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Counter-Terrorism, "Policy Laundering," and the FATF: Legalizing Surveillance, Regulating Civil Society

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1 Introduction

Over the past decade, surveillance of the financial system and demands for increased regulation and financial transparency of non-profit organizations (NPOs) have become central counter-terrorism policies with the stated aim of reducing their vulnerability to abuse by terrorist organizations. This has happened because intergovernmental organizations have adopted the hypothesis that terrorist organizations use laundered money for their activities, and that charities and NPOs are a potential conduit for terrorist organizations. Non-profit organizations have been placed under surveillance, while charitable giving, development assistance, and remittances from Diaspora communities have been intensively scrutinized by security agencies, particularly those organizations 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 was widely praised "as partners in a shared agenda of democratization, participation and service delivery."²

In Europe and the USA, financial surveillance policies have been opposed by civil liberties and privacy groups, and attempts to introduce binding rules on enhanced financial transparency of the non-profit sector have been resisted by charities, development organizations, 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 organizations, 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 article examines the intergovernmental organizations 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 organizations. It begins by suggesting a critical lens through which these developments can be seen.

1.1 "Policy Laundering" and Intergovernmental Organizations

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.³ 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."⁴ A critical feature of policy laundering is "forum shifting," which occurs when actors pursue roles in intergovernmental organizations 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 analyzing how and why certain governments have shaped intergovernmental policy agendas to their own ends. What are crucial in this discussion are the eschewing of a deliberative process, the sidestepping of parliamentary democracy, and the marginalization of civil society.⁵ This report engages the concept of policy laundering not to accuse the

Financial Action Task Force (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 – was 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, United Nations, International Monetary Fund, and World Bank, these standards then passed quickly down through regional bodies such as the Financial Action Task Force (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 organization (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 criminalize certain behaviors 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.⁶ Examples of global enforcement regimes include those enacted to suppress the production and trafficking of narcotic drugs (cf. the three main UN Drugs Conventions);⁷ to prevent and prosecute terrorist acts (cf. the dozen UN terrorism-related Conventions);⁸ to combat organized crime and “illegal” immigration (cf. the UN Convention and three protocols on Transnational Organised Crime);⁹ and to tackle “cybercrime” (cf. the CoE Cybercrime Convention, which is open for worldwide signature).¹⁰ These regimes function through the obligations on signatory states to criminalize certain acts, to facilitate cross-border investigations (by providing mutual legal assistance), and to assist in the prosecution of offenses (by providing evidence and/or extraditing suspects).

While the Bush administration appeared to shun international law in favor of unilateral “war on terror,” it continued to shape the agenda of various IGOs in order to embed and legitimize 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 organizations 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.¹¹

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 or more to agree (and even longer to ratify and enter into force). Academics have described this process as “hard coercion through soft law,”¹² suggesting that such measures may be *ultra vires*, or beyond the powers of the bodies that adopted them.¹³ 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."¹⁴ 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."¹⁵ 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."¹⁶

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 organizations. 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 organizations 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 organizations (NGOs) and civil society organizations (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. 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 organizations 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 behaviors (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 organizations 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 discourse on NPO regulation thus strongly emphasizes 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 organizations 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 organizations" dealing with the regulation of financial services.²⁹ No non-governmental organizations have observer status at the FATF.

In addition to the 36-member FATF, eight further intergovernmental 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: 40³⁰
- CFATF - Caribbean Financial Action Task Force
established: 1996 | HQ: Port of Spain, Trinidad & Tobago | member countries: 29³¹
- EAG - Eurasian Group on money laundering and terrorist financing
established: 2004 | HQ: Moscow, Russia | member countries: 8³²
- ESAAMLG - Eastern and Southern Africa Anti-Money Laundering Group
established: 1999 | HQ: Dar es Salaam, Tanzania | member countries: 14³³
- GAFISUD - Financial Action Task Force on Money Laundering in South America
established: 2000 | HQ: Buenos Aires, Argentina | member countries: 12³⁴
- GIABA - Inter Governmental Action Group against Money Laundering in West Africa
established: 1999 | HQ: Dakar, Senegal | member countries: 15³⁵
- MENAFATF - Middle East and North Africa Financial Action Task Force
established: 2004 | HQ: Manama, Bahrain | member countries: 18³⁶
- 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: 29³⁷

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 organized crime;
- criminalize 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 eight 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;
- criminalize terrorist financing and enable authorities to freeze 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 organization 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 that, as Professor Peter Alldrige, Head of the School of Law at University of London has argued, 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 professions.

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

- intensify its surveillance of systemic criminal and terrorist financing risks to enhance its ability to identify, prioritize, 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 review was completed in February 2012. While the text and interpretation of SR VIII were not amended, the nine Special Recommendations on terrorist financing were integrated into the 40 earlier Recommendations on money laundering, with the result that Special Recommendation VIII becomes Recommendation 8.⁴⁶

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 neighboring 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.⁴⁷

By 2001, 23 countries and territories had been designated as “non-cooperative” and placed on the FATF blacklist.⁴⁸ 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.”⁴⁹ 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.”⁵⁰

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.”⁵¹ Self-assessment questionnaires are sent to the state being evaluated and then followed up by inspection teams composed 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).⁵² Participation in inspection teams may also be extended, on a reciprocal basis, to experts from other observers that are conducting assessments (observers from bodies like the UN Counter-Terrorism Executive Directorate may also be considered “on an exceptional basis”).⁵³

The mutual evaluation process is crucial because it *de facto* extends the FATF recommendations by imposing extraordinarily detailed guidance – more than 250 criteria – on how states should comply with those recommendations (see further the guidance on FATF SR VIII in Section 4, below).⁵⁴ 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 globalizing the FATF regime and extending its mandate to counter-terrorism and regulations governing non-profit organizations. 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 cooperation. 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).⁵⁵

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.⁵⁶

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 offense of *failing to disclose* a potentially suspicious transaction, which is punishable by up to five years imprisonment.⁵⁷ 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),⁵⁸ then to all cash purchases over €15,000 (Directive 2005/60/EC),⁵⁹ then to persons entering or leaving the EU with cash amounts of €10,000 or more (Regulation 1889/2005/EC),⁶⁰ and then to all wire transfers (Regulation 1781/2006/EC).⁶¹ 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, also known as Suspicious Activity Reports (SARs)) 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.⁶²

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" organization for the "stimulation of international cooperation," including "information exchange, training and the sharing of expertise."⁶³ 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 obliges member states to "ensure" that their FIUs "exchange, spontaneously or on request ... any information that may be relevant" to another state.⁶⁴ 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.⁶⁵

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 organizations like the Egmont Group and the EU Platform of FIUs raises 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.⁶⁶ 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."⁶⁷

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 prescribed by law, to be proportionate to the need they purport to address, and to be subject to adequate judicial control.⁶⁸ 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.⁶⁹ 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 galvanized a 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 center 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.”⁷⁰ 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].*⁷¹

A year later, in 1997, an identical provision appeared in a Resolution of the United Nations General Assembly.⁷² 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 criminalize the financing of terrorist activities, freeze and seize funds intended for this purpose, and cooperate in international terrorism investigations.⁷³ These provisions were *de facto* extended to transnational organized crime in the UN Convention on that subject adopted in November 2000.⁷⁴

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 harmonize rules relating to wire transfers; and enhancing understanding of alternative remittance systems.⁷⁵

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.⁷⁶ 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.⁷⁷

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.”⁷⁸ 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.⁷⁹

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 organization designated by the Secretaries of State or Treasury, and criminalizing the provision of any financial or "material support" to those so designated.⁸⁰ 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.⁸¹ For international donors and grant-makers, 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.

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 2011 and later described as "the most sweeping sanctioning measures ever adopted by the Security Council."⁸² The resolution required states to implement the UN Terrorist Financing Convention (which at that time had 46 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 more than 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 criminalize the support of terrorism by freezing the assets of suspected terrorists. Whereas Resolution 1267 had targeted specific individuals, Resolution 1373 does not specify the persons or entities that should be listed. Instead, it gives states the discretion to blacklist all those deemed necessary to "prevent and suppress the financing of terrorist acts." The decentralized nature of this regime effectively enables states to interpret the resolution unilaterally and identify terrorist suspects in light of their own national interests.⁸³ 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.⁸⁴

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."⁸⁵ 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 the FATF and the Egmont Group of Financial Intelligence Units to include financial flows to terrorists – one of more than 40 specific counter-terrorism demands.⁸⁶ 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 criminalize 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 cooperation; 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 organizations.⁸⁷ 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."⁸⁸ 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.

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."⁸⁹ 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."⁹⁰ 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 organizations 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."⁹¹ 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 organizations 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).⁹² 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.⁹³ 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).⁹⁴ 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.⁹⁵ 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.⁹⁶

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 harmonization 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,⁹⁷ while the "Financial Market Integrity" (AML/CFT) program is an "essential element of the World Bank's development mandate."⁹⁸ 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.⁹⁹ 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."¹⁰⁰

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 afoul of their obligations under national and international law.¹⁰¹ International development and philanthropic organizations have been adversely affected by the burden of compliance as we will examine in more detail later,¹⁰² while companies that supply sophisticated technologies for law enforcement agencies to identify and analyze suspicious financial transactions and other datasets have seen their stock soar.¹⁰³ In August 2011 the U.S. security firm Regulatory DataCorp revealed that it held more than one million individuals and organizations in its "anti-terror" database.¹⁰⁴ The company markets this asset to government and private-sector clients around the world as an AML/KYC "compliance protection" service.¹⁰⁵

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 organizations 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.”¹⁰⁶ Post-9/11, counter-terrorism policies have since accused some NPOs of supporting terrorism in two ways: either as fronts for terrorist organizations that raise funds, transfer money, and provide logistical support, or as legitimate enterprises that indirectly or directly support the aims of terrorist organizations. 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 underdeveloped 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 organization based on terrorism.¹⁰⁷

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.”¹⁰⁸

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”;¹⁰⁹ the UK Charities Commission has reported that “actual instances of abuse have proved very rare”;¹¹⁰ 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.”¹¹¹ The FATF’s own “mutual evaluation” reports also often acknowledge that terrorist financing in the NPO sector is an insignificant or nonexistent 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.”¹¹² 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.”¹¹³

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 organizations are particularly vulnerable, and countries should ensure that they cannot be misused:

(i) by terrorist organizations 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 organizations.

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." 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 organization. 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. The best practices include 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 combating 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. 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."¹¹⁴

The Center on Global Counterterrorism Cooperation (an organization 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,¹¹⁵ 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.¹¹⁶ 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 Financial Action Task Force of South America (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 Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) countries; seven out of eight of the Eurasian FATF Group (EAG) countries; and 24 out of 27 Asia/Pacific FATF Group (APG).¹¹⁷ 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.¹¹⁸ Some show a direct link between FATF country evaluation reports and new national NPO regulations seen to adversely affect 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 “compliant” by that organization in respect to SR VIII.¹¹⁹ It also has some of the strictest counter-terrorism-related NPO regulations in the world on its statute books, and has controversially prosecuted charities for “material support.” In doing so, it has effectively outlawed the provision of any kind of assistance that could be construed as “material support” to “terrorist” organizations, be it humanitarian assistance for social projects connected to

proscribed organizations, or human rights advice to non-state actors engaged in armed conflict. 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.¹²⁰ 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 organizations led, for example, the American Civil Liberties Union (ACLU) to return a million-dollar grant to the Ford Foundation.¹²¹ 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."¹²² 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."¹²³

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 compliant" 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."¹²⁴

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 organizations 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 organizations with funding from international aid agencies, Western embassies, or donations from overseas Burmese.¹²⁵ 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 2009.¹²⁶ Its NGO law has also been described as "one of the most restrictive in the world."¹²⁷ 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 organization 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.¹²⁸

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.”¹²⁹ 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.”¹³⁰

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.”¹³¹ 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.”¹³²

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 organizations as being of “political nature” and prevent them from receiving foreign funds.¹³³ This is particularly problematic for organizations 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 organization receiving foreign funding, while those organizations that are given permission to receive funding from abroad must reapply 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 organizations 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.”¹³⁴

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.¹³⁵

4.4.7 Cambodia: Draft NPO law threatens unauthorized groups and organizations

Cambodia was rated partially compliant with FATF SR VIII by the World Bank and APG in July 2007.¹³⁶ 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 organizations, 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.”¹³⁷

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.¹³⁸

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.¹³⁹ A gay rights organization 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.”¹⁴⁰

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.”¹⁴¹ 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).”¹⁴²

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.¹⁴³ 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.”¹⁴⁴ 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 “criminalizes 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.¹⁴⁵ 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 five to 15 years in prison, as is any kind of association with terrorist organizations. The law was seen as a clear attempt to criminalize forms of social protest and clampdown on NGOs.¹⁴⁶ Despite widespread opposition, the law was passed in 2010.¹⁴⁷ 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.¹⁴⁸

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.¹⁴⁹

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.¹⁵⁰ Under the Administrative Liability Code it is illegal to participate in the activity of an unregistered organization.¹⁵¹ One of the last international organizations 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.”¹⁵² What the evaluators fail to stress is that in Saudi Arabia, only organizations 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 organizations 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 organizations.¹⁵³

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 organizations that fail to comply with the regulations.¹⁵⁴ The Government of Sierra Leone duly enacted the Revised NGO Policy

Regulations in 2009, subjecting civil society organizations 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.”¹⁵⁵

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 from being abused by terrorist organizations and comply with FATF SR VIII.¹⁵⁶ Member State governments meeting in the Council of the EU endorsed the draft Code without debate.¹⁵⁷

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.”¹⁵⁸

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,¹⁵⁹ the other examining self-regulatory initiatives.¹⁶⁰ 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 2010-14.¹⁶¹ More concerted advocacy from European civil society organizations followed and the proposal was restricted to “promot[ing] increased transparency and responsibility for charitable organisations with a view to ensuring compatibility with [SRVIII].”¹⁶²

In 2010 the European Commission issued “voluntary guidelines” for European NPOs; ¹⁶³ these too were strongly criticized by civil society organizations which described them as wholly unnecessary.¹⁶⁴ 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.”

5 Conclusions and Recommendations

5.1 A contradictory approach

The positive roles that many civil society groups across the world play in protecting and providing services to marginalized 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, are widely recognized 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.¹⁶⁵ 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.”¹⁶⁶

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 organizations 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 exploitation by terrorist financiers from an obscure intergovernmental 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 organizations. 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 organizations 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 securitization, 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 organizations and engaging marginalized 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 organizations? 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.”¹⁶⁷ 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 organizations.

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 adversely affect others in civil society. The FATF’s approach to the NPO sector contrasts with 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 to prevent undue restrictions on the operational space of civil society organizations 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.”¹⁶⁸ 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 organizations. 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.¹⁶⁹ The principles 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 combating 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 programs, 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.¹⁷⁰ 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.

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² Howell, J. (2010) "[Civil Society, Aid, and Security Post-9/11](#)" in *International Journal of Not-for-Profit Law*, vol. 12 no. 4.

³ 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.

⁴ Policy Laundering Project (2005), [The Problem of Policy Laundering](#).

⁵ 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 behavior), 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.

⁶ Transnational Institute (2005) "[Global Enforcement Regimes Transnational Organised Crime, International Terrorism and Money Laundering](#)," *TNI Crime and Globalisation seminar*, Amsterdam, 28-29 April 2005.

⁷ 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.

⁸ 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.

⁹ 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.

¹⁰ Council of Europe Convention on Cybercrime, 2001.

¹¹ See further Rees, W. (2006) *Transatlantic Counter-terrorism Co-operation: The New Imperative*. London: Routledge.

¹² 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.

¹³ 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)*.

¹⁴ 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).

¹⁵ See for example "[Publish What You Fund](#)," *Global Campaign for Aid Transparency* website.

¹⁶ [International Aid Transparency Initiative](#) website.

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.

¹⁹ See [NGOWATCH](#) website.

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.

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 Center for Not-for-Profit Law and World Movement for Democracy (2008) [Defending Civil Society](#).

²⁴ Tiwana, M. and Belay, N (2010), [Civil Society: The Clampdown is Real - Global Trends 2009-2010](#), CIVICUS World Alliance for Citizen Participation.

The G7 countries are Canada, France, Germany, Italy, Japan, UK, and USA. Following the inclusion of Russia in 1994 the group met as the P8 until 1997, when Russia formally joined and the G7 became the G8.

"[Summit Declaration](#)," *G7 meeting*, 14-16 July 1989, Paris. The "EU15" consisted of Belgium, France, Germany, Italy, Luxembourg, Netherlands, Ireland, Denmark, UK, Greece, Portugal, Spain, Austria, Sweden, and Finland.

The Gulf Cooperation Council members are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates.

²⁵ The G7 countries are Canada, France, Germany, Italy, Japan, UK, and USA. Following the inclusion of Russia in 1994 the group met as the P8 until 1997, when Russia formally joined and the G7 became the G8.

²⁶ "[Summit Declaration](#)," *G7 meeting*, 14-16 July 1989, Paris.

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.

³⁰ See [Asia/Pacific Group on Money Laundering](#) website.

³¹ See [Caribbean Financial Action Task Force](#) website.

³² See [Eurasian Group on money laundering and terrorist financing](#) website.

³³ See [Eastern and Southern Africa Anti-Money Laundering Group](#) website.

³⁴ See [Financial Action Task Force on Money Laundering in South America](#) website.

³⁵ See [Inter Governmental Action Group against Money Laundering in West Africa](#) website.

³⁶ See [Middle East and North Africa Financial Action Task Force](#) website.

³⁷ See [Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism](#) website.

³⁸ See [Organisation for Economic Co-operation and Development](#) website.

³⁹ "[About the FATF](#)," FATF-GAFI website.

⁴⁰ See [FATF-GAFI](#) website.

⁴¹ House of Lords European Union Committee (2009) [Nineteenth Report, Session 2008-09, Money laundering and the financing of terrorism](#), (see paragraph 27).

⁴² "[FATF Revised Mandate 2008-2012](#)," Financial Action Task Force.

⁴³ "[Mandate for the Future of the FATF \(September 2004 – December 2012\)](#)," Financial Action Task Force.

⁴⁴ "[FATF Revised Mandate 2008-2012](#)," Financial Action Task Force.

⁴⁵ "[Consultation on Proposed Changes to the FATF Standards: Compilation of Responses from NGOs and Individuals](#)," Financial Action Task Force.

⁴⁶ For an explanation of the new numbering system, see pp. 4-5, FATF (2012) [International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations](#).

⁴⁷ "[Publications & Documents : Best Practices](#)," FATF-GAFI website.

⁴⁸ 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.

⁴⁹ [Improving Compliance with the International Standards](#),⁴⁹ FATF-GAFI website.

⁵⁰ Since 2009 the FATF has issued statements noting concerns and encouraging greater compliance by Iran, Pakistan, Turkmenistan, Uzbekistan, North Korea, São Tomé, and Príncipe. Only Iran and North Korea are currently listed as “High risk and non-cooperative jurisdictions” in [FATF Statement, 25 February 2011](#),⁵⁰ *Financial Action Task Force*.

⁵¹ [Mutual Evaluations Programme](#),⁵¹ FATF-GAFI website.

⁵² [AML/CFT Evaluations and Assessments: Handbook for Countries and Assessors](#),⁵² *Financial Action Task Force Reference Document*, April 2009.

⁵³ [Third Round of AML/CFT Mutual Evaluations: Process and Procedures](#),⁵³ *Financial Action Task Force Reference Document*, October 2009. See also [Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations](#),⁵³ *Financial Action Task Force Reference Document*, 27 February 2004 (Updated as of February 2009).

⁵⁴ [AML/CFT Evaluations and Assessments: Handbook for Countries and Assessors](#),⁵⁴ *Financial Action Task Force Reference Document*, April 2009.

⁵⁵ [FATF 40 Recommendations](#),⁵⁵ *Financial Action Task Force Reference Standards*, October 2003 (incorporating all subsequent amendments until October 2004).

⁵⁶ [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](#)

⁵⁷ 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.

⁵⁸ [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](#).

⁵⁹ [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](#).

⁶⁰ [Regulation 1889/2005/EC of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community](#).

⁶¹ [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](#).

⁶² [FATF Recommendation 26: Competent authorities, their powers and resources](#),⁶² FATF-GAFI website.

⁶³ 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 and International Monetary Fund and World Bank (2004) [Financial Intelligence Units: An Overview](#). Washington: IMF.

- ⁶⁴ [**EU Council Decision of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information \(2000/642/JHA\).**](#)
- ⁶⁵ "[**Financial Crime,**](#)" European Commission website.
- ⁶⁶ "[**The UK Financial Intelligence Unit,**](#)" Serious Organised Crime Agency website
- ⁶⁷ House of Lords European Union Committee (2009) [**Nineteenth Report, Session 2008-09, Money laundering and the financing of terrorism,**](#) (see paragraph 288).
- ⁶⁸ Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2009) [**Report on the right to privacy**](#) (p. 2).
- ⁶⁹ Council of Europe Commissioner for Human Rights (2008) [**Protecting the right to privacy in the fight against terrorism.**](#) CommDH/IssuePaper(2008)3 .
- ⁷⁰ "[**Ottawa Ministerial Declaration on Countering Terrorism,**](#)" G8 Ottawa Ministerial Meeting on Terrorism, 12 December 1995.
- ⁷¹ "[**Agreement on 25 Measures,**](#)" G8 Ministerial Conference on Terrorism, Paris, 30 July 1996.
- ⁷² "[**Measures to eliminate international terrorism,**](#)" United Nations General Assembly Resolution (A/RES/51/210), 88th plenary meeting, 17 December 1996.
- ⁷³ [**International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999.**](#)
- ⁷⁴ [**Article 7, United Nations Convention against Transnational Organized Crime adopted by the General Assembly of the United Nations in resolution 55/25 of 15 December 2000.**](#)
- ⁷⁵ [**The National Money Laundering Strategy for 1999,**](#) Departments of the Treasury and Justice of USA.
- ⁷⁶ [**Resolution 1267 adopted by the Security Council at its 4051st meeting on 15 October 1999 \(S/RES/1267\).**](#)
- ⁷⁷ See Sullivan G. and Hayes, B. (2009) [**Blacklisted: Targeted sanctions, preemptive security and fundamental rights.**](#) Berlin: European Center for Constitutional and Human Rights.
- ⁷⁸ [**Statement by the leaders of the G8 over last week's terrorist attacks in New York and Washington,**](#) 19 September 2001.
- ⁷⁹ [**Statement of G7 Ministers of Finance,**](#) September 25, 2001.
- ⁸⁰ "Executive Order 13224," Office of the Coordinator for Counterterrorism, U.S. Department of State website.
- ⁸¹ [**Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism \(USA PATRIOT ACT\) Act of 2001.**](#)
- ⁸² Eckes, C. (2009) *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*. Oxford: Oxford University Press, page 16.

- ⁸³ Sullivan G. and Hayes, B. (2009) [**Blacklisted: Targeted sanctions, preemptive security and fundamental rights**](#). Berlin: European Center for Constitutional and Human Rights.
- ⁸⁴ de Goede, M. (forthcoming 2011) "Blacklisting and the Ban: Contesting targeted sanctions in Europe" in *Security Dialogue* 45 (5), December 2011.
- ⁸⁵ [**Statement of the G7 Finance Ministers and Central Bank Governors**](#), 6 October 2001, Washington DC.
- ⁸⁶ "[**Text of US letter from Bush with demands for EU for cooperation**](#)," *Statewatch News online*, November 2006.
- ⁸⁷ "[**9 Special Recommendations \(SR\) on Terrorist Financing \(TF\)**](#)," FATF-GAFI website.
- ⁸⁸ 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.
- ⁸⁹ House of Lords European Union Committee (2009) [**Nineteenth Report, Session 2008-09, Money laundering and the financing of terrorism**](#) (see paragraph 17).
- ⁹⁰ [**Professor Peter Alldrige**](#), Head of the School of Law at Queen Mary, University of London (see para 25)
- ⁹¹ 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, pages 10-11.
- ⁹² "[**Combating the Financing of Terrorism: First Year Report**](#)," *G7 Press Release*, 27 September 2002.
- ⁹³ See Williams, D. (2008) in above citation, pages 11-12.
- ⁹⁴ 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.
- ⁹⁵ See "[**Technical Assistance**](#)," *United Nations Security Council Counter-Terrorism Committee website*. See also Rosand, E. (2009) "[**The G8's Counterterrorism Action Group**](#)," *Center on Global Counterterrorism Cooperation*, May 2009.
- ⁹⁶ Article 14, [**United Nations Convention against Corruption adopted by the General Assembly of the United Nations in Resolution 58/4 of 31 October 2003**](#). See further "[**Legislative guide for the implementation of the United Nations Convention against Corruption**](#)," *United Nations Office on Drugs and Crime Division for treaty Affairs*, 2006.
- ⁹⁷ Canada, France, Japan, Korea, Kuwait, Luxembourg, the Netherlands, Norway, Qatar, Saudi Arabia, Switzerland, and the United Kingdom have committed \$25.3 million over five years. See "[**Factsheet: The IMF and the Fight Against Money Laundering and the Financing of Terrorism**](#)," August 31, 2011, *International Monetary Fund website*.
- ⁹⁸ [**Financial Market Integrity**](#), *World Bank website*.

⁹⁹ Cortright et al. (2011) [**Friend Not Foe: Opening Spaces for Civil Society Engagement to Prevent Violent Extremism**](#). Report to Cordaid by Fourth Freedom Forum and the Kroc Institute for International Peace Studies.

¹⁰⁰ On the contrary, it is argued that evidence suggests that the focus on establishing AML and CFT regimes actually diverts funding away from development. See 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.

¹⁰¹ In Europe, companies such as World-Check offer "risk intelligence" in order to reduce "customer exposure to potential threats posed by the organisations and people they do business with." The company claims to have a client base of "over 4,500 organisations, with a "renewal rate in excess of 97%" (see [**Worldcheck**](#) website). Infosphere AB is another European "Commercial Intelligence and Knowledge Strategy consultancy" providing similar services (see [**Infosphere**](#) website). Crucially these companies do not just provide vetting services against those on official blacklists, they claim to collect data on other individuals and entities deemed "worthy of enhanced scrutiny." The potential dangers of such private intelligence bodies are well known. In Britain in the 1980s, the Economic League drew up its own blacklists and acted as a right-wing employment vetting agency. The League, which was acknowledged to have close links with the security services, had accumulated files on at least 30,000 people, files it shared with more than 2,000 company subscribers, in return for annual revenues of over £1 million. The files it held contained details of political and trade union activists, Labour Party MPs, and individuals who, for instance, had written to their local papers protesting at government policy. The League always maintained that "innocent" people had nothing to fear as they only kept files on "known members of extreme organisations." Critical investigative reporting coupled with a campaign against the organization saw it disband in 1993 (though its directors reportedly set-up a new company offering the same service on the basis of the same files the following year). An enterprise considered illegitimate in the early 1990s has now been supplanted by an entire industry. Hayes, B. (2010) "[**Spying in a see-through World: the "Open Source" intelligence industry**](#)," *Statewatch Journal*, vol. 20 no. 1.

¹⁰² See for example "[**Charities End Dialogue with Treasury over Guidelines That Stifle Effective Global Grantmaking**](#)," *Council on Foundations Press Release*, 22 November 2010.

¹⁰³ In January 2011 the arms manufacturer BAE Systems announced that it was to pay £184 million for Norkom, an Ireland-based counter-fraud and anti-money laundering solutions provider that employs around 350 people. BAE already owns Detica, a company specializing in "collecting, managing and exploiting information to reveal actionable [financial] intelligence." See "[**BAE systems to buy Irish financial crime company**](#)," *NeoConOpticon blog*, January 2011.

¹⁰⁴ See [**Regulatory DataCorp**](#) website. See also "[**Firm holds 1 million on anti-terror list**](#)," *Spacewars*, 3 August 2011.

¹⁰⁵ KYC (Know Your Customer) obligations are placed on banks and other financial services.

¹⁰⁶ "[**Agreement on 25 Measures**](#)," *G8 Ministerial Conference on Terrorism*, Paris, 30 July 1996.

¹⁰⁷ [**Financial Action Task Force**](#) (2008) *Terrorist Financing*. FATF/GAFI website.

¹⁰⁸ Howell, J. (2010) "[**Civil Society, Aid, and Security Post-9/11**](#)" in *International Journal of Not-for-Profit Law*, vol. 12 no. 4.

¹⁰⁹ Matrix Insight (2008) [**Study to Assess the Extent of Abuse of Non-Profit Organisations for Financial Criminal Purposes at EU Level**](#). European Commission Directorate-General Justice, Freedom & Security.

¹¹⁰ "[**Charity Commission Counter-terrorism strategy**](#)," UK Charity Commission website.

¹¹¹ ["Charities End Dialogue With Treasury Over Guidelines That Stifle Effective Global Grantmaking,"](#) Council on Foundations Press Release, 22 November 2010.

¹¹² Van der Does de Willebois, E (2010) ["Nonprofit Organizations and the Combating of Terrorism Financing: A Proportionate Response,"](#) *World Bank Working Paper no. 208*.

¹¹³ United Nations Counter Terrorism Implementation Task Force (2009) [Final report of the Working Group on Tackling the Financing of Terrorism.](#)

¹¹⁴ 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 (p. 78).

¹¹⁵ Center on Global Counterterrorism Cooperation (2011) [Regional working group meeting on preventing abuse of the non-profit sector for the purposes of terrorist financing: Bangkok, Thailand, 22-24 March 2011: Key Observations Of The Organizers.](#)

¹¹⁶ The research took place between February and July 2011 and utilized all available reports from the FATF and regional FATF group websites (see section 2.1, above). These evaluation reports were produced by inspection teams comprised of FATF/regional FATF, World Bank, and IMF officials with the support of national experts.

¹¹⁷ Figure excludes APG member countries that are also members of the FATF.

¹¹⁸ The [International Center for Not-for-Profit Law](#) publishes the "NGO Law Monitor" and the *International Journal of Not-for-Profit Law*. For more information about ICNL see .

¹¹⁹ Financial Action Task Force (2006) [Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism.](#)

¹²⁰ U.S. Department of the Treasury (undated document) [Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities.](#)

¹²¹ Sidel, M. (2008) ["Counter-Terrorism and the Enabling Legal and Political Environment for Civil Society: A Comparative Analysis of 'War on Terror' States"](#) in *International Journal of Not-for-Profit Law*, Volume 10, Issue 3, June 2008.

¹²² ["Charities End Dialogue with Treasury over Guidelines That Stifle Effective Global Grantmaking,"](#) *US Council on Foundations* press release, 22 November 2010.

¹²³ American Civil Liberties Union (2009) [Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism" Financing.](#)

¹²⁴ Asia/Pacific Group on Money Laundering (2008) [APG Mutual Evaluation Report on Myanmar Against the FATF 40 Recommendations \(2003\) and 9 Special Recommendations as Adopted by the APG Plenary on 10 July 2008.](#)

¹²⁵ ["Junta to Increase Scrutiny of NGOs' Finances,"](#) *Irrawaddy.org*, 18 January 2011.

¹²⁶ Middle East and North Africa Financial Action Task Force (2009) [Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism: EGYPT.](#)

¹²⁷ "The Impact of NGOs on the State & Non-State Relations in the Middle East," Peter Gubser, *Middle East Policy*, March. 2002, Volume 9, Issue 1, p. 141.

¹²⁸ Elbayar, K (2005) "[NGO Laws in Selected Arab States](#)" in *International Journal of Not-for-Profit Law*, Volume 7, Issue 4, September 2005.

¹²⁹ Middle East & North Africa Financial Action Task Force (2007) [Mutual Evaluation Report of the Republic of Tunisia on Anti-Money Laundering and Combating Financing of Terrorism, adopted by the MENAFATF Plenary on April 3rd 2007.](#)

¹³⁰ *Id.*

¹³¹ "[Developments in Tunisia](#)," International Center for Not-for-Profit Law, *News & Information*, 3 March 2011.

¹³² Asia/Pacific Group on Money Laundering & Financial Action Task Force (2010) [Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism: India](#), 25 June 2010.

¹³³ "[CIVICUS World Assembly Delegates Express Deep Disappointment at India's New Curbs on Civil Society](#)," CIVICUS press release, 6 September 2010.

¹³⁴ Asia/Pacific Group on Money Laundering (2008) APG 2nd [Mutual Evaluation Report on Indonesia Against the FATF 40 Recommendations \(2003\) and 9 Special Recommendations, Adopted by the APG Plenary 9 July 2008.](#)

¹³⁵ "[NGO law monitor: Indonesia](#)," International Center for Not-for-Profit Law .

¹³⁶ World Bank (2008) "[Kingdom of Cambodia: Detailed Assessment Report Anti-Money Laundering And Combating The Financing Of Terrorism As Adopted By The APG Plenary 25 July 2007.](#)

¹³⁷ "[Cambodian Government releases revised draft Law on Associations and NGOs](#)," International Center for Not-for-Profit Law website, 8 April 2011.

¹³⁸ "[After European pressure, Putin announces softer NGO law](#)," *Euractiv.com*, 9 December 2005.

¹³⁹ Kamhi, A. (2006) "[The Russian NGO Law: Potential Conflicts with International, National, and Foreign Legislation](#)" in *International Journal of Not-for-Profit Law*, Volume 9, Issue 1, December 2006.

¹⁴⁰ *Id.*

¹⁴¹ Financial Action Task Force (2008) [Second Mutual Evaluation Report Anti-Money Laundering And Combating the Financing of Terrorism: Russian Federation, 20 June 2008.](#)

¹⁴² International Center for Non-Profit Law and World Movement for Democracy (2008) [Defending Civil Society](#) (p. 13).

¹⁴³ Grupo de Acción Financiera de Sudamérica (2008) [Tercera Ronda De Evaluaciones: República De Colombia, Informe Plenario, 7 November 2008.](#)

¹⁴⁴ "[NGO law monitor: Colombia](#)," International Center for Not-for-Profit Law website.

¹⁴⁵ Grupo de Acción Financiera de Sudamérica (2005) [Informe De Evaluación Mutua Sobre Lavado de Activos y Financiamiento del Terrorismo: Paraguay, 9 December 2005.](#)

- ¹⁴⁶ "[Anti-Terrorism Law Criminalizes Protest in Paraguay](#)," *Upside Down World*, 8 August 2007.
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- ¹⁴⁸ "[Country Reports on Terrorism \(Paraguay\)](#)," *Embassy of the United States in Paraguay*, press release, 5 August 2010.
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- ¹⁵⁰ "[NGO law monitor: Uzbekistan](#)," *International Center for Not-for-Profit Law* website.
- ¹⁵¹ International Centre for Non-Profit Law and World Movement for Democracy (2008) [Defending Civil Society](#) (p. 10).
- ¹⁵² Financial Action Task Force (2011) [Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism: Kingdom of Saudi Arabia](#), 25 June 2011.
- ¹⁵³ "[NGO law monitor: Saudi Arabia](#)," *International Center for Not-for-Profit Law* website.
- ¹⁵⁴ Inter-Governmental Action Group Against Money Laundering in West Africa (2007) [Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism: Sierra Leone](#), 12 June 2007.
- ¹⁵⁵ "[NGO Law Monitor: Sierra Leone](#)," *International Center for Not-for-Profit Law* website.
- ¹⁵⁶ European Commission (2005) [Commission Communication to the Council, the European Parliament and the European Economic And Social Committee: The Prevention of and Fight Against Terrorist Financing Through Enhanced National Level Coordination and Greater Transparency of the Non-Profit Sector](#), COM(2005) 620 final, 29.11.2005.
- ¹⁵⁷ "[2696th Council Meeting: Justice and Home Affairs](#)," *Council of the European Union* press release, 14 December 2005.
- ¹⁵⁸ "[CSCG position on Code of Conduct for Non Profit Organisations](#)," *EU Civil Society Contact Group* website.
- ¹⁵⁹ Matrix Insight (2008) [Study to Assess the Extent of Abuse of Non-Profit Organisations for Financial Criminal Purposes at EU Level](#). European Commission Directorate-General Justice, Freedom & Security.
- ¹⁶⁰ European Commission (2009) [Study on Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union Commissioned by the European Commission Directorate-General of Justice, Freedom and Security, Submitted by the European Center for Not-for-Profit Law](#).
- ¹⁶¹ Statewatch (2010) [Statewatch briefing on EU proposals to increase the financial transparency of charities and non-profit organisations](#), January 2010.
- ¹⁶² European Foundation Centre (2009) [When cooperation works: Overcoming security concerns about NPOs at EU level](#), EFC Briefing, 15 December 2009.

¹⁶³ European Commission (2010) "[Voluntary Guidelines for EU based non-profit organisations,](#)" *Discussion Paper for 3rd conference on "Enhancing Transparency and Accountability of the Non-Profit Sector"*, Brussels 2 July 2010.

¹⁶⁴ The European Foundation Centre, Cordaid, and the Samenwerkende Brancheorganisaties Filantropie (2010) *Joint comments on the discussion paper: "[Voluntary guidelines for EU based non-profit organisations,](#)"* 10 September 2010.

¹⁶⁵ United States Department of State (2006) "[Guiding Principles on Non-Governmental Organizations \(NGOs\)](#)" in *International Journal of Not-for-Profit Law*, Volume 9, Issue 1, December 2006. See also [Civil Society: Supporting Democracy in the 21st Century](#), Remarks by Hillary Rodham Clinton, Secretary of State, Krakow, Poland, 3 July 2010.

¹⁶⁶ "[UNHCR Creation of Special Rapporteur on Freedom of Assembly and Association,](#)" Press Statement, Hillary Rodham Clinton, Secretary of State, 30 September 2010.

¹⁶⁷ Van der Does de Willebois, E (2010) "[Nonprofit Organizations and the Combating of Terrorism Financing: A Proportionate Response,](#)" *World Bank Working Paper no. 208*.

¹⁶⁸ The UN's Counter-Terrorism Executive Directorate (CTED) is also guided by the principle that "effective counter-terrorism measures and respect for human rights are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort" and CTED is obliged "to further develop its activities in this area, to ensure that all human rights issues relevant to the implementation of [Security Council] resolutions [on counter-terrorism] are addressed consistently and even-handedly." [Resolution 1963 \(2010\) Adopted by the Security Council at its 6459th meeting, on 20 December 2010, S/RES/1963 \(2010\).](#)

¹⁶⁹ International Center for Not-for-Profit Law and World Movement for Democracy (2008) [Defending Civil Society.](#)

¹⁷⁰ There is a single recommendation buried in the evaluation handbook that states: "Countries *should* establish controls and safeguards to ensure that information received by competent authorities is used only in an authorised manner. These controls and safeguards *should* be consistent with national provisions on privacy and data protection" (emphasis added).