Crime. 'The authorities will check NGOs to see if any of their expenses violate the existing Money Laundering Control Law. If a group can't present proper records of their expenditures, it could be dissolved' said an interior ministry official. Observers suggest that the operation was aimed at new social organisations that emerged in Burma after Cyclone Nargis struck the country in May 2008, many of which had yet to officially register as NGOs and are still operating as community-based organisations with funding from international aid agencies, Western embassies or donations from overseas Burmese.¹³³ As with other evaluation reports, the APG/FATF recommendations to the Burmese government make no reference to the protection of freedom of association, despite the country being well-known for repression and restriction of this fundamental right.

4.4.3 Egypt: 'most restrictive NPO regime in world' compliant with SR VIII

Egypt is one of only five out of 159 countries to be designated compliant in respect to SR VIII, following an inspection by the World Bank in May 2009.¹³⁴ Its NGO law has also been described as 'one of the most restrictive in the world'.¹³⁵ According to the *International Journal of Not-for-Profit Law*, 'the provisions dealing with supervision of NGOs and enforcement of the law are vague, arbitrary, and unnecessarily severe. MOSA [Ministry of Insurance and Social Affairs] has the authority to dissolve any NGO at any time if finds that the organisation is "threatening national unity" or "violating public order or morals". And although any MOSA dissolution order can be appealed in the administrative courts, an appeal can take several years in Egypt's backlogged court system. As an example, the Egyptian Organization for Human Rights fought MOSA in court for more than ten years. Although it ultimately prevailed, the well-respected human rights group wasted enormous amounts of time and money in its decade-long fight for legal recognition.

More worrisome, from the standpoint of encouraging civil society, Law 84/2002 imposes severe individual penalties for non-compliance with the law. These penalties include up to one year in prison and a fine of up to 10,000 Egyptian pounds for establishing an association that threatens "national unity" or violates "public order or morals"; up to six months in prison and a fine of up to

£E 2,000 for conducting NGO activity "without following the provisions prescribed" by the law, conducting activity despite a court ruling dissolving or suspending an association, or collecting or sending funds abroad without MOSA permission; and up to three months in prison and a fine of up to £E 1,000 for conducting NGO activity without a license from MOSA, affiliating with a foreign NGO network or association without MOSA permission, or merging with another association without MOSA approval'.¹³⁶

Following the Revolution in Egypt in 2011, decades of repression and restrictions on civil society have been cited as a major inhibiting factor for new social movements to achieve adequate representation in subsequent legal and political processes.

4.4.4 Tunisia: 'highly restrictive regime' endorsed by regional FATF

Tunisia was another one of the five countries to be rated 'compliant' in a 2007 evaluation by MENAFATF, which noted that regulation of the NPO sector was 'very strict and highly restrictive'.¹³⁷ In much the same way as Egypt had, 'Tunisia outlaws unlicensed associations, and individuals who operate or participate in an unlicensed association can be imprisoned or fined. Yet it is impossible for many CSOs to register and obtain the required license. Only certain categories of CSOs are permitted to register, and these do not include human rights or democracy groups. The government also creates procedural barriers to prevent registration. In particular, the government routinely fails to issue required receipts to organizations seeking to register, in effect blocking many independent CSOs from registering'.

Following the ousting of Ben Ali in the Tunisian Revolution, ICNL warned donors responding to the humanitarian crisis on Tunisia's border with Libya that 'Staff of Tunisian CSOs who have contact with foreign governments or organizations could later be prosecuted and face imprisonment if the Tunisian authorities determine that these contacts have "incited prejudice" against Tunisia's vital interests, economic security, or diplomatic relations – broad terms that give the government wide discretion to target disfavored groups'.¹³⁸ Tunisian CSOs have called for a new NPO framework law that respects the rights to association and assembly and eliminates these and other barriers to philanthropy.

4.4.5 India: FATF demands tighter regulations; restrictive new Act adopted

In July 2010, a joint FATF/APG inspection found that India was 'non-compliant' in respect to FATF SR VIII. The FATF report called on the Indian authorities to 'implement measures to ensure that all NPOs are licensed and/or registered as such and make this new information available to the competent authorities'; 'ensure that NPOs maintain information on the identity of the persons who own, control or direct their activities, including senior officers, board members and trustees'; 'demonstrate that appropriate measures are in place to sanction violations of oversight measures or rules by NPOs or persons acting on [their] behalf' and 'undertake comprehensive outreach to the NPO sector with a view to protecting the sector from abuse for terrorist financing as well as wider outreach in relation to good governance and accountability'.¹³⁹

The Indian government drew-up new regulations in advance of the publication of the FATF report and adopted the Foreign Contributions Regulations Act (FCRA) in mid-2010. The FCRA was condemned by CIVICUS, a global civil society alliance, for allowing broad executive discretion to designate organisations as being of 'political nature' and prevent them from receiving foreign funds.¹⁴⁰ This is particularly problematic for organisations concerned with issues like human rights that rely more heavily on foreign grants to fund their activities. FCRA also places an arbitrary cap of 50% on the administrative expenses of an organisation receiving foreign funding; while those organisations that are given permission to receive funding from abroad must re-apply for permission from the government every five years.

4.4.6 Indonesia: new FATF-promoted laws opposed by NGOs

In July 2008 an APG inspection of Indonesia found that country to be 'non-compliant' in respect to FATF SR VIII. While foreign NPOs are subject to special regulations and procedures and required to register with the Ministry of Home Affairs, the Law on Societal Organisations adopted by the Suharto government in 1985 as a means of controlling civil society organisations had not been applied since the regime fell in 1998.

In order to comply with FATF SR VIII the APG called on Indonesia to 'institute a process to improve regulation and

oversight of charities as a priority'; conduct a coordinated review of the domestic NPO sector; include religious NPOs in effective controls to 'improve good governance and ensure AML/CFT measures are effective in the sector'; 'conduct outreach and implement measures to improve transparency and good governance within the NPO sector'; 'implement measures, including existing laws relating to Foundations, to ensure that all relevant NPOs operate within the terms of their registration and make publicly available information on their activities, their office holders and financial activities'; 'remove barriers to information sharing between the DG Tax and other NPO regulators, POLRI, PPATK and other relevant CFT agencies'; and 'support improved mechanisms for information exchange with foreign counterparts'.¹⁴¹

In 2010 the Indonesian government announced several proposals including a new law on Civil Society Organizations (to replace the 1985 Societal Organizations law) and a Bill on the Management of Islamic Charity (Zakat). At a public hearing on the draft CSO law in June 2011, the *Indonesian Centre for Law & Policy Studies* submitted a joint statement from a coalition of NGOs calling on the government to scrap the Bill and simply repeal the defunct Societal Organizations law in order to guarantee continued freedom of association.¹⁴²

4.4.7 Cambodia: draft NPO law threatens unauthorised groups and organisations

Cambodia was rated partially-compliant with FATF SR VIII by the World Bank and APG in July 2007.¹⁴³ The evaluation report called on the Cambodian government to adopt a 'comprehensive legal framework to govern the activities of NPOs'.

A draft NPO law was released in August 2010. Following widespread criticism from NGOs and civil society organisations, a revised draft was produced in March 2011. ICNL reports that reaction to the new draft 'has been largely critical, as many of the problematic provisions remain... and new concerns have arisen'. In particular, the draft law limits eligible founding members of both associations and NGOs to Cambodian nationals, thus excluding refugees, stateless persons and others in Cambodia from forming associations or domestic NGOs. The draft law also prohibits any activity conducted by unregistered associations and NGOs; registration is mandatory and unregistered groups are banned. According to ICNL, 'this means that every group of individuals who gather together with a differing level of frequency and perform the broadest

variety of imaginable activities, from trekking and football fans, to chess and silk weaving groups, will be acting in violation of law'. The draft law also 'provides inadequate standards to guide the government's determination of suspension or termination of an association or NGO'; there is no requirement for the governmental authorities to provide notice and an opportunity to rectify problems prior to the suspension or termination. There is no mention of a right to appeal after suspension or termination. Cambodia's draft NPO law also 'places constraints on associations and NGOs through notification and reporting requirements' and 'erects barriers to the registration and activity of foreign NGOs' in 'a heavily bureaucratic, multi-staged registration process, which lacks procedural safeguards'.¹⁴⁴

4.4.8 Russia: NPO regulations 'dangerously increase' coercive powers of state

Draft legislation imposing heightened surveillance and re-registration procedures affecting the 450,000 Russian NGOs operating in Russia was passed by the Duma in November 2005. Many interpreted the initiative as a reaction to the revolutions in Georgia and Ukraine where NGOs played an important role. The Council of Europe, the EU Civil Society Contact Group, European politicians and media commentators, and Russia's own Public Chamber all expressed concern about the law prior to its 'second reading' in the Duma. The United States House of Representatives even passed a Resolution in December 2005, calling for Russia to withdraw the NGO legislation drafts. The EU Civil Society Contact Group argued that the proposed law would 'dangerously increase' the intrusive power of the state by allowing unprecedented control over independent NGOs; create an overly complicated registration procedure for NGOs and permit government officials to deny registration arbitrarily; subject NGOs to inspections and audits at any time and without limitation; liquidate NGOs unable to obtain registration; outlaw foreign representative offices; and diminish the necessary checks and balances intrinsic to a democratic society.¹⁴⁵

Despite promises by President Vladimir Putin to change the Bill, the legislation was passed in January 2006. Critics argue that the law is unconstitutional and in violation of domestic and international law.¹⁴⁶ A gay rights organisation has been denied registration on the grounds that its work 'undermines the sovereignty and territorial

integrity of the Russian Federation in view of the reduction of the population.'

Despite criticism from around the world that the law is overtly repressive and restrictive, a joint evaluation by FATF, EAG and MONEYVAL in 2008 found that Russia was only 'partially compliant' with FATF SR VIII and called upon the authorities to set up a more 'formalised and efficient system'.¹⁴⁷ According to ICNL, the existing legislation already 'authorizes the government to request any financial, operational, or internal document at any time without any limitation, and to send government representatives to an organization's events and meetings (including internal business or strategy meetings)'.¹⁴⁸

4.4.9 Colombia: regulation needed to ensure compliance with SR VIII

In 2007 a GAFISUD inspection of Colombia found that country 'non-compliant' with FATF SR VIII. It noted the failure to adequately review the sector to assess its vulnerability to terrorist financing and introduce a uniform regulatory framework for NPOs.¹⁴⁹ According to ICNL, Colombia is 'one of the most dangerous countries in the world in which to be a human rights defender, with dozens of labor rights activists, lawyers, indigenous activists and community and religious leaders being murdered every year. In recent years, civil society organizations, mainly human rights NGOs, and their members have been frequent victims of reprisals and undue restrictions as a result of their work of promoting and protecting the victims of the armed conflict. On several occasions, the Inter-American Commission of Human Rights has voiced its concern about threats against human rights defenders and members of civil society organizations. Other forms of violations include: illegal surveillance, smear campaigns and criminal prosecutions, and violations of the home and other arbitrary or abusive entry to the offices of human rights organizations, and interference in correspondence and phone and electronic communication'.¹⁵⁰ While 'there are no express legal barriers to operational activities, the subjective application of regulations by government institutions often produces a disparity between the original intent of the laws and their present enforcement'. The GAFISUD evaluation failed to take this political climate into account or qualify its demands for new NPO regulation with the need for stringent safeguards guaranteeing freedom of association and expression.

4.4.10 Paraguay: anti-terrorism law 'criminalises protest'

Paraguay was rated non-compliant with SRVIII by a GAFISUD inspection in December 2005 on the grounds that it lacked an adequate framework for combating terrorist financing and regulating NGOs.¹⁵¹ In 2007 the government introduced a draft Anti-Terrorist Law and modifications to the penal code. The proposed anti-terrorist law did not clearly define what constitutes terrorism and included acts such as 'dangerous interventions or obstacles on public roadways', 'noise pollution' and other actions which 'intimidate Paraguayan citizens'. Under the law, financing terrorist activities is a crime punishable by 5-15 years in prison, as is any kind of association with terrorist organisations. The law was seen as a clear attempt to criminalise forms of social protest and clampdown on NGOs.¹⁵² Despite widespread opposition, the law was passed in 2010.¹⁵³ A second law on the Prevention of Money-Laundering, which extends the range of financial institutions that can be placed under surveillance and provides the tools to investigate institutions suspected of financing terrorism, was also passed, leading to a lifting of sanctions against Panama by the Egmont Group of Financial Intelligence Units.¹⁵⁴

4.4.11 Uzbekistan: could do better?

In June 2010, EAG (Eurasian Group on money laundering and terrorist financing) found Uzbekistan 'partially compliant' with SR VIII, noting that the government had established 'a comprehensive integrated system of monitoring and oversight over the NPO sector' and 'that this system can be used for, inter alia, protection of the sector from FT or ML risks'. EAG nevertheless recommended that Uzbekistan should 'review effectiveness of the established system of control and monitoring of the NPO sector' for AML/CFT purposes.¹⁵⁵

The Uzbek NPO regulation system is seen by ICNL to have resulted in most foreign and international NGOs being 'closed and expelled from the country' and 'a process of re-registration, which led to a significant reduction in the number of non-governmental organizations' in Uzbekistan.¹⁵⁶ Under the Administrative Liability Code it is illegal to participate in the activity of an unregistered organisation.¹⁵⁷ One of the last international organisations in Uzbekistan – the representative office of the *Institution of New Democracies* in Uzbekistan – was closed by the courts in the spring of 2010'. *Human*

Rights Watch's representative office in Uzbekistan was closed down by a court decision the following year.

4.4.12 Saudi Arabia: NPO regulation 'outclasses' other jurisdiction

A joint FATF/MENAFATF evaluation of Saudi Arabia in 2010 rated the Kingdom as 'largely compliant' with FATF SR VIII and observed that 'the NPO sector appears to be encapsulated in a comprehensive regulatory and supervisory system that outclasses many other systems of other jurisdictions and that appears to be rather effective'.¹⁵⁸ What the evaluators fail to stress is that in Saudi Arabia, only organisations established by royal decree are allowed.

According to ICNL, Saudi regulations impose 'multiple barriers to the formation and existence of civil society organizations'; strictly confines civil society organisations to a narrowly construed range of permissible activities; subject the activities of NGOs to strict monitoring by the Ministry of Social Affairs and intelligence authorities (if an NGO engages in unapproved activities, then government authorities compel the founders of the organization to sign pledges to discontinue these activities); and require CSOs to obtain prior approval from the Ministry before communicating with regional and international peer groups. Saudi laws also allow the state to intervene directly in the internal affairs of non-governmental organisations.¹⁵⁹

4.4.13 Sierra Leone: World Bank demands new NPO regulations

In June 2007, an FATF mutual evaluation conducted by the World Bank found Sierra Leone to be non-compliant with SR VIII and called upon the government to introduce a 'legal framework for the regulation of NPOs' and 'dissuasive and proportionate' sanctions for organisations that fail to comply with the regulations.¹⁶⁰ The Government of Sierra Leone duly enacted the Revised NGO Policy Regulations in 2009, subjecting civil society organisations to increased interference from Government and other state agencies.

According to ICNL, NGOs in Sierra Leone are defined as having the primary objective of 'enhancing the social, environmental, cultural and economic well being of communities'. They are therefore restricted from engaging in political and human rights advocacy. NGOs must

also sign an Agreement with the Government of Sierra Leone before they can commence operations; this is interpreted to mean that every project implemented in Sierra Leone by NGOs must be approved by the sectoral ministry concerned and by the Ministry of Finance and Economic Development. No project shall be implemented by an NGO in the country without prior state approval. NGOs are subject to stringent reporting and supervisory requirements and must submit annual reports for all projects implemented and details of ‘all funds committed by donors for project implementation’. NGOs are subject to site visits without prior notice. The NGO Policy also states that all assets purchased or acquired with donor funds should be the property of the people of Sierra Leone who are the beneficiaries – rather than of the NGO itself. Finally, NGOs are subject to sanctions (which could include cancellation of duty-free concessions and/or suspension or cancellation of certificate of registration) for failing to comply with the provisions of the NGO Policy, for acting in contravention of its stated objectives, and where the ‘NGO shows by its nature, composition and operations over the years that it is not developing/promoting the capacity of Sierra Leoneans in the management of its operations’.¹⁶¹

4.4.14 European Union: attempt to introduce binding NPO regulations rebuffed

In 2005 the European Commission proposed a draft Code of Conduct for Non-profit Organisations to prevent the sector being abused by terrorist organisations and comply with FATF SR VIII.¹⁶² Member State governments meeting in the Council of the EU endorsed the draft Code without debate.¹⁶³

A public consultation was also launched and a coalition of European NGO platforms called on governments to reject the draft code on the grounds that the European sector ‘already has inherent mechanisms of transparency and

accountability and is already subject to national legislation and control’. It added that ‘Unless evidence is advanced to the contrary, strong doubts are justified as to whether this initiative is proportionate to the actual threat... while aiming at tackling what has not been demonstrated to be more than a marginal phenomenon, it could end up raising suspicion on the broader NPO sector and have very serious counter-productive effects’.¹⁶⁴

Following further criticism, the Code appeared to have been withdrawn and the European Commission decided instead to fund two studies: one examining the extent of criminal abuse of NPOs,¹⁶⁵ the other examining self-regulatory initiatives.¹⁶⁶ The studies confirmed what the coalition of NGO platforms had suggested: the problem of terrorist abuse of NPOs in Europe was extremely rare and existing standards of transparency and accountability were largely sufficient.

Nonetheless, in 2009, a demand for ‘legal standards for charitable organisations to increase their transparency and responsibility so as to ensure compatibility with Special Recommendation (SR) VIII of the Financial Action Task Force (FATF)’ appeared in the draft legislative programme of the EU for 2010-14.¹⁶⁷ More concerted advocacy from European civil society organisations followed and the proposal was restricted to ‘promot[ing] increased transparency and responsibility for charitable organisations with a view to ensuring compatibility with [SRVIII]’.¹⁶⁸

In 2010 the European Commission issued ‘voluntary guidelines’ for European NPOs;¹⁶⁹ these too were strongly criticised by civil society organisations which described them as wholly unnecessary.¹⁷⁰ All 27 EU member states have been subject to the mutual evaluation process with regards to FATF SR VIII. Only two countries are deemed ‘compliant’, six are ‘largely compliant’, 12 are ‘partially compliant’ and seven are ‘non-compliant’ (see Appendix D).

5 Conclusions and Recommendations

5.1 A contradictory approach

The positive role that many civil society groups across the world play in protecting and providing services to marginalised communities, combating racism and discrimination, promoting human rights and social justice, holding governments, corporations and IGOs to account, demanding democracy and transparency, challenging inequality and educating the public, is widely recognised and lauded. Outside the framework of the 'War on Terror', the U.S. State Department has called on other states to allow NGOs to function in an environment free from harassment, intimidation and discrimination; to receive financial support from domestic, foreign, and international entities; and called for laws regulating NGOs to be applied apolitically and equitably.¹⁷¹ Last year the United Nations created the first ever *Special Rapporteur* on Freedom of Assembly and Association to defend civil society. Welcoming the initiative, the U.S. government announced that it 'will continue our leading effort to expand respect for this fundamental freedom for civil society members and other individuals all over the world'.¹⁷²

The 'top-down' and over-broad approach to the regulation of civil society in the name of countering terrorism, strongly promoted by U.S. governments and the Financial Action Task Force, clearly contradicts these values and principles. The FATF is not, of course, responsible for the outright repression of civil society in the countries discussed above (the governments and agencies of those countries are). But what the research demonstrates is that, in its current form, FATF SR VIII is a danger to civil society organisations in many parts of the world, because it incites governments to introduce onerous rules and regulations, subject NPOs to excessive state surveillance, and interfere in or restrict the activities of CSOs. While this was surely not the intention of the Group of Seven justice ministers who called for the establishment of the FATF, or the Group of Eight finance ministers who called for measures to tackle terrorist financing in the immediate aftermath of 9/11, that is what the FATF process has resulted in. An innocuous sounding Recommendation 'on reducing the vulnerability of the NPO sector to the vulnerability of terrorist financing' from an obscure inter-governmental body has been interpreted, expanded and

enforced in a way that threatens to impose a rigid global framework for state regulation of NPOs.

A growing body of research has documented the way in which many less developed and less democratic states already make it very difficult for NPOs to operate without undue restraint; many of their governments now have the express endorsement of the FATF, World Bank or IMF to introduce or expand regulatory frameworks that facilitate their intrusions into activities of NGOs and civil society organisations. The plethora of rules and regulations regarding due diligence and the proactive disclosure of suspicions about terrorist links has also made it much more difficult for international NGOs and donor organisations to work in conflict zones and with 'suspect communities'. In a climate in which European and North American development budgets already face the dual pressures of budget cuts and securitisation, the perceived dangers of doing development work in countries where NPOs are vulnerable to terrorist abuse has already contributed to decisions by donors to pull out of supposedly 'high-risk' or 'non-compliant' countries. This can only have negative consequences for social justice and conflict resolution initiatives that had previously benefited from projects supporting grass-roots and community organisations and engaging marginalised stakeholders.

5.2 Rethinking SR VIII

The legitimacy of the SR VIII regime rests on its proportionality: is the framework for NPO regulation elaborated by the FATF commensurate to the actual threat of terrorist exploitation of non-profit organisations? The available evidence certainly does not support the proposition that terrorist financing is a major problem across the world. The FATF has taken a sledgehammer to crack the proverbial nut. Its approach appears both disproportionate and *ultra vires* with SR VIII going beyond its remit of reviewing the adequacy of laws to address potential vulnerabilities of NPO sectors to abuse by terrorism, to requiring states to regulate their NPO sectors as a whole. A serious debate about the purpose, impact and future of SR VIII is necessary in the light of the serious threats to civil society described above. This debate should give careful consideration to the options open to FATF member states, including repealing or reforming SR VIII.

Given the already substantive and onerous obligations on states and private entities to enact a whole host of measures designed to prevent terrorist financing – many

of which are set out in other FATF Recommendations and UN Security Council Resolutions – there are strong arguments that FATF SR VIII is not needed at all. Assuming that states meet their financial surveillance, criminal law and police cooperation obligations, they should have all the powers they need to investigate and prosecute terrorist financing regardless of the status of the perpetrator. As a 2010 report by the World Bank suggested: ‘The rarity of instances of terrorism financing by NPOs, when contrasted against the enormous scope of the sector, does raise the question of whether, in and of itself, government regulation is the most appropriate response. To be clear, this is not to belittle the significance of the issue; rather, it is to question the nature of the response’.¹⁷³ In this context the FATF might simply restrict the scope of SR VIII to its apparently original purpose; in other words limiting the obligation on states to the review of their own NPO sectors for vulnerability of terrorist financing (see Section 4). This would require wholesale changes to the FATF’s guidance and compliance regime. If terrorist financing by NPOs is found to be a *bona fide* problem in specific countries, then advice on how to deal with it may be provided the FATF and other expert organisations.

In imposing a package that amounts to wholesale NPO regulation in order to serve an international law enforcement agenda, the FATF has also disregarded the great strides toward transparency and accountability already taken by NPO sectors in many countries. State-centric approaches also ignore the positive role that NPOs can play in both assessing measures to prevent terrorist financing and ensuring that any new regulations does not impact adversely on others in civil society. The FATF’s approach to the NPO sector contrasts that taken toward the banking and financial services sectors, which have long had observer status at the FATF and play a very active role in the development and implementation of FATF Recommendations. It is difficult to understand why the recommendation, guidance and evaluation criteria for SR VIII have all been drawn-up by the FATF without any open consultation or structured input from concerned NPOs.

If SR VIII is to be maintained, substantial safeguards are urgently required to protect freedom of expression and association and prevent undue restrictions on the operational space of civil society organisations and human rights defenders. Among the most alarming findings of this research was the failure on the part of the FATF – an intergovernmental policy forum with global reach – to adequately mainstream human rights concerns into any of its 40+9 Recommendations.

International human rights law requires the FATF to ensure that all of its recommendations and guidance pay due regard to the appropriate minimum standards of protection set out in international conventions, protocols and jurisprudence. Yet there is nothing in the FATF’s evaluation and assessment guidance to suggest that the rights to freedom of association and expression of NPOs should be expressly guaranteed, or indeed any other enforceable safeguards against the kind of excessive regulation described above. Moreover, it was also apparent from the evaluation reports that the inspection teams lacked the mandate and expertise to address NPO regulation in a manner consistent with international human rights law.

In response to growing concerns about human rights violations arising from the implementation of Security Council resolutions on the prevention of terrorism, the United Nations Counter-Terrorism Executive Directorate (CTED) is now obliged to ‘ensure that all human rights issues relevant to the implementation of [Security Council] resolutions [on counter-terrorism] are addressed consistently and even-handedly’.¹⁷⁴ Why not subject the FATF counter-terrorism mandate to the same standards?

Careful thought must be given to whether the FATF is an appropriate body to be promoting and enforcing standards of NPO regulation throughout the world. If it is to continue in this vein, then it must urgently introduce specific safeguards based on international laws protecting the right of individuals to form, join and participate in civil society organisations. The *World Movement for Democracy* and the *International Center for Not-for-Profit Law* ‘Defending Civil Society Project’ have developed six principles to protect civil society from excessive regulation and undue political and legal interference.¹⁷⁵ The Principles, reproduced in full in Appendix E, reflect the way in which international law protects the rights to Freedom of Association, to operate free from unwarranted state interference, to free expression, to communication and cooperation, to seek and secure resources, and places a duty on states to protect the rights of civil society. Judged against these benchmarks, it is SR VIII itself that appears ‘non-compliant’. The newly appointed *Special Rapporteur* on Freedom of Assembly and Association could surely provide guidance to the FATF on this matter.

5.3 The need for a broader debate about the FATF

The FATF emerges as a powerful policy-making and enforcement body with global reach. This raises important

questions about the kind of regulation and democratic control to which the FATF's activities should be subject. The introduction to this report employed several deliberately provocative concepts to highlight several specific problems. Whether one agrees or not with the concept of 'policy laundering', the fact remains that the highly coercive and technocratic frameworks for financial surveillance, combating money laundering and terrorist financing have been firmly implanted on the international counter-terrorism and global governance agendas in the absence of any real debate about their impact outside of the financial services sector. And whether or not one accepts or rejects the premise of 'global enforcement regimes', a series of decisions adopted in the six weeks after 9/11 have had far-reaching implications in terms of globalising the FATF and effectively imposing a set of G7 standards upon the rest of the world.

The FATF's compliance framework, developed out of the World Bank and IMF financial sector assessment programmes, means that states' obligations under the 40+9 Recommendations now exceed the scope of those under comparable intergovernmental law enforcement conventions. It matters that the FATF is not regulated by any formal legal agreement, because crucial debates about its mandate, powers and activities have been avoided. It was the emergence of this kind of *ad hoc* alternative to traditional forms of so-called 'liberal intergovernmentalism' that gave rise to the concept of policy laundering in the first place. The absence of important debates about adequate democratic control of the FATF and public accountability is reflected in a mandate that is concerned almost solely with the needs of law enforcement agencies above other values and principles, and a Secretariat that is unwilling to even disclose the nationality of the seven governments which sit on the FATF's Steering Board.

In addition to the specific human rights concerns around SR VIII, the FATF has also failed to augment its financial surveillance mechanisms with dedicated data protection regimes governing 'suspicious' transactions reports and the activities of Financial Intelligence Units.¹⁷⁶ Beyond the urgent need to re-think SR VIII there should be a much broader debate about the future regulation and control of the FATF, its legal status, its enforcement regime, its compliance with international human rights standards,

and its mechanisms for enhanced accountability and transparency.

5.4 Recommendations

1. The FATF should recognise the crucial role of civil society in developing effective and proportionate counter-terrorism policies, as set out in United Nations Security Council Resolutions, and begin an active dialogue on SR VIII with NPOs and human rights experts as a matter of urgency.
2. This dialogue should assess the legitimacy, scope and interpretation of FATF Special Recommendation VIII with a view to substantial reform, including the introduction of adequate protections for civil society.
3. The FATF should limit compliance assessments for SR VIII to countries where there is a demonstrable problem of terrorist financing by NPOs.
4. In accordance with the Recommendations of the Working Group on Tackling the Financing of Terrorism of the United Nations Counter Terrorism Implementation Task Force, states and IGOs should avoid rhetoric that ties NPOs to terrorism financing in general terms, because it overstates the threat and unduly damages the NPO sector as a whole.
5. Experts should assess the compliance of all 40+9 Recommendations with international human rights and data protection laws and conventions with a view to incorporating the necessary protections into FATF guidance, best practices and evaluations of member states.
6. Member countries should consider appropriate mechanisms to improve the democratic control, public accountability and legal regulation of the FATF. At a minimum, this should include a formal international agreement regulating the powers and activities of the FATF, transparent rules and procedures around decision-making, and measures to facilitate the public's right of access to FATF information.

APPENDICES

Appendix A

FATF Special Recommendation VIII

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- (i) by terrorist organisations posing as legitimate entities;
- (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations

Interpretative Note

Introduction

1. Non-profit organisations (NPOs) play a vital role in the world economy and in many national economies and social systems. Their efforts complement the activity of the governmental and business sectors in providing essential services, comfort and hope to those in need around the world. The ongoing international campaign against terrorist financing has unfortunately demonstrated however that terrorists and terrorist organisations exploit the NPO sector to raise and move funds, provide logistical support, encourage terrorist recruitment or otherwise support terrorist organisations and operations. This misuse not only facilitates terrorist activity but also undermines donor confidence and jeopardises the very integrity of NPOs. Therefore, protecting the NPO sector from terrorist abuse is both a critical component of the global fight against terrorism and a necessary step to preserve the integrity of NPOs.
2. NPOs may be vulnerable to abuse by terrorists for a variety of reasons. NPOs enjoy the public trust, have access to considerable sources of funds, and are often cash-intensive. Furthermore, some NPOs have a global presence that provides a framework for national and international operations and financial transactions, often within or near those areas that are most exposed to terrorist activity. Depending on the legal form of the NPO and the country, NPOs may often be subject to little or no governmental oversight (for example, registration, record keeping, reporting and monitoring), or few formalities may be required for their creation (for example, there may be no skills or starting capital required, no background checks necessary for employees). Terrorist organisations have taken advantage of these characteristics of NPOs to infiltrate the sector and misuse NPO funds and operations to cover for or support terrorist activity.

Objectives and General Principles

3. The objective of Special Recommendation VIII is to ensure that NPOs are not misused by terrorist organisations:
 - (i) to pose as legitimate entities;
 - (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; or
 - (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes but diverted for terrorist purposes. In this Interpretative Note, the approach taken to achieve this objective is based on the following general principles:
 - a. Past and ongoing abuse of the NPO sector by terrorists and terrorist organisations requires countries to adopt measures both:
 - (i) to protect the sector against such abuse, and
 - (ii) to identify and take effective action against those NPOs that either are exploited by or actively support terrorists or terrorist organizations.
 - b. Measures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities. Rather, such measures should promote transparency and engender greater confidence in the sector, across the donor community and with the general public that charitable funds and services reach intended legitimate beneficiaries. Systems that promote achieving a high degree of transparency, integrity and public confidence in the management and functioning of all NPOs are integral to ensuring the sector cannot be misused for terrorist financing.
 - c. Measures adopted by countries to identify and take effective action against NPOs that either are exploited by or actively support terrorists or terrorist organisations should aim to prevent and prosecute as appropriate terrorist financing and other forms of terrorist support. Where NPOs suspected of or implicated in terrorist financing or other forms of terrorist support

are identified, the first priority of countries must be to investigate and halt such terrorist financing or support.

Actions taken for this purpose should to the extent reasonably possible avoid any negative impact on innocent and legitimate beneficiaries of charitable activity. However, this interest cannot excuse the need to undertake immediate and effective actions to advance the immediate interest of halting terrorist financing or other forms of terrorist support provided by NPOs.

- d. Developing co-operative relationships among the public, private and NPO sector is critical to raising awareness and fostering capabilities to combat terrorist abuse within the sector. Countries should encourage the development of academic research on and information sharing in the NPO sector to address terrorist financing related issues.
- e. A targeted approach in dealing with the terrorist threat to the NPO sector is essential given the diversity within individual national sectors, the differing degrees to which parts of each sector may be vulnerable to misuse by terrorists, the need to ensure that legitimate charitable activity continues to flourish and the limited resources and authorities available to combat terrorist financing in each jurisdiction.
- f. Flexibility in developing a national response to terrorist financing in the NPO sector is also essential in order to allow it to evolve over time as it faces the changing nature of the terrorist financing threat.

Definitions

4. For the purposes of Special Recommendation VIII and this interpretative note, the following definitions apply:
 - a. The term non-profit organisation or NPO refers to a legal entity or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of "good works".
 - b. The terms FIU, legal arrangement and legal person are as defined by the FATF Forty Recommendations (2003) (the FATF Recommendations).
 - c. The term funds is as defined by the Interpretative Note to FATF Special Recommendation II.
 - d. The terms freezing, terrorist and terrorist organisation are as defined by the Interpretative Note to FATF Special Recommendation III.
 - e. The term appropriate authorities refers to competent authorities, self-regulatory bodies, accrediting institutions and other administrative authorities.
 - f. The term beneficiaries refers to those natural persons, or groups of natural persons who receive charitable, humanitarian or other types of assistance through the services of the NPO.

Measures

5. Countries should undertake domestic reviews of their NPO sector or have the capacity to obtain timely information on its activities, size and other relevant features. In undertaking these assessments, countries should use all available sources of information in order to identify features and types of NPOs, which by virtue of their activities or characteristics, are at risk of being misused for terrorist financing. [1] Countries should also periodically reassess the sector by reviewing new information on the sector's potential vulnerabilities to terrorist activities.
6. There is a diverse range of approaches in identifying, preventing and combating terrorist misuse of NPOs. An effective approach, however, is one that involves all four of the following elements:
 - (a) Outreach to the sector,
 - (b) Supervision or monitoring,
 - (c) Effective investigation and information gathering and (d) Effective mechanisms for international co-operation.

The following measures represent specific actions that countries should take with respect to each of these elements in order to protect their NPO sector from terrorist financing abuse.

- a. Outreach to the NPO sector concerning terrorist financing issues
 - (i) Countries should have clear policies to promote transparency, integrity and public confidence in the administration and management of all NPOs.
 - (ii) Countries should encourage or undertake outreach programmes to raise awareness in the NPO sector about the vulnerabilities of NPOs to terrorist abuse and terrorist financing risks, and the measures that NPOs can take to protect themselves against such abuse.
 - (iii) Countries should work with the NPO sector to develop and refine best practices to address terrorist financing risks and vulnerabilities and thus protect the sector from terrorist abuse. [2]
 - (iv) Countries should encourage NPOs to conduct transactions via regulated financial channels, wherever feasible, keeping in mind the varying capacities of financial sectors in different countries and in different areas of urgent charitable and humanitarian concerns.
- b. Supervision or monitoring of the NPO sector

Countries should take steps to promote effective supervision or monitoring of their NPO sector. In practice, countries should be able to demonstrate that the following standards apply to NPOs which account for (1) a significant portion of

the financial resources under control of the sector; and (2) a substantial share of the sector's international activities.

(i) NPOs should maintain information on:

(1) the purpose and objectives of their stated activities; and

(2) the identity of the person(s) who own, control or direct their activities, including senior officers, board members and trustees. This information should be publicly available either directly from the NPO or through appropriate authorities.

(ii) NPOs should issue annual financial statements that provide detailed breakdowns of incomes and expenditures.

(iii) NPOs should be licensed or registered. This information should be available to competent authorities. [3]

(iv) NPOs should have appropriate controls in place to ensure that all funds are fully accounted for and are spent in a manner that is consistent with the purpose and objectives of the NPO's stated activities.

(v) NPOs should follow a "know your beneficiaries and associate NPOs [4]" rule, which means that the NPO should make best efforts to confirm the identity, credentials and good standing of their beneficiaries and associate NPOs. NPOs should also undertake best efforts to document the identity of their significant donors and to respect donor confidentiality.

(vi) NPOs should maintain, for a period of at least five years, and make available to appropriate authorities, records of domestic and international transactions that are sufficiently detailed to verify that funds have been spent in a manner consistent with the purpose and objectives of the organisation. This also applies to information mentioned in paragraphs (i) and (ii) above.

(vii) Appropriate authorities should monitor the compliance of NPOs with applicable rules and regulations. [5] Appropriate authorities should be able to properly sanction relevant violations by NPOs or persons acting on behalf of these NPOs. [6]

c. Effective information gathering and investigation

(i) Countries should ensure effective co-operation, co-ordination and information sharing to the extent possible among all levels of appropriate authorities or organisations that hold relevant information on NPOs.

(ii) Countries should have investigative expertise and capability to examine those NPOs suspected of either being exploited by or actively supporting terrorist activity or terrorist organisations.

(iii) Countries should ensure that full access to information on the administration and management of a particular NPO (including financial and programmatic information) may be obtained during the course of an investigation.

(iv) Countries should establish appropriate mechanisms to ensure that when there is suspicion or reasonable grounds to suspect that a particular NPO:

(1) is a front for fundraising by a terrorist organisation;

(2) is being exploited as a conduit for terrorist financing, including for the purpose of escaping asset freezing measures; or

(3) is concealing or obscuring the clandestine diversion of funds intended for legitimate purposes, but redirected for the benefit of terrorists or terrorist organisations, this information is promptly shared with all relevant competent authorities in order to take preventative or investigative action.

d. Effective capacity to respond to international requests for information about an NPO of concern

Consistent with *Special Recommendation V*, countries should identify appropriate points of contact and procedures to respond to international requests for information regarding particular NPOs suspected of terrorist financing or other forms of terrorist support.

Footnotes:

1. For example, such information could be provided by regulators, tax authorities, FIUs, donor organisations or law enforcement and intelligence authorities.
2. The FATF's *Combating the Abuse of Non-Profit Organisations: International Best Practices* provides a useful reference document for such exercises.
3. Specific licensing or registration requirements for counter terrorist financing purposes are not necessary. For example, in some countries, NPOs are already registered with tax authorities and monitored in the context of qualifying for favourable tax treatment (such as tax credits or tax exemptions).
4. The term associate NPOs includes foreign branches of international NPOs.
5. In this context, rules and regulations may include rules and standards applied by self regulatory bodies and accrediting institutions.
6. The range of such sanctions might include freezing of accounts, removal of trustees, fines, de-certification, delicensing and de-registration. This should not preclude parallel civil, administrative or criminal proceedings with respect to NPOs or persons acting on their behalf where appropriate.

Appendix B

FATF International Best Practices on
Combating the Abuse of non-Profit
Organisations



**Financial Action Task Force
on Money Laundering**
Groupe d'action financière
sur le blanchiment de capitaux

**COMBATING THE ABUSE OF
NON-PROFIT ORGANISATIONS**

International Best Practices

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COMBATING THE ABUSE OF NON-PROFIT ORGANISATIONS

International Best Practices

Introduction and definition

1. The misuse of non-profit organisations for the financing of terrorism is coming to be recognised as a crucial weak point in the global struggle to stop such funding at its source. This issue has captured the attention of the Financial Action Task Force (FATF), the G7, and the United Nations, as well as national authorities in many regions. Within the FATF, this has rightly become the priority focus of work to implement Special Recommendation VIII (Non-profit organisations).

2. Non-profit organisations can take on a variety of forms, depending on the jurisdiction and legal system. Within FATF members, law and practice recognise associations, foundations, fund-raising committees, community service organisations, corporations of public interest, limited companies, Public Benevolent Institutions, all as legitimate forms of non-profit organisation, just to name a few.

3. This variety of legal forms, as well as the adoption of a risk-based approach to the problem, militates in favour of a functional, rather than a legalistic definition. Accordingly, the FATF has developed suggested practices that would best aid authorities to protect non-profit organisations **that engage in raising or disbursing funds** for charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of “good works” from being misused or exploited by the financiers of terrorism.

Statement of the Problem

4. Unfortunately, numerous instances have come to light in which the mechanism of charitable fundraising – *i.e.*, the collection of resources from donors and its redistribution for charitable purposes – has been used to provide a cover for the financing of terror. In certain cases, the organisation itself was a mere sham that existed simply to funnel money to terrorists. However, often the abuse of non-profit organisations occurred without the knowledge of donors, or even of members of the management and staff of the organisation itself, due to malfeasance by employees and/or managers diverting funding on their own. Besides financial support, some non-profit organisations have also provided cover and logistical support for the movement of terrorists and illicit arms. Some examples of these kinds of activities were presented in the 2001-2002 FATF Report on Money Laundering Typologies¹; others are presented in the annex to this paper.

Principles

5. The following principles guide the establishment of these best practices:

- The charitable sector is a vital component of the world economy and of many national economies and social systems that complements the activity of the governmental and business sectors in supplying a broad spectrum of public services and improving quality of life. We wish to safeguard and maintain the practice of charitable giving and the strong and diversified community of institutions through which it operates.
- Oversight of non-profit organisations is a co-operative undertaking among government, the charitable community, persons who support charity, and those whom it serves. Robust oversight

¹ Published 1 February 2002 and available at http://www.fatf-gafi.org/FATDocs_en.htm#Trends.

mechanisms and a degree of institutional tension between non-profit organisations and government entities charged with their oversight do not preclude shared goals and complementary functions – both seek to promote transparency and accountability and, more broadly, common social welfare and security goals.

- Government oversight should be flexible, effective, and proportional to the risk of abuse. Mechanisms that reduce the compliance burden without creating loopholes for terrorist financiers should be given due consideration. Small organisations that do not raise significant amounts of money from public sources, and locally based associations or organisations whose primary function is to redistribute resources among members may not necessarily require enhanced government oversight.
- Different jurisdictions approach the regulation of non-profit organisations from different constitutional, legal, regulatory, and institutional frameworks, and any international standards or range of models must allow for such differences, while adhering to the goals of establishing transparency and accountability in the ways in which non-profit organisations collect and transmit funds. It is understood as well that jurisdictions may be restricted in their ability to regulate religious activity.
- Jurisdictions may differ on the scope of purposes and activities that are within the definition of “charity,” but all should agree that it does not include activities that directly or indirectly support terrorism, including actions that could serve to induce or compensate for participation in terrorist acts.
- The non-profit sector in many jurisdictions has representational, self-regulatory, watchdog, and accreditation organisations that can and should play a role in the protection of the sector against abuse, in the context of a public-private partnership. Measures to strengthen self-regulation should be encouraged as a significant method of decreasing the risk of misuse by terrorist groups.

Areas of focus

6. Preliminary analysis of the investigations, blocking actions, and law-enforcement activities of various jurisdictions indicate several ways in which non-profit organisations have been misused by terrorists and suggests areas in which preventive measures should be considered.

(i) *Financial transparency*

7. Non-profit organisations collect hundreds of billions of dollars annually from donors and distribute those monies – after paying for their own administrative costs – to beneficiaries. Transparency is in the interest of the donors, organisations, and authorities. However, the sheer volume of transactions conducted by non-profit organisations combined with the desire not to unduly burden legitimate organisations generally underscore the importance of risk and size-based proportionality in setting the appropriate level of rules and oversight in this area.

a. *Financial accounting*

- Non-profit organisations should maintain and be able to present full program budgets that account for all programme expenses. These budgets should indicate the identity of recipients and how the money is to be used. The administrative budget should also be protected from diversion through similar oversight, reporting, and safeguards.
- Independent auditing is a widely recognised method of ensuring that that accounts of an organisation accurately reflect the reality of its finances and should be considered a best practice. Many major non-profit organisations undergo audits to retain donor confidence, and regulatory

authorities in some jurisdictions require them for non-profit organisations. Where practical, such audits should be conducted to ensure that such organisations are not being abused by terrorist groups. It should be noted that such financial auditing is not a guarantee that program funds are actually reaching the intended beneficiaries.

b. Bank accounts:

- It is considered a best practice for non-profit organisations that handle funds to maintain registered bank accounts, keep its funds in them, and utilise formal or registered financial channels for transferring funds, especially overseas. Where feasible, therefore, non-profit organisations that handle large amounts of money should use formal financial systems to conduct their financial transactions. Adoption of this best practice would bring the accounts of non-profit organisations, by and large, within the formal banking system and under the relevant controls or regulations of that system.

(ii) Programmatic verification

8. The need to verify adequately the activities of a non-profit organisation is critical. In several instances, programmes that were reported to the home office were not being implemented as represented. The funds were in fact being diverted to terrorist organisations. Non-profit organisations should be in a position to know and to verify that funds have been spent as advertised and planned.

a. Solicitations

9. Solicitations for donations should accurately and transparently tell donors the purpose(s) for which donations are being collected. The non-profit organisation should then ensure that such funds are used for the purpose stated.

b. Oversight

10. To help ensure that funds are reaching the intended beneficiary, non-profit organisations should ask following general questions:

- Have projects actually been carried out?
- Are the beneficiaries real?
- Have the intended beneficiaries received the funds that were sent for them?
- Are all funds, assets, and premises accounted for?

c. Field examinations

11. In several instances, financial accounting and auditing might be insufficient protection against the abuse of non-profit organisations. Direct field audits of programmes may be, in some instances, the only method for detecting misdirection of funds. Examination of field operations is clearly a superior mechanism for discovering malfeasance of all kinds, including diversion of funds to terrorists. Given considerations of risk-based proportionality, across-the-board examination of all programmes would not be required. However, non-profit organisations should track programme accomplishments as well as finances. Where warranted, examinations to verify reports should be conducted.

d. Foreign operations

12. When the home office of the non-profit organisation is in one country and the beneficent operations take place in another, the competent authorities of both jurisdictions should strive to exchange information and co-ordinate oversight or investigative work, in accordance with their

comparative advantages. Where possible, a non-profit organisation should take appropriate measures to account for funds and services delivered in locations other than in its home jurisdiction.

(iii) Administration

13. Non-profit organisations should be able to document their administrative, managerial, and policy control over their operations. The role of the Board of Directors, or its equivalent, is key.

14. Much has been written about the responsibilities of Boards of Directors in the corporate world and recent years have seen an increased focus and scrutiny of the important role of the Directors in the healthy and ethical functioning of the corporation. Directors of non-profit organisations, or those with equivalent responsibility for the direction and control of an organisation's management, likewise have a responsibility to act with due diligence and a concern that the organisation operates ethically. The directors or those exercising ultimate control over a non-profit organisation need to know who is acting in the organisation's name – in particular, responsible parties such as office directors, plenipotentiaries, those with signing authority and fiduciaries. Directors should exercise care, taking proactive verification measures whenever feasible, to ensure their partner organisations and those to which they provide funding, services, or material support, are not being penetrated or manipulated by terrorists.

15. Directors should act with diligence and probity in carrying out their duties. Lack of knowledge or passive involvement in the organisation's affairs does not absolve a director – or one who controls the activities or budget of a non-profit organisation – of responsibility. To this end, directors have responsibilities to:

- The organisation and its members to ensure the financial health of the organisation and that it focuses on its stated mandate.
- Those with whom the organisation interacts, like donors, clients, suppliers.
- All levels of government that in any way regulate the organisation.

16. These responsibilities take on new meaning in light of the potential abuse of non-for-profit organisations for terrorist financing. If a non-profit organisation has a board of directors, the board of directors should:

- Be able to identify positively each board and executive member;
- Meet on a regular basis, keep records of the decisions taken at these meetings and through these meetings;
- Formalise the manner in which elections to the board are conducted as well as the manner in which a director can be removed;
- Ensure that there is an annual independent review of the finances and accounts of the organisation;
- Ensure that there are appropriate financial controls over program spending, including programs undertaken through agreements with other organisations;
- Ensure an appropriate balance between spending on direct programme delivery and administration;
- Ensure that procedures are put in place to prevent the use of the organisation's facilities or assets to support or condone terrorist activities.

Oversight bodies

17. Various bodies in different jurisdictions interact with the charitable community. In general, preventing misuse of non-profit organisations or fundraising organisations by terrorists has not been a historical focus of their work. Rather, the thrust of oversight, regulation, and accreditation to date has been maintaining donor confidence through combating waste and fraud, as well as ensuring that

government tax relief benefits, where applicable, go to appropriate organisations. While much of this oversight focus is fairly easily transferable to the fight against terrorist finance, this will also require a broadening of focus.

18. There is not a single correct approach to ensuring appropriate transparency within non-profit organisations, and different jurisdictions use different methods to achieve this end. In some, independent charity commissions have an oversight role, in other jurisdictions government ministries are directly involved, just to take two examples. Tax authorities play a role in some jurisdictions, but not in others. Other authorities that have roles to play in the fight against terrorist finance include law enforcement agencies and bank regulators. Far from all the bodies are governmental – private sector watchdog or accreditation organisations play an important role in many jurisdictions.

(i) Government Law Enforcement and Security officials

19. Non-profit organisations funding terrorism are operating illegally, just like any other illicit financier; therefore, much of the fight against the abuse of non-profit organisations will continue to rely heavily on law enforcement and security officials. Non-profit organisations are not exempt from the criminal laws that apply to individuals or business enterprises.

- Law enforcement and security officials should continue to play a key role in the combat against the abuse of non-profit organisations by terrorist groups, including by continuing their ongoing activities with regard to non-profit organisations.

(ii) Specialised Government Regulatory Bodies

20. A brief overview of the pattern of specialised government regulation of non-profit organisations shows a great variety of practice. In England and Wales, such regulation is housed in a special Charities Commission. In the United States, any specialised government regulation occurs at the sub-national (state) level. GCC member countries oversee non-profit organisations with a variety of regulatory bodies, including government ministerial and intergovernmental agencies.

- In all cases, there should be interagency outreach and discussion within governments on the issue of terrorist financing – especially between those agencies that have traditionally dealt with terrorism and regulatory bodies that may not be aware of the terrorist financing risk to non-profit organisations. Specifically, terrorist financing experts should work with non-profit organisation oversight authorities to raise awareness of the problem, and they should alert these authorities to the specific characteristics of terrorist financing.

(iii) Government Bank, Tax, and Financial Regulatory Authorities

21. While bank regulators are not usually engaged in the oversight of non-profit organisations, the earlier discussion of the importance of requiring charitable fund-raising and transfer of funds to go through formal or registered channels underscores the benefit of enlisting the established powers of the bank regulatory system – suspicious activity reporting, know-your-customer (KYC) rules, etc – in the fight against terrorist abuse or exploitation of non-profit organisations.

22. In those jurisdictions that provide tax benefits to charities, tax authorities have a high level of interaction with the charitable community. This expertise is of special importance to the fight against terrorist finance, since it tends to focus on the financial workings of charities.

- Jurisdictions which collect financial information on charities for the purposes of tax deductions should encourage the sharing of such information with government bodies involved in the combating of terrorism (including FIUs) to the maximum extent possible. Though such tax-

related information may be sensitive, authorities should ensure that information relevant to the misuse of non-profit organisations by terrorist groups or supporters is shared as appropriate.

(iv) Private Sector Watchdog Organisations

23. In the countries and jurisdictions where they exist, the private sector watchdog or accreditation organisations are a unique resource that should be a focal point of international efforts to combat the abuse of non-profit organisations by terrorists. Not only do they contain observers knowledgeable of fundraising organisations, they are also very directly interested in preserving the legitimacy and reputation of the non-profit organisations. More than any other class of participants, they have long been engaged in the development and promulgation of "best practices" for these organisations in a wide array of functions.

24. Jurisdictions should make every effort to reach out and engage such watchdog and accreditation organisations in their attempt to put best practices into place for combating the misuse of non-profit organisations. Such engagement could include a dialogue on how to improve such practices.

Sanctions

25. Countries should use existing laws and regulations or establish any such new laws or regulations to establish effective and proportionate administrative, civil, or criminal penalties for those who misuse charities for terrorist financing.

Appendix C

AML/CFT Evaluations and Assessments: FATF Handbook for Countries and Assessors

Reviews of the domestic non-profit sector:

VIII.1 Countries should:

- (i) review the adequacy of domestic laws and regulations that relate to nonprofit organisations;
- (ii) use all available sources of information to undertake domestic reviews of or have the capacity to obtain timely information on the activities, size and other relevant features of their non-profit sectors for the purpose of identifying the features and types of nonprofit organisations (NPOs) that are at risk of being misused for terrorist financing by virtue of their activities or characteristics;
- (iii) conduct periodic reassessments by reviewing new information on the sector's potential vulnerabilities to terrorist activities.

Some examples of possible sources of information that could be used to undertake a domestic review or provide timely information on the activities, size and other relevant features of the domestic non-profit sector are: regulators, statistical institutions, tax authorities, FIUs, donor organisations, self-regulatory organizations or accreditation institutions, or law enforcement and intelligence authorities.

Protecting the NPO sector from terrorist financing through outreach and effective oversight:

VIII.2 Countries should undertake outreach to the NPO sector with a view to protecting the sector from terrorist financing abuse. This outreach should include

- (i) raising awareness in the NPO sector about the risks of terrorist abuse and the available measures to protect against such abuse; and
- (ii) promoting transparency, accountability, integrity, and public confidence in the administration and management of all NPOs.

An effective outreach program with the NPO sector may include the development of best practices to address terrorist financing risks, regular outreach events with the sector to discuss scope and methods of abuse of NPOs, emerging trends in terrorist financing and new protective measures, and the issuance of advisory papers and other useful resources.

VIII.3 Countries should be able to demonstrate that the following steps have been taken to promote effective supervision or monitoring of those NPOs which account for: (i) a significant portion of the financial resources under control of the sector; and (ii) a substantial share of the sector's international activities.

VIII.3.1 NPOs should maintain information on: (1) the purpose and objectives of their stated activities; and (2) the identity of person(s) who own, control or direct their activities, including senior officers, board members and trustees. This information should be publicly available either directly from the NPO or through appropriate authorities.

VIII.3.2 Countries should be able to demonstrate that there are appropriate measures in place to sanction violations of oversight measures or rules by NPOs or persons acting on behalf of NPOs. The application of such sanctions should not preclude parallel civil, administrative, or criminal proceedings with respect to NPOs or persons acting on their behalf where appropriate. Sanctions may include freezing of accounts, removal of trustees, fines, de-certification, delicensing or de-registration.

VIII.3.3 NPOs should be licensed or registered. This information should be available to competent authorities.

VIII.3.4 NPOs should maintain, for a period of at least five years, and make available to appropriate authorities, records of domestic and international transactions that are sufficiently detailed to verify that funds have been spent in a manner consistent with the purpose and objectives of the organisation. This also applies to information mentioned in paragraphs (i) and (ii) of the Interpretative Note to Special Recommendation VIII.

Targeting and attacking terrorist abuse of NPOs through effective information gathering, investigation:

VIII.4 Countries should implement measures to ensure that they can effectively investigate and gather information on NPOs.

VIII.4.1 Countries should ensure effective domestic co-operation, co-ordination and information sharing to the extent possible among all levels of appropriate authorities

or organisations that hold relevant information on NPOs of potential terrorist financing concern.

VIII.4.2 Countries should ensure that full access to information on the administration and management of a particular NPO (including financial and programmatic information) may be obtained during the course of an investigation.

VIII.4.3 Countries should develop and implement mechanisms for the prompt sharing of information among all relevant competent authorities in order to take preventative or investigative action when there is suspicion or reasonable grounds to suspect that a particular NPO is being exploited for terrorist financing purposes or is a front organization

for terrorist fundraising. Countries should have investigative expertise and capability to examine those NPOs that are suspected of either being exploited by or actively supporting terrorist activity or terrorist organisations. Countries should also have mechanisms in place that allow for prompt investigative or preventative action against such NPOs.

Responding to international requests for information about an NPO of concern:

VIII.5 Countries should identify appropriate points of contact and procedures to respond to international requests for information regarding particular NPOs that are suspected of terrorist financing or other forms of terrorist support.

Appendix D

Compliance with FATF SR VIII in 159 countries

Abbreviations

Compliance bodies:

APG	Asia/Pacific Group on Money Laundering
CFATF	Caribbean Financial Action Task Force
EAG	Eurasian Group on money laundering and terrorist financing
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
MONEYVAL	Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
GAFISUD	Financial Action Task Force on Money Laundering in South America
GIABA	Inter Governmental Action Group against Money Laundering in West Africa
MENAFATF	Middle East and North Africa Financial Action Task Force

Compliance ratings:

NC	There are major shortcomings, with a large majority of the essential criteria not being met
PC	The country has taken some substantive action and complies with some of the essential criteria
LC	There are only minor shortcomings, with a large majority of the essential criteria being fully met.
C	The Recommendation is fully observed with respect to all essential criteria.

Country	Date of report	Compliance body	Rating	Country	Date of report	Compliance body	Rating
Albania	July 2006	MONEYVAL	NC	Bahamas	Nov. 2007	CFATF	PC
Algeria	Dec. 2010	MENAFATF	NC	Bahrain	Nov. 2006	IMF	PC
Andorra	Sept. 2007	MONEYVAL	NC	Bangladesh	July 2009	APG	PC
Anguilla	July 2010	CFATF	NC	Barbados	June 2008	CFATF	LC
Antigua & Barbuda	June 2008	CFATF	NC	Belarus	Dec. 2008	EAG	PC
Argentina	Dec. 2010	FATF/GAFISUD	NC	Belgium	June 2005	FATF	C
Armenia	Sept. 2009	MONEYVAL	PC	Belize	July 2011	CFATF	NC
Aruba (Netherlands)	Oct. 2009	FATF/CFATF	NC	Benin	May 2010	GIABA	NC
Australia	Oct. 2005	FATF/APG	PC	Bermuda	Jan. 2008	IMF	PC
Austria	June 2010	FATF	PC	Bolivia	July 2006	GAFISUD	NC
Azerbaijan	Dec. 2008	MONEYVAL	NC	Bosnia & Herzegovina	Dec. 2009	MONEYVAL	NC
				Botswana	Aug. 2007	WORLD BANK	NC

Country	Date of report	Compliance body	Rating
Brazil	Aug. 2010	FATF/GAFISUD	NC
Brunei	July 2010	APG	PC
Bulgaria	Apr. 2008	MONEYVAL	PC
Burkina Faso	Nov. 2009	GIABA	NC
Cambodia	July 2007	WORLD BANK	PC
Canada	Feb. 2008	FATF	LC
Cape Verde	Nov. 2007	GIABA	NC
Cayman Islands	Nov. 2007	CFATF	PC
Chile	Dec. 2010	GAFISUD	NC
China	June 2007	FATF/EAG	LC
Colombia	2007	GAFISUD	NC
Comoros	March 2010	IMF	NC
Cook Islands	July 2009	APG/OGBS	PC
Costa Rica	May 2007	CFATF	PC
Croatia	Apr. 2008	MONEYVAL	NC
Cyprus	Feb. 2006	MONEYVAL	PC
Czech Republic	Sept. 2007	MONEYVAL	PC
Denmark	June 2006	FATF	LC
Dominica	July 2009	CFATF	NC
Dominican Republic	Oct. 2006	CFATF	NC
Ecuador	Dec. 2007	GAFISUD	NC
Egypt	May 2009	WORLD BANK	C
El Salvador	Sept. 2010	CFATF	PC
Estonia	Dec. 2008	MONEYVAL	PC
Fiji	July 2006	WORLD BANK	PC
Finland	Oct. 2007	FATF	PC
France	Feb. 2011	FATF	LC
Gambia	Sept. 2008	GIABA	PC
Georgia	Feb. 2007	MONEYVAL	PC
Germany	Feb. 2010	FATF	LC
Ghana	Nov. 2009	GIABA	NC
Greece	June 2007	FATF	NC
Grenada	June 2009	CFATF	NC
Guatemala	Nov. 2010	CFATF	PC

Country	Date of report	Compliance body	Rating
Guyana	July 2011	CFATF	NC
Haiti	June 2008	IMF	NC
Honduras	Aug. 2009	CFATF	NC
Hong Kong	July 2008	FATF/APG	LC
Hungary	Sept. 2010	MONEYVAL	NC
Iceland	Oct. 2006	FATF	NC
India	July 2010	FATF/APG	NC
Indonesia	July 2008	APG	NC
Ireland	Feb. 2006	FATF	PC
Israel	July 2008	MONEYVAL	LC
Italy	Feb. 2006	FATF	C
Jamaica	Oct. 2005	CFATF	NC
Japan	Oct. 2008	FATF	PC
Jordan	May 2009	MENAFATF	PC
Kazakhstan	June 2011	EAG	NC
Kyrgyz Republic	June 2007	EAG	NC
Latvia	Sept. 2006	MONEYVAL	NC
Lebanon	Nov. 2009	MENAFATF	NC
Liechtenstein	Sept. 2007	MONEYVAL	PC
Lithuania	Nov. 2006	MONEYVAL	PC
Luxembourg	Feb. 2010	FATF	PC
Macao	July 2007	APG/OGBS	PC
FYR Macedonia	July 2008	MONEYVAL	NC
Malawi	Dec. 2008	WORLD BANK	NC
Malaysia	July 2007	APG	PC
Mali	Sept. 2008	WORLD BANK	NC
Malta	Sept. 2007	MONEYVAL	NC
Mauritania	Nov. 2006	WORLD BANK	PC
Mauritius	Dec. 2008	IMF	NC
Mexico	Oct. 2008	FATF/GAFISUD	PC
Moldova	Dec. 2009	MONEYVAL	PC
Monaco	Dec. 2007	MONEYVAL	PC
Mongolia	July 2007	APG	PC
Montenegro	Mar. 2009	MONEYVAL	NC
Montserrat	July 2007	CFATF	PC

Country	Date of report	Compliance body	Rating
Morocco	Nov. 2007	MENAFATF	NC
Myanmar/ Burma	July 2008	APG	PC
Namibia	Aug. 2007	WORLD BANK	PC
Netherlands	Feb. 2011	FATF	LC
New Zealand	Nov. 2010	FATF/APG	PC
Nicaragua	Oct. 2009	CFATF	PC
Niger	May 2009	WORLD BANK	PC
Nigeria	May 2008	GIABA	NC
Norway	June 2005	FATF	NC
Oman	May 2011	MENAFATF/FATF	LC
Pakistan	July 2009	WORLD BANK/APG	PC
Palau	July 2008	IMF	PC
Panama	Sept. 2006	IMF	PC
Paraguay	Dec. 2005	GAFISUD	NC
Peru	July 2005	GAFISUD	PC
Philippines	July 2009	WORLD BANK/APG	PC
Poland	June 2007	MONEYVAL	NC
Portugal	Oct. 2006	FATF	PC
Qatar	Apr. 2008	IMF	LC
Romania	July 2008	MONEYVAL	PC
Russia	June 2008	FATF/EAG/MONEYVAL	PC
Samoa	July 2006	APG/OGBS	NC
San Marino	Apr. 2008	MONEYVAL	NC
Saudi Arabia	July 2010	FATF/MENAFATF	LC
Senegal	May 2008	GIABA	NC
Serbia	Dec. 2009	MONEYVAL	NC
Seychelles	Aug. 2008	ESAAMLG	NC
Sierra Leone	June 2007	WORLD BANK	NC
Slovak Republic	Sept. 2006	MONEYVAL	NC
Singapore	Feb. 2008	FATF/APG	LC
Slovenia	May 2005	MONEYVAL	PC
Solomon Islands	July 2010	WORLD BANK/APG	NC
South Africa	Feb. 2009	FATF/ESAAMLG	PC
South Korea	Aug. 2009	FAFT/APG	PC
Spain	June 2006	FATF	LC

Country	Date of report	Compliance body	Rating
Sri Lanka	July 2006	APG	PC
St. Kitts & Nevis	June 2009	CFATF	PC
St. Lucia	Nov. 2008	CFATF	NC
St. Vincent & Grenadines	June 2010	IMF	LC
Suriname	Nov. 2009	CFATF	NC
Sweden	Feb. 2006	FATF	PC
Switzerland	Nov. 2005	FATF	LC
Syria	Nov. 2006	MENAFATF	PC
Taipei	July 2007	APG	LC
Tajikistan	Dec. 2008	EAG	NC
Tanzania	Dec. 2009	ESAAMLG	NC
Thailand	July 2007	IMF	NC
Tonga	July 2010	APG	NC
Trinidad & Tobago	May 2007	CFATF	NC
Turkey	Feb. 2007	FATF	PC
Turks & Caicos Islands	Nov. 2008	CFATF	NC
Tunisia	Apr. 2007	WORLD BANK	C
Turkmenistan	June 2011	EAG	PC
Uganda	Aug. 2007	WORLD BANK	PC
Ukraine	Mar. 2009	MONEYVAL	PC
United Arab Emirates	Apr. 2008	FATF/MENAFATF	LC
United Kingdom	June 2007	FATF	LC
USA	June 2006	FATF	C
Uruguay	Dec. 2006	GAFISUD	PC
Uzbekistan	June 2010	EAG	PC
Vanuatu	Mar. 2006	APG/OGBS	NC
Venezuela	Sept. 2009	CFATF	NC
Vietnam	July 2009	APG	PC
Virgin Islands	Nov. 2008	CFATF	PC
Yemen	Apr. 2008	MENAFATF	PC
Zambia	Aug. 2008	ESAAMLG	NC
Zimbabwe	Aug. 2007	ESAAMLG	NC

Appendix E

Six Principles to protect civil society organizations

Source: *World Movement for Democracy* and the *International Center for Not-for-Profit Law* 'Defending Civil Society Project'.¹⁷⁷

Principle 1: The Right to Entry (Freedom of Association)

International law protects the right of individuals to form, join and participate in civil society organizations.

- Broad scope of right. Freedom of association protects individuals in their right to establish a wide range of civil society forms, including trade unions, associations, and other types of NGOs.
- Broadly permissible purposes. International law recognizes the right of individuals, through NGOs, to pursue a broad range of objectives. Permissible purposes generally embrace all 'legal' or 'lawful' purposes and specifically includes the promotion and protection of human rights and fundamental freedoms.
- Potential founders. The architecture of international human rights is built on the premise that all persons, including non-citizens, enjoy certain rights, including freedom of association.

Individuals are not required to form a legal entity in order to enjoy the freedom of association.

International law protects the right of individuals to form an NGO as a legal entity.

- The system of recognition of legal entity status, whether a "declaration" or "registration/incorporation" system, must ensure that the process is truly accessible, with clear, speedy, apolitical, and inexpensive procedures in place.
- In the case of a registration/incorporation system, the designated authority must be guided by objective standards and restricted from arbitrary decision-making.

Principle 2: The Right to Operate Free from Unwarranted State Interference

Once established, NGOs have the right to operate free from unwarranted state intrusion or interference in their affairs. International law creates a presumption against any state regulation that would amount to a restriction of recognized rights.

- Interference can only be justified where it is prescribed by law, to further a legitimate government interest, and necessary in a democratic society. States must refrain from restricting freedom of association through vague, imprecise, and overly broad regulatory language.
- It is incumbent upon the state to ensure that applicable laws and regulations are implemented and enforced in a fair, apolitical, objective, transparent and consistent manner.
- Involuntary termination or dissolution must meet the standards of international law; the relevant government authority should be guided by objective standards and restricted from arbitrary decision-making.

NGOs are protected against unwarranted governmental intrusion in their internal governance and affairs. Freedom of association embraces the freedom of the founders and/or members to regulate the organization's internal governance.

Civil society representatives, individually and through their organizations, are protected against unwarranted interference with their privacy.

Principle 3: The Right to Free Expression

Civil society representatives, individually and through their organizations, enjoy the right to freedom of expression.

- Freedom of expression protects not only ideas regarded as inoffensive or a matter of indifference but also those that offend, shock or disturb, since pluralism is essential in a democratic society. NGOs are therefore protected in their ability to speak critically against government law or policy, and to speak favorably for human rights and fundamental freedoms.
- Interference with freedom of expression can only be justified where it is prescribed by law, in the

interests of a legitimate government interest, and necessary in a democratic society. States must refrain from restricting freedom of expression through vague, imprecise, and overly broad regulatory language.

- Stemming from the well-recognized protection of individuals to freedom of assembly, NGO representatives have the right to plan and/or engage in the advocacy of legal aims, including human rights and fundamental freedoms.

Principle 4: The Right to Communication and Cooperation

Civil society representatives, individually and through their organizations, have the right to communicate and seek cooperation with other elements of civil society, the business community, international organizations and governments, both within and outside their home countries.

Individuals and NGOs have the right to form and participate in networks and coalitions in order to enhance communication and cooperation, and to pursue legitimate aims.

Individuals and NGOs have the right to use the Internet and web-based technologies to communicate more effectively.

Principle 5: The Right to Seek and Secure Resources

Within broad parameters, NGOs have the right to seek and secure funding from legal sources. Legal sources must include individuals and businesses, other civil society actors and international organizations, inter-governmental organizations, as well as local, national, and foreign governments.

Principle 6: State Duty to Protect

The State has a duty to promote respect for human rights and fundamental freedoms, and the obligation to protect the rights of civil society. The State's duty is both negative (i.e., to refrain from interference with human rights and fundamental freedoms), and positive (i.e., to ensure respect for human rights and fundamental freedoms).

The State duty includes an accompanying obligation to ensure that the legislative framework relating to freedom of association and civil society is appropriately enabling, and that the necessary institutional mechanisms are in place to ensure the recognized rights to all individuals.

Papers by TNI and Statewatch

Michael Woodiwiss and Dave Bewley-Taylor (2005), 'The Global Fix: The construction of a global enforcement regime,' *Crime and Globalisation series, Transnational Institute* <http://www.tni.org/briefing/global-fix>

Transnational Institute, 'Global Enforcement Regimes, Transnational Organised Crime, International Terrorism and Money Laundering', *Report of TNI Crime and Globalisation seminar (28-29 April 2005)* <http://www.tni.org/archives/crime-docs/enforce.pdf>

Michael Levi (2005), 'Controlling the international money trail: What Lessons Have Been Learned?' *Paper presented at TNI Crime and Globalisation seminar, April 2005* <http://www.tni.org/archives/crime-docs/levi.pdf>

David Cortright/Fourth Freedom Forum (2005), 'A Critical Evaluation of the UN Counter-Terrorism Program: Accomplishments and Challenges.' *Paper presented at TNI Crime and Globalisation seminar, April 2005* <http://www.tni.org/archives/crime-docs/cortright.pdf>

Margaret Beare (2005), 'Fear-based Security: The Political Economy of 'Threat'.' *Paper presented at TNI Crime and Globalisation seminar, April 2005* <http://www.tni.org/archives/crime-docs/beare.pdf>

Notes

- 1 Howell, J. (2010) 'Civil Society, Aid, and Security Post-9/11' in *International Journal of Not-for-Profit Law*, vol. 12 no. 4, available at: http://www.icnl.org/knowledge/ijnl/vol12iss4/special_2.htm.
- 2 Hosein, I. (2003) 'On International Policy Dynamics: Challenges for Civil Society' in *Spreading the Word on the Internet*. Vienna: Organisation for Security and Cooperation in Europe, available at: <http://www.osce.org/fom/13871>.
- 3 Policy Laundering Project (2005) *The Problem of Policy Laundering*, available at: <http://www.policylaundering.org/PolicyLaunderingIntro.html>.
- 4 Proponents of 'liberal intergovernmentalism' broadly reject these arguments on the grounds that national governments have an 'equal stake' in IGO decision-making fora and that as such their decisions are accountable at the national level. However, as Kovach observes, "even this limited form of accountability is extremely precarious when stretched to the global level. This is because, first, it relies on the caveat that all member states of IGOs are democratically elected, which is plainly not the case. Second, it ignores the differential degrees of power given to member nation states within the internal governance structures of IGOs. Very few IGOs are based on the principle of one member, one vote. Most privilege a minority of nation states, giving them far greater decision-making power at the expense of others. The result is that a small minority of citizens, by virtue of their national identity, have far greater access to accountability than others. Finally, it ignores the need for citizens to have access to information in order to exercise their accountability rights. Intergovernmental decision-making is often opaque and private, preventing citizens from ever finding out what position their governments have taken within a given IGO and hence holding them to account". See Kovach, H (2006) 'Addressing Accountability at the Global Level: The Challenges Facing International NGOs' in Jordan, L. & van Tuijl, P. (eds) *NGO Accountability: Politics, Principles and Innovations*. London: Earthscan (pp. 195-210). Research into IGOs based on 'policy network theory' further suggests that these structures routinely privilege certain interests in setting the policy agenda, limit participation in the decision-making process, define the roles of specific actors (thereby shaping their behaviour) and effectively substitute public accountability for private government. See for example Rhodes, R. A. W. (2002) *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*. London: Open University Press.
- 5 Transnational Institute (2005) 'Global Enforcement Regimes Transnational Organised Crime, International Terrorism and Money Laundering', *TNI Crime and Globalisation seminar*, Amsterdam, 28-29 April 2005, available at: <http://www.tni.org/crime-docs/enforce.pdf>.
- 6 These are the Single Convention on Narcotic Drugs of 1961 (as amended by the 1972 Protocol), the Convention on Psychotropic Substances of 1971 and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.
- 7 These are the Convention on Offences and Certain Other Acts Committed On Board Aircraft of 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 (as amended by the 1988 Protocol), the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 1973, the International Convention against the Taking of Hostages of 1979, the Convention on the Physical Protection of Nuclear Material of 1980, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (as amended by the 2005 Protocol), the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of 1988 (as amended by the 2005 Protocol), the Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1991, the International Convention for the Suppression of Terrorist Bombings of 1977, the International Convention for the Suppression of the Financing of Terrorism of 1999, and the International Convention for the Suppression of Acts of Nuclear Terrorism of 2005.
- 8 That is the Convention against Transnational Organized Crime of 2001 and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition.
- 9 Council of Europe Convention on Cybercrime, 2001.
- 10 See further Rees, W. (2006) *Transatlantic Counter-terrorism Co-operation: The New Imperative*. London: Routledge.
- 11 Scheiber, C. (2006) 'Hard Coercion through Soft Law? The Case of the International Anti-Money Laundering Regime', *Paper presented at the annual meeting of the International Studies Association*, San Diego, 22 March 2006.

- 12 Martin Scheinin, former UN Special Rapporteur on Counter-terrorism and Human Rights, for example, described UN Security Council Resolution 1373 (which placed substantive counter-terrorism obligations on United Nations members after 9/11) in the following terms: "To put it bluntly, while international terrorism remains a very serious threat and constitutes a category of atrocious crime, it is not generally and on its own a permanent threat to the peace within the meaning of Article 39 of the Charter and does not justify exercise by the Security Council of supranational quasi-judicial sanctioning powers over individuals or of supranational legislative powers over Member States". See 'Rapporteur Says Neither of Existing Regimes Has Proper Legal Basis; Committee Also Hears Experts on Freedom of Opinion; Human Rights and Corporations', Minutes of the Sixty-fifth General Assembly, Third Committee, 30th & 31st Meetings (AM & PM), available at: <http://www.un.org/News/Press/docs/2010/gashc3988.doc.htm>.
- 13 Kovach, H (2006) 'Addressing Accountability at the Global Level: The Challenges Facing International NGOs' in Jordan, L. & van Tuijl, P. (eds) *NGO Accountability: Politics, Principles and Innovations*. London: Earthscan (pp. 195-210).
- 14 See for example 'Publish What You Fund', *Global Campaign for Aid Transparency* website, available at: <http://www.publishwhatyoufund.org/>.
- 15 *International Aid Transparency Initiative* website, available at: <http://www.aidtransparency.net/>.
- 16 Armstrong, P. (2006) 'The Limits and Risks of Regulation: The Case of the World Bank-supported Draft Handbook on Good Practices for Laws Relating to NGOs' in Jordan, L. & van Tuijl, P. (eds) *NGO Accountability: Politics, Principles and Innovations*. London: Earthscan (pp. 61-80).
- 17 Charnovitz, S. (2006) 'Accountability of Non-Governmental Organizations in Global Governance' in Jordan, L. & van Tuijl, P. (eds) *NGO Accountability: Politics, Principles and Innovations*. London: Earthscan (pp. 21-42).
- 18 'NGOs-The Growing Power of an Unelected Few', undated American Enterprise Institute Newsletter, available at: http://www.globalgovernancewatch.org/ngo_watch/.
- 19 See *NGOWATCH* website, available at: <http://www.aei.org/article/18081>.
- 20 Bloodgood, E. A. and Tremblay-Boire, J. (2010), 'NGO Responses to Counterterrorism Regulations After September 11th' in *International Journal of Not-for-Profit Law*, vol. 12 no. 4, available at: http://www.icnl.org/knowledge/ijnl/vol12iss4/special_1.htm.
- 21 Edwards M. (2006) Foreword to Jordan, L. & van Tuijl, P. (eds) *NGO Accountability: Politics, Principles and Innovations*. London: Earthscan (pp. vii-ix).
- 22 Jordan, L. & van Tuijl, P. (2006) 'Rights and Responsibilities in the Political Landscape of NGO Accountability: Introduction and Overview' in Jordan, L. & van Tuijl, P. (eds) *NGO Accountability: Politics, Principles and Innovations*. London: Earthscan (pp. 3-20). As the authors explain, "an NGO will be in a much better position to address accountability demands in an environment that is free, democratic and conducive to civic action, as opposed to a situation in which an authoritarian regime is repressing the basic freedoms of association, assembly and expression. Similarly, myriad issues arise around an NGO's responsibility when it operates in an environment where democratic institutions and practices are not fully formed. NGO accountability thus inevitably leads to discussing issues of human rights and democracy, not merely from a conceptual perspective, but as a basic human condition that either allows or prohibits individuals from associating with each other to promote their legitimate interests" (page 5).
- 23 International Centre for Non-profit Law and World Movement for Democracy (2008) *Defending Civil Society*, available at: <http://www.wmd.org/projects/defending-civil-society/executive-summary>.
- 24 Tiwana, M. and Belay, N (2010), *Civil Society: The Clampdown is Real - Global Trends 2009-2010*, CIVICUS World Alliance for Citizen Participation, available at: <http://civicus.org/news-and-resources/reports-and-publications/234-civil-society-the-clamp-down-is-real>.
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- 26 'Summit Declaration', *G7 meeting*, 14-16 July 1989, Paris, available at: <http://www.g8.utoronto.ca/summit/1989paris/communiqué/index.html>.
- 27 The 'EU15' consisted of Belgium, France, Germany, Italy, Luxembourg, Netherlands, Ireland, Denmark, UK, Greece, Portugal, Spain, Austria, Sweden and Finland.
- 28 The Gulf Cooperation Council members are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates.

- 29 For a full list see 'Members and Observers', *FATF-GAFI* website, available at: http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236869_1_1_1_1,00.html.
- 30 See *Asia/Pacific Group on Money Laundering* website, available at: <http://www.apgml.org/>.
- 31 See *Caribbean Financial Action Task Force* website, available at: <http://www.cfatf-gafic.org/>.
- 32 See *Eurasian Group on money laundering and terrorist financing* website, available at: <http://www.eurasiangroup.org/>.
- 33 See *Eastern and Southern Africa Anti-Money Laundering Group* website, available at: <http://www.esaamlg.org/>.
- 34 See *Financial Action Task Force on Money Laundering in South America* website, available at: <http://www.gafisud.info/>.
- 35 See *Inter Governmental Action Group against Money Laundering in West Africa* website, available at: <http://www.giaba.org/>.
- 36 See *Middle East and North Africa Financial Action Task Force* website, available at: <http://www.menafatf.org/>.
- 37 See *Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism* website, available at: <http://www.coe.int/moneyval>.
- 38 See *Organisation for Economic Co-operation and Development* website, available at: <http://www.oecd.org/>.
- 39 'About the FATF', *FATF-GAFI* website, available at: http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1,00.html.
- 40 See *FATF-GAFI* website, available at: <http://www.fatf-gafi.org/>.
- 41 House of Lords European Union Committee (2009) *Nineteenth Report, Session 2008-09, Money laundering and the financing of terrorism*, available at: <http://www.publications.parliament.uk/pa/ld200809/ldselect/lducom/132/13205.htm#a16> (see paragraph 27).
- 42 'FATF Revised Mandate 2008-2012', *Financial Action Task Force*, available at: <http://www.fatf-gafi.org/dataoecd/3/32/40433653.pdf>.
- 43 'Mandate for the Future of the FATF (September 2004 – December 2012)', *Financial Action Task Force*, available at: <http://www.fatf-gafi.org/dataoecd/14/60/36309648.pdf>.
- 44 'FATF Revised Mandate 2008-2012', *Financial Action Task Force*, available at: <http://www.fatf-gafi.org/dataoecd/3/32/40433653.pdf>.
- 45 'Consultation on Proposed Changes to the FATF Standards: Compilation of Responses from NGOs and Individuals', *Financial Action Task Force*, available at: <http://www.fatf-gafi.org/dataoecd/41/32/47257330.pdf>.
- 46 'Publications & Documents > Best Practices', *FATF-GAFI* website, available at: http://www.fatf-gafi.org/findDocument/0,3770,en_32250379_32236920_1_43383774_1_1_1,00.html.
- 47 The 23 countries were The Bahamas, Cayman Islands, Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russian Federation, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Egypt, Grenada, Guatemala, Hungary, Indonesia, Burma, Nigeria and Ukraine.
- 48 'Improving Compliance with the International Standards', *FATF-GAFI* website, available at: http://www.fatf-gafi.org/document/0/0,3746,en_32250379_32236879_44228352_1_1_1,00.html.
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- 52 'Third Round of AML/CFT Mutual Evaluations: Process and Procedures', *Financial Action Task Force Reference Document*, October 2009, available at: <http://www.fatf-gafi.org/dataoecd/20/14/41563294.pdf>. See also 'Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations', *Financial Action Task Force Reference Document*, 27 February 2004 (Updated as of February 2009), available at: <http://www.fatf-gafi.org/dataoecd/16/54/40339628.pdf>.
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- 55 *EU Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering* Directive 91/308/EC, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0308:EN:NOT>.
- 56 Actual knowledge or suspicion on the part of the 'non-disclosee' is not required, nor apparently need it be proved that actual money laundering took place. See Murphy, P. (2004) *Blackstone's Criminal Practice*. Oxford: Oxford University Press, page 835.
- 57 *EU Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0097:EN:NOT>.
- 58 *EU Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0060:EN:NOT>.
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- 60 *Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1781:EN:NOT>.
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- 62 The Egmont Group took its name from the Egmont Arenberg Palace in Brussels, where the group first met. For more information see *Egmont Group of Financial Intelligence Units website*, available at: <http://www.egmontgroup.org/> and International Monetary Fund and World Bank (2004) *Financial Intelligence Units: An Overview*. Washington: IMF, available at: http://www.justice.gov.il/NR/rdonlyres/3DAC2825-5A9F-46C2-94C2-6199EEDB20FA/7885/FIUHandbook_English.pdf.
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- 82 U.S.C. 2339A outlaws providing material support for the commission of certain designated terrorist offences; U.S.C. 2339B prohibits the provision of material support to certain designated terrorist organizations; U.S.C. 2339C bans provision of funds used to carry out terror attacks.
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- 91 Cited in Suskind, R. (2004) *The Price of Loyalty*. New York: Simon & Schuster, page 192. Almost a decade after these measures were adopted, the assets belonging to hundreds of blacklisted individuals remain frozen and their lawyers have still not been able to access the 'evidence' against them.
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- 93 Professor Peter Alldridge, Head of the School of Law at Queen Mary, University of London, available at: <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/132/13205.htm#a16> (see para 25).
- 94 Williams, D. (2008) 'Governance, Security and 'Development': the case of money Laundering', *City University Working Papers on Transnational Politics*, Working Paper CUTP/001, February 2008, available at: http://www.city.ac.uk/__data/assets/pdf_file/0003/86475/D_Williams-Governance,-Security-and-Development.pdf, pages 10-11.
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- 96 See Williams, D. (2008) in above citation, pages 11-12.
- 97 See Williams, D. (2008) in above citation, pages 12-13. See also, for example, 'Manual on Countering Money Laundering and the Financing of Terrorism', *Asian Development Bank*, March 2003, available at: http://www.adb.org/Documents/Manuals/Countering_Money_Laundering/prelim.pdf.
- 98 See 'Technical Assistance', *United Nations Security Council Counter-Terrorism Committee* website, available at: <http://www.un.org/en/sc/ctc/capacity.html>. See also Rosand, E. (2009) 'The G8's Counterterrorism Action Group', *Center on Global Counterterrorism Cooperation*, May 2009, available at: http://www.globalct.org/images/content/pdf/policybriefs/rosand_policybrief_092.pdf.
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