



STUDY

# The impact of international counter-terrorism on civil society organisations

Understanding the role of the Financial Action Task Force

**Publisher**

Bread for the World -  
Protestant Development Service  
Protestant Agency for Diakonie  
and Development

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Krackhardt (title, p. 15), Eric Miller  
(p. 8, 12, 14), Frank Schultze (p. 16, 29),  
UN Photo/Mark Garten (p. 11)

**Layout** János Theil

**Print** Umweltdruckerei GmbH,  
Hannover

**Art. Nr.** 129 502 530

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**Donations**

Brot für die Welt -  
Evangelischer Entwicklungsdienst  
IBAN DE10 1006 1006 0500 5005 00  
Bank für Kirche und Diakonie  
BIC GENODED1KD

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April 2017

STUDY

# **The impact of international counter- terrorism on civil society organisations**

Understanding the role of the Financial Action  
Task Force

By Ben Hayes

# Contents

- Preface** ..... 5
- Executive summary**..... 6
- 1 Introduction** ..... 7
  - 1.1 Shrinking and closing space for civil society ..... 7
- 2 How the international counterterrorism framework affects the work of INGOs and their partners on the ground** ..... 10
  - 2.1 The United Nations ..... 10
  - 2.2 The Financial Action Task Force ..... 13
  - 2.3 The European Union ..... 16
- 3 The FATF and the worldwide proliferation of restrictive non-profit laws** ..... 18
  - 3.1 Ensuring compliance ..... 19
  - 3.2 The impact on non-profits ..... 20
  - 3.3 Incremental reforms ..... 25
- 4 Don't bank on it: how due diligence and 'de-risking' is limiting civil society's access to financial services** ..... 27
  - 4.1 Due diligence and non-profits ..... 27
  - 4.2 The role of the compliance industry ..... 28
  - 4.3 The impact on development activities ..... 29
  - 4.4 Nascent reform efforts ..... 31
- 5 Undermining conflict resolution, hampering humanitarian action: terrorist 'blacklisting'** ..... 32
  - 5.1 The role of the FATF ..... 32
  - 5.2 Counterterrorism and humanitarian aid ..... 34
  - 5.3 Counterterrorism and peacebuilding ..... 38
  - 5.4 De-risking, self-censorship and securitisation ..... 39
- 6 Conclusions: facing-up to the disabling environment** ..... 40
- 7 Recommendations** ..... 42
- Annex** ..... 43
- Bibliography** ..... 44

# Preface

It may seem unusual for an organisation like Brot für die Welt (Bread for the World) to be raising concerns about the international counterterrorism framework. In Germany, civil society organisations (CSOs) do not seem to be affected by antiterrorism measures. However, as a development organisation we see more and more how anti-terrorism measures have an impact on the work of organisations which Brot für die Welt is partnering with.

For some years now, we have been observing that, throughout the world, civic engagement is getting riskier for activists, employees and volunteers working for associations, NGOs and social movements. In addition to this personal threat, their organisations face systematic restrictions on their abilities to conduct their work. An increasing number of countries are establishing laws or adapting existing legal frameworks to make civic engagement almost impossible. CSOs may have their registrations withdrawn or bank accounts frozen. Bans on foreign financing are becoming increasingly common. Some countries have introduced complicated as well as time and resource consuming administrative processes. This thwarts the work of civil society organisations all over the world and limits their independence. For our partner organisations and for Brot für die Welt, the shrinking and closing of civil society space has very direct effects. Partner organisations cannot work any more or are closed because activities they pursue become illegal, they lose their registration, or bank accounts are frozen. Senior staff members of partner organisations are criminalised, detained or threatened. These are just some examples of the challenges our partner organisations are facing.

In some contexts, it is argued that these measures are necessary because of terrorism threats and national security. However, the national legislation and regulations linked to antiterrorism measures are not nationally isolated, but often linked and connected to international regulations. In fact, as the report shows, FATF (Financial Action Task Force) Recommendation 8 and FATF recommendations following evaluations add to these restrictions.

At Brot für die Welt we strongly believe that countries which silence independent voices, punish critical intervention and violate people's freedom of speech, assembly and association, face grave difficulties in terms of their political and social development. A vibrant democracy that aims to fight poverty and to secure justice and peace needs a strong, independent civil society that is involved and critically accompanies political

discussions and decisions. This is the only way of ensuring that marginalised groups can gain a voice and that development reaches all, instead of merely benefiting the privileged. In particular, in times when human rights and civic engagement are increasingly under pressure, international organisations have to ensure that their recommendations, evaluations and decisions have no negative impact on human rights or civic space. They should not provide a justification for less democratic and repressive governments to introduce restrictive laws and regulatory environments for civil society organisations.

The links between measures that fight financing of terrorism and civic space are not known widely. Many civil society organisations in various countries are already affected by these measures and many more will be in future. This report aims to inform civil society organisations and non-profit organisations (NPOs), but also political decision makers who are not familiar with anti-terrorism measures. Ben Hayes has been following anti-terrorism measures and their impacts on civil society organisations for many years. We very much appreciate that he could take the time and effort to write this report for us.

We hope that its conclusions and recommendations encourage debate and reform in Germany and in other countries, and within the intergovernmental organisations addressed by the report.

CHRISTINE MEISSLER

Policy Advisor Protection of Civil Society,  
Brot für die Welt

# Executive summary

This report examines the impact of international counterterrorism frameworks on the work of civil society organisations. In particular, it explains the role of the Financial Action Task Force in setting international standards that affect the way in which civil society organisations are regulated by nation-states, their access to financial services, and their obligations to avoid proscribed organisations and other entities deemed to pose a ‘terrorism’ risk.

The introduction to the report frames these developments in the context of the ‘shrinking space’ of civil society organisations. This narrative describes a new generation of restrictions and attacks on the legitimacy and actions of non-profits and social justice organisations.

Chapter two introduces the counterterrorism frameworks that have most affected civil society. This includes UN Security Council measures on combating terrorism, the new international CVE (Countering Violent Extremism) agenda, the FATF’s counterterrorist financing requirements, and the EU’s development and implementation of these measures.

Chapter three examines the worldwide proliferation of restrictive civil society laws and their relationship to the FATF’s recommendations on the regulation of the non-profit sector. It draws on existing research showing how these have been used as a vehicle for the imposition of restrictive legislation across the globe, and augments this discourse with new evidence, examples and case studies. It also considers the prospects for reform, and the potential for the FATF to engage proactively in preventing further restrictions.

Chapter four addresses a relatively newer phenomenon: the financial exclusion of civil society organisations and resulting from the ‘due diligence’ obligations mandated by the FATF. Driven by ever-tighter demands on financial institutions to scrutinise their customers for links to terrorism, crime and corruption – and underscored by substantial fines for failures due diligence – banks and intermediaries are cutting ties with non-profits and refusing to process ‘suspicious’ cross-border transactions. This is a process that economists have termed ‘de-risking’. While more research is needed, examples show how financial exclusion can fundamentally compromise the ability of affected non-profits to implement their programmes and fulfil their mandates.

Chapter five examines the impact of terrorist ‘black-listing’ and sanctions regimes more widely on activities such as peacebuilding and the provision of humanitarian assistance. It shows how the rigid interpretation of states’

obligations by the FATF is exacerbating what have become often intractable problems for conflict resolutions organisations and NGOs working at close proximity to conflict zones or ‘suspect communities’.

The report draws three main conclusions. First, without fundamental reform to the FATF’s non-profit sector recommendations, the proliferation and legitimisation of restrictive counterterrorism laws is likely to continue unabated. Second, the FATF is undermining international law by directly promoting laws that contravene states’ human rights obligations, even where the draft laws have been criticised by UN mandate holders. Third, a rights-based approach to financial services in which the onus is on the banks and regulators to service non-profits and process transactions is the only way to address this particular problem of de-risking.

The report makes 11 recommendations to civil society organisations, national and regional parliamentary committees, national governments and the FATF. It also encourages civil society organisations concerned about the developments described in this report to join the international coalition of organisations established to engage with the FATF and create and ‘enabling environment’ for civil society.

# Chapter 1

## Introduction

Counterterrorism has direct and indirect consequences for organisations that seek to empower poor and marginalised people by supporting democracy and human rights in developing countries. Repressive and authoritarian regimes have long made life difficult for international development organisations pursuing this kind of agenda, and now international counterterrorism has engendered a new generation of restrictions on civil society. These restrictions are related to a worldwide framework that singles out non-profit organisations as being particularly vulnerable to exploitation and abuse by terrorist organisations, and demands remedial action to ensure that CSOs are adequately regulated and supervised by state authorities. Absent any meaningful protections for freedom of association and expression, these rules are making a significant contribution to a wider, global trend toward the restriction and closure of the ‘political space’ in which CSOs operate.

By providing humanitarian assistance and protection to civilian populations and refugees, and supporting peacebuilding and conflict resolution efforts, international non-governmental organisations (INGOs) must also negotiate complex legal frameworks designed to mediate these conflicts, including international sanctions against designated terrorist organisations and national laws prohibiting ‘material support’ to them. Because of these laws, working in and around conflict zones now entails legal and political risks for relief and development organisations and their staff that did not exist in the 1990s, when such organisations were relatively unencumbered “as partners in a shared agenda of democratization, participation and service delivery” (Howell 2010).

International counterterrorism rules and policies are being developed by well-known organisations like the UN and EU, but also in little known international venues like the Financial Action Task Force and the Global Counter-Terrorism Forum (an international consortium established in 2011 by 29 countries and the European Union, its members include those countries most invested in the military and national security aspects of the war against terrorism). This has enabled states to reach cooperation agreements more quickly, but also means that the rules and regulations being instituted frequently lack any democratic input, and in turn pay inadequate regard to fundamental rights. The decisions of these institutions can have a profound impact on the lives of ordinary people by transforming international law and shaping domestic policy (Kiai 2014a, para. 2). They also affect the ability of

CSOs to carry out their mandates, to deliver assistance and protection according to the fundamental principles of humanitarian action where it is needed, and to support local civil society organisations facing state repression.

This report describes the development and implementation of major international counterterrorism frameworks affecting international relief and development organisations. It focuses on three trends in particular: (i) the ‘shrinking space’ for civil society and its activities more broadly; (ii) restrictions on access to the financial services needed to sustain these activities and actors; and (iii) the increasing difficulty in working in and around conflict zones.

Having tried to manage the consequences pragmatically by adopting risk mitigation measures and programmatic adjustments, sometimes at the expense of their mandates or partners on the ground, non-profits and CSOs are now coming together in greater numbers to demand international solutions to the common problems they face.

### 1.1 Shrinking and closing space for civil society

The ‘shrinking space’ metaphor has been widely embraced as a way of describing a new generation of restrictions and other factors affecting civil society’s ability to operate, though the level of abstraction is such that it often fails to capture the mechanics of what is actually happening on the ground, and why. Due to the level of limitations and restrictions in some contexts, observers started to speak of ‘closing space’ for civil society. Under the rubric of ‘shrinking space’ are at least six, often interrelated trends:

- i. ‘Philanthropic protectionism’ encompasses a raft of constraints on the ability of CSOs to receive international funding: This includes government vetting and approval of organisations in receipt of such funding, ‘foreign agents’ laws stigmatising foreign-funded CSOs, and restrictions such as caps, state control of funds, limits on the activities that can be funded, the prohibition of specific donors, and taxation (cf. Rutzen 2015a).
- ii. Domestic laws regulate the activities of non-profits more broadly: These may include government licensing or registration procedures that can prohibit or impede the formation of CSOs, impose onerous reporting





Amongst others, the well-known social movement “Treat Action Campaign”, which has been successfully campaigning for the rights of people living with HIV/AIDS, faced opposition from HIV/AIDS denialists in the South African government.

requirements, and institute intrusive state supervisory powers and sanctions. While these regulations are often enacted in the name of increasing transparency and accountability in the non-profit sector, experience suggests that states, particularly those that do not respect human rights, are likely to introduce or apply regulatory frameworks in a coercive or repressive manner (Jordan/van Tuijl 2006).

- iii. Policies and practices impose restrictions on the rights to freedom of assembly: As the UN Special Rapporteur on freedom of association has explained, in recent years, states across the world have responded to peaceful protest with violent clampdowns and a host of legal and practical restrictions (Kiai 2014b, para. 7; cf. also Kiai 2013; Kiai 2014a; INCLO 2013).
- iv. Criminalization, stigmatisation and de-legitimation of so-called ‘Human Rights Defenders’ (HRDs) - activists, journalists, critical academics and others in civil society (Protection International 2015): As the UN Special Rapporteur on HRDs stated following consultations in 111 countries across the world: “The evidence

is oppressive... In very many countries the situation is getting worse by the day... A growing number of defenders point to backtracking in countries in which the law seems designed to criminalize them and to thwart what they do” (Forst 2015, para’s 35 & 41). While the repression of human rights defenders is synonymous with parts of South and Central America, Africa and Asia, we can also point, for example, to the harassment and prosecution of people in Europe providing humanitarian assistance and protection to refugees as demonstrable of this trend (cf. Dearden 2016).

- v. The restriction of freedom of expression online, directly through censorship and indirectly through ‘mass surveillance’, which is used to target activists and civil society organisations (La Rue 2013);
- vi. Attacks on civil society by religious conservatives, the far right or non-state actors;
- vii. The exclusion of civil society organisations from the banking system, which is a relatively new but escalating phenomenon in the discourse on ‘shrinking space’.



In its 2011 report, “Shrinking political space of civil society action”, the Act Alliance highlighted the negative attention given to organisations or actors who work in justice, human rights or natural resources related areas (Act Alliance 2011). According to data from the International Center for Not-for-Profit Law (ICNL), between 2004 and 2010 more than 50 countries considered or enacted measures restricting civil society (Rutzen 2015b). This trend has markedly increased since the brutal repression that followed the so-called ‘Arab Spring’ of 2011, with more than 90 laws constraining freedom of association or assembly proposed or enacted worldwide since 2012, according to ICNL (Rutzen 2015a, 3). Civicus, the World Alliance for Citizen Participation, expects to report substantial threats to core civil society freedoms of expression, association and peaceful assembly in more than 100 countries for the first time in its 2016 annual report (CIVICUS 2016). As the Carnegie Endowment for International Peace has stated, there can be little doubt that the “pushback is global” and the “restrictive measures against international support for democracy and rights are likely to persist for the foreseeable future” (Carothers/Brechenmacher 2014).

The reasons behind the “shrinking space” trends are complex. While government harassment of independent organisations is as old as the state system itself (Mendelson 2015), various theses have been put forward to explain its recent acceleration. One is the changing nature of development financing and the role of the state. Put simply, as states become less dependent on western aid, they become less open to influence by western governments, and have pushed-back accordingly (Green 2015). Wider public perceptions about the legitimacy and effectiveness of NGOs and the motives of foreign donors often provide a strong degree of domestic support for restrictive measures in these countries (Sriskandarajah 2015). Another explanation is the changing nature of CSOs themselves, which is characterised, in part, by a shift in focus from service delivery to influencing policy, often under the banner of a ‘rights-based approach’ (Green 2015). This is certainly the area in which the ‘shrinking of space’ appears most tangible. In the same vein, the restriction of freedom of expression online relates directly to the revolution in information and communication technologies, and the amplification of critical voices and citizen mobilisation it has facilitated. Finally, as this report attests, the relentless demand for stronger counterterrorism and security policies, at both national and

international level, has been increasingly associated with the overregulation of civil society and attempts to restrict its influence.

The result is an increasingly incoherent policy framework in which intergovernmental development bodies have called for increased action to address the problems of ‘fragile states’, including ‘radicalisation’ and ‘extremism’ in war-torn and chronically impoverished countries, while the ‘political space’ needed to actually do this work on the ground is being squeezed in the name of security and counterterrorism.

## Chapter 2

# How the international counterterrorism framework affects the work of INGOs and their partners on the ground

While there is nothing new about the international community working together to combat terrorism, the way in which policies are being developed and implemented has changed profoundly. Prior to 9/11, eleven intergovernmental conventions relating to the prevention of terrorist acts had been agreed by the United Nations and the Council of Europe:

- Convention on Offences and Certain Other Acts Committed On Board Aircraft of 1963
- Convention for the Suppression of Unlawful Seizure of Aircraft of 1970
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 (as amended by the 1988 Protocol)
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 1973
- International Convention against the Taking of Hostages of 1979
- Convention on the Physical Protection of Nuclear Material of 1980
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (as amended by the 2005 Protocol)
- 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)
- Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1991
- International Convention for the Suppression of Terrorist Bombings of 1977
- International Convention for the Suppression of the Financing of Terrorism of 1999

As intergovernmental acts, they were agreed by all signatories to those conventions and ratified by national legislatures. This type of decision-making characterised 20th century international relations and maintained an important degree of national sovereignty, which was exercised by both government and parliament.

In more recent times, in a process that began in the 1990s and was catalysed by 9/11, more permanent international structures, with a mandate to coordinate, develop and implement counterterrorism policies, have eclipsed

the previous intergovernmental order. Obscure international bodies, populated with technocrats and ‘overseen’ by committees comprised of national government representatives, have become policymakers in their own right, drafting international rules and regulations, and devising measures to ensure their implementation by nation states. This has had a detrimental impact on the capacity of national parliaments to scrutinise the measures their governments are agreeing at international level.

In the absence of a central international body or authority with overall responsibility for counterterrorism, mandates are fragmented and diffused across a range of multilateral institutions and regional frameworks. Consequently, national policy and practice is spread across an ever-growing body of legally binding instruments and non-legislative measures (the latter include so-called ‘soft law’ and policy instruments such as budget lines, guidelines, strategies and action plans). Taken together, this body of international legislation and policy is now intelligible only to expert observers. By way of background, this section of the report describes the key intergovernmental frameworks, actors and mechanisms in which counterterrorism policies are developed and implemented, and introduces some of the key impacts they are having on the activities of CSOs.

## 2.1 The United Nations

Within the United Nations alone there are said to be more than 30 different agencies and bodies working on counterterrorism-related issues (Council on Foreign Relations 2013). This includes the UN Security Council’s Counterterrorism Committee (CTC), the CTC Executive Directorate (CTED), Terrorism Sanctions Monitoring Committees, and the Counterterrorism Implementation Task Force (CTITF).

In terms of their impact, the UN Security Council’s Resolutions on counterterrorism and terrorist ‘blacklisting’ are the most important measures affecting international development activities. Resolution 1373 (United Nations 2001), adopted in the immediate aftermath of the 9/11 attacks, has been described by legal experts as “the most sweeping sanctioning measures ever adopted by the Security Council” (Eckes 2009, 38). Mirroring key elements of President Bush’s Executive Order 13224 (EO

13224 expanded the USA's existing terrorist blacklisting regime by obliging financial institutions to freeze the assets of any individual or organisation designated by the Secretaries of State or Treasury, and criminalising the provision of any financial or 'material support' to those so designated), and the USA's PATRIOT Act (The PATRIOT Act increased existing criminal penalties for knowingly or intentionally providing material support or resources for terrorism), the Resolution requires all states to introduce laws to criminalise, prevent and disrupt support for terrorism and to freeze the funds of those who commit terrorist acts and those associated with them (S/RES/1373, para. 1c). In the absence of a commonly agreed definition of terrorism, states implementing the Resolution were left free to decide who the 'terrorists' are on the basis of their national interest. At a stroke, long-standing armed conflicts between states and non-state actors were recast into domestic 'wars on terror', undermining legitimate struggles for self-determination.

As the UN Special Rapporteur on Counterterrorism and Human Rights has noted, overly broad definitions of 'terrorism' have been used "to target civil society, silence human rights defenders, bloggers and journalists, and criminalize peaceful activities in defence of minority, religious, labour and political rights" (Emmerson 2015b,

6). In the USA, the Animal Enterprise Terrorism Act 2006 has criminalised non-violent activism against animal businesses and elevated minor offences such as vandalism and civil disobedience to a federal crime of terrorism (Center for Constitutional Rights, *Blum v. Holder*). Together with a series of Royal Decrees, Saudi Arabia's 2014 terrorism law criminalised virtually all dissident thought or expression (Human Rights Watch 2014). In the aftermath of the Charlie Hebdo attacks in France, dozens of people were arrested and prosecuted under laws prohibiting the 'glorification' of terrorism - for things they said on social media (Greenwald 2016). In 2015, the Kenyan government designated two leading human rights organisations as 'terrorist' without prior notice under new counterterrorism provisions, freezing their bank accounts (Human Rights Watch 2015a). In 2016, Pakistan used anti-terrorism laws against farmers in a land rights protest (Human Rights Watch 2016a). Brazil's new anti-terrorism law defines terrorism as motivated by "political extremism", a term critics fear will be used to target protestors and social movements (Human Rights Watch 2015b). The latest proposed EU counterterrorism Directive, which is currently being fast-tracked through the EU's legislative process, is described by the 'Meijer's Committee', a standing committee of legal experts on EU



Delegates at the fifty-ninth session of the General Assembly of the United Nations





Initiatives advocating for transparency and anticorruption are under pressure in more and more countries.

criminal law, as containing a definition of terrorism “so broad” that “discussions of possible justifications for violent resistance in exceptional circumstances are also criminalised” (Standing Committee of Experts on International Immigration, Refugee and Criminal Law 2016, para. 11). In 2010, the UN Counterterrorism Committee reported “continuing concern” with “the definition of terrorist offences and related concepts (such as support and assistance) contained in criminal legislation in some States [which] provide the basis for the imposition of criminal sanctions and preventive measures.” The absence of an agreed definition of terrorism at the international level has left a void which has been filled by overly broad and vague definitions which, according to the UN Special Rapporteur on Counterterrorism, “violate the principle of legality” (Emmerson 2015b, para. 15).

At the heart of UN Resolution 1373 is the requirement that states prohibit making funds (including financial assets, services and economic resources) available for the benefit of persons or entities that commit terrorist acts, either directly or indirectly. What is problematic is the conceptualisation of ‘indirect’ or ‘material support’ (Mackintosh/Duplat 2013), under which persons or organisations working at close proximity to designated

terrorist organisations could be criminalised for actions occurring in the course of humanitarian or development activities. The risk of association with ‘terrorist’ organisations has at times hampered the delivery of aid and had a broader chilling effect on development and humanitarian organisations working in the areas of conflict resolution, peacebuilding and the protection of civilian populations in conflict zones. There are now more than 400 sanctions lists worldwide, and steering clear of the individuals and organisation named on those lists has become an onerous undertaking that for some INGOs now incurs substantial operating costs. The UN, EU and many nation-states maintain country-specific sanctions regimes as well as dedicated lists of members and supporters of alleged terrorist groups. The most important UN terrorist list was established pursuant to Security Council Resolution 1267 (United Nations 1999), which first targeted Osama Bin Laden and his associates in 1999. After 9/11 it was amended to target terrorist networks worldwide but was still known as the “Al-Qaida Sanctions List”. Today, following a series of new UN Security Council Resolutions on ISIS, it is known as the “ISIL (Da’esh) & Al-Qaida Sanctions List” (see in particular United Nations 2014, United Nations 2015a and 2015c). The impact of these Resolutions and terrorist blacklisting more widely is discussed in section 5 of this report.

### The UN Global Counterterrorism Strategy

The period immediately after 9/11 was characterised by punitive international measures designed by the USA and its allies to enlist the cooperation of all UN signatories in counterterrorism efforts. By 2006 there was widespread concern at UN level - not least on the part of the G77 group of developing countries and the human rights community - about the trajectory of the US-led ‘war on terror’, the failure to take the root causes of terrorism into account, and the impact of counterterrorism measures on democracy and fundamental rights. These issues were duly addressed in the Global Counterterrorism Strategy (United Nations 2006), which was unanimously adopted by the UN General Assembly in 2006 as part of a concerted effort to increase the legitimacy and coherence of the UN’s counterterrorism efforts. The Strategy, which was reaffirmed by the UN in 2010, addressed four pillars: (i) tackling the conditions conducive to the spread of terrorism; (ii) preventing and combating terrorism; (iii) building national and UN capacity to do so; and (iv)

ensuring respect for human rights and the rule of law. As the UN Special Rapporteur on Counterterrorism and Human Rights observed in February 2016: “Unsurprisingly”, pillars (i) and (iv) “have attracted the least attention and remain relatively unimplemented compared to the more operational and security focussed Pillars II and III” (Emmerson 2016, para. 48).

So while the UN’s global strategy provided a normative framework that better reflected the UN’s values and principles, the role of ‘counterterrorism’ in the intractable conflicts across the Middle East and North Africa has continued to divide its membership, with the dominant mandate of the 15-member UN Security Council failing to command worldwide legitimacy. Moreover, the failure to develop an effective UN counterterrorism capability beyond the rigid international terrorist blacklisting system has placed limits on the UN’s overall capacity and marginalised key UN entities. As the Center on Global Counterterrorism Cooperation noted ahead of the 2010 UN counterterrorism review, the global strategy’s potential to “provide for collaborative, holistic counterterrorism efforts is either unknown or largely overlooked beyond New York, Geneva, and Vienna” (Cockayne/Miller/Ipe 2010). Subsequently, the root causes and fundamental rights-based approaches that human rights organisations and INGOs have supported have developed in silos, in the form of ad hoc UN Security Council resolutions on issues such as the role of women and youth in peace and security, and critical reports from UN Special Rapporteurs working under the auspices of the UN Human Rights Council (see in particular United Nations 2000, United Nations 2015b and 2015c).

### **From counterterrorism to countering violent extremism**

More recently, following the establishment of the so-called ‘Islamic State’ in Syria and Iraq (ISIS), the focus of counterterrorism has been widened significantly to encompass the countering or prevention of violent extremism (CVE/PVE). In September 2014, the Security Council adopted Resolution 2178 to address the threat posed by ‘foreign fighters’ – people travelling to Iraq and Syria to join ISIS or any one of the scores of armed groups involved in the wider regional conflict. The Resolution was described by a former UN Special Rapporteur as “a huge backlash in the UN counterterrorism regime, comparable to Security Council Resolution (SCR) 1373,” which “wipes out the

piecemeal progress made over 13 long years in introducing protections of human rights and the rule of law into the highly problematic manner in which the Security Council exercises its supranational powers” (Scheinin 2014). The current UN Special Rapporteur on Counterterrorism has warned that in the absence of definitions as to what is meant by ‘extremism’ and ‘radicalisation’, the Resolution paves the way for “Governments to use the resolution to justify repressive measures against political dissenters with the apparent endorsement of the Security Council” (Emmerson 2015a, para. 42).

In January 2016, the UN Secretary-General issued his own Plan of Action to Prevent Violent Extremism, containing more than 70 recommendations for national, regional and international action (United Nations 2015e). Echoing the UN Global Counter-Terrorism Strategy adopted a decade earlier, it suggests that the creation of open, equitable, inclusive and pluralist societies, based on full respect for human rights and with economic opportunities for all, represents the most tangible and meaningful alternative to violent extremism and the most promising strategy for rendering it unattractive (United Nations 2015e, para. 7). The plan, which was drafted by the UN Counter-Terrorism Implementation Task Force, also draws on Security Council Resolutions on the role of women and youth in peace and security. As with the Global Counter-Terrorism Strategy it effectively replaces, the challenge is to bridge the significant gap between the UN’s holistic aspirations and the ‘hard security’ agenda prioritised by those states most invested in the ‘war on terror’. The counter-extremism agenda also poses a renewed challenge in terms of human rights protection, due to the widened scope for criminalising ‘extremist’ groups and individuals. Like many human rights organisations, Amnesty International has warned that abusive regimes could take advantage of ‘CVE-mania’ and use international funding to violate human rights in the absence of appropriate safeguards (Hawkins 2015; cf. also UN HRC 2015).

## **2.2 The Financial Action Task Force**

One of the most important bodies outside the UN is the little-known international Financial Action Task Force, which has a mandate to ensure the integrity of the global financial system by devising anti-money laundering

(AML) and terrorist financing rules. The FATF’s counterterrorism mandate is a product of post-9/11 thinking, which was dominated by an obsession with preventing terrorist financing and imposed a new orthodoxy in which “stopping terrorism starts with stopping the money” (Goede 2012, p. 4). This has had a tremendous impact on the financial sector, to which responsibility for policing the users of the financial system has effectively been outsourced.

The decision to establish the FATF was taken in 1989 at a summit of the Group of Seven (G7) leading industrialised nations. The G7 demanded concerted international action to counter drug trafficking and the laundering of its proceeds (G7 1989, para. 52). The newly established Task Force, which along with the G7 states also comprised the European Commission and eight other countries, was asked to assess international efforts to combat money laundering and to consider additional preventive measures (ibid., para. 53). Nine months later, in April 1990, the 130 FATF delegates delivered 40 wide-ranging recommendations encompassing legal,

regulatory and operational measures (FATF 1990, FATF 2012). In October 2001 the FATF issued ‘Eight Special Recommendations’ on terrorist financing. The 40 money laundering recommendations were revised in June 2003 and in October 2004 the FATF added a Ninth Special Recommendation on terrorist financing. In February 2012, the FATF integrated the 40 money laundering and nine terrorist financing standards into a single set of 40 recommendations. In October 2015, the recommendations were subject to further, minor amendment (see FATF 2012, updated October 2015).

**Countering the financing of terrorism (CFT)**

The contours of the FATF’s counterterrorism framework were agreed within just six weeks after 9/11, with no consultation of national parliaments or civil society. Centred on the UN terrorist listing regime described in the previous section, the FATF rules set out a wide range of legal measures and due diligence obligations to be implemented by states and private actors in order to prevent terrorist groups and their supporters utilising the banking system. Compliance with FATF rules is extremely onerous and non-compliance is not an option, with banks facing a range of sanctions including large fines, possible withdrawal of their banking licenses and criminal prosecutions. This has spawned a global compliance industry, already worth billions of euros annually.

The FATF recommendations on terrorist financing codified and expanded UN Security Council Resolution 1373. They require states to, inter alia, ratify and implement all UN measures relevant to terrorist financing by enacting measures to freeze and confiscate terrorist assets, set-up reporting mechanisms for suspicious financial transactions related to terrorism, establish disclosure regimes around alternative remittance and ‘wire transfer’ systems, and review the adequacy of laws and regulations that relate to entities that risk being abused for the financing of terrorism. Non-profit organisations were singled-out by the FATF as ‘particularly vulnerable’ to exploitation by terrorist organisations (Recommendation 8 in FATF 2012, 13). President George W. Bush had captured the thinking behind this approach in the immediate aftermath of 9/11: “Just to show you how insidious these terrorists are, they oftentimes use nice-sounding, non-governmental organisations as fronts for their activities... We intend to deal with them, just like we intend to deal with others who aid and abet terrorist organisations” (Rutzen 2015, 4).



In many countries, the liberal “rule of law” concept is more and more challenged by the “rule by law” concept, which facilitates discriminatory or repressive laws.





Women human rights defenders are often at the forefront of the struggle to defend human rights. In many cases, they additionally suffer specific forms of oppression, including sexualised violence.

### Implementing the FATF recommendations

Today the FATF has expanded its membership from 16 initial members to 36 (FATF n.d. a), and extended its reach across the world via eight further FATF-style regional bodies that promote and enforce the recommendations. The eight FATF-style regional bodies (FSRBs) are the Asia/Pacific Group on Money Laundering, the Caribbean Financial Action Task Force, the Eurasian Group, the Eastern and Southern Africa Anti-Money Laundering Group, the Financial Action Task Force on Money Laundering in South America, the Inter-Governmental Action Group against Money Laundering in West Africa, the Middle East and North Africa Financial Action Task Force and the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (see further 'Find a country', FATF website, available at: [www.fatf-gafi.org/countries](http://www.fatf-gafi.org/countries)). The result is that more than 190 countries are now committed to implementing the latest iteration of the 40 FATF recommendations. In Europe, the EU has transposed the FATF recommendations into EU

law. The latest Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing was a direct response to the updating of the FATF recommendations in 2013 (Directive (EU) 2015/849).

The FATF's recommendations have impacted CSOs and the wider non-profit sector in three fundamental ways. Firstly, they have been used as a vehicle for the imposition of new national legislation regulating non-profit and civil society organisations across the world, and contributed to what is now a widely observed worldwide restriction of the 'political space' in which civil society operates. Secondly, states have been required by the FATF to adopt broad counterterrorism statutes, which have been used in a similar manner to clampdown on civil society activists. Third, in the attempt to lock terrorist groups out of the financial system, non-profits have found their capacity to move money around the world, and to fund particular activities and organisations in troubled regions, severely inhibited. These problems are discussed in sections 3 and 4 of this report, where the impacts of the



Palestinian and Israeli teenagers in a common project: Youth exchange and regional youth projects are one example of civil society activities which can help to prevent radicalization and extremism.

FATF's CFT agenda will be shown to be fundamentally at odds with the UN Global Counter-Terrorism Strategy. The UN has recognised that a "lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance" are "conditions conducive to the spread of terrorism" (United Nations 2006, para. 1). However, as the following section shows, there is growing evidence that FATF requirements are making it more difficult for the very grass roots and inter/national civil society organisations addressing these issues to fulfil their mandates.

## 2.3 The European Union

The EU has developed an extensive body of counterterrorism law and policy, including sophisticated frameworks for the designation and asset freezing of terrorist groups and countering the financing of terrorism more broadly. These follow the UN Security Council and FATF counterterrorism requirements extremely closely (a noted point of diversion is in respect to the right of appeal to

the European Court of Justice against EU terrorist sanctions, itself the result of a ruling that found the UN procedures for blacklisting denied fair trial guarantees to those included on the UN 1267 list). As noted above, the EU is currently fast-tracking a draft Directive that will implement UN Security Council Resolution 2178 on foreign fighters by expanding terrorist offences to include offences relating to 'foreign fighters', training and the financing or facilitation of such activities (European Commission 2015). However, whereas the EU is regarded as a model pupil when it comes to implementing the FATF standards, civil society organisations have resisted the imposition of NPO regulations tied to FATF Recommendation 8 (R8).

### EU Code of Conduct for non-profits rejected

The European Commission proposed a draft 'Code of Conduct for Non-profit Organisations' in 2005 to prevent the sector from being abused by terrorist organisations and to comply with FATF SR VIII (as Recommendation 8 was then) (European Commission 2005). Member State governments meeting in the Council of the EU endorsed the draft Code without debate (Council of the European

Union 2005). A public consultation was 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.” The coalition argued 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” (Civil Society Contact Group 2005). These are the same concerns that are now being levelled at the global Recommendation 8 process.

With the draft EU Code of Conduct apparently withdrawn, the European Commission decided instead to fund two studies: one examining the extent of criminal abuse of the NPO sector (Matrix Insight 2008), the other examining self-regulatory initiatives (European Center for Not-For-Profit Law 2009). 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)” was included in the draft legislative programme of the EU for 2010-14 (Statewatch 2010). More concerted advocacy from European civil society organisations followed and the proposal was ultimately restricted to “promot[ing] increased transparency and responsibility for charitable organisations with a view to ensuring compatibility with [Recommendation 8]” (European Foundation Centre 2009). In 2010, the European Commission issued ‘voluntary guidelines’ for European NPOs (European Commission 2010); these too were strongly criticised by civil society organisations, which described them as wholly unnecessary (European Foundation Centre 2010). Subsequently, they have not been promoted by the Commission.

### **EU AML-CFT risk assessment**

As noted earlier, EU member states are currently transposing (implementing) the provisions of the fourth EU anti-money laundering and counterterrorist financing

Directive, adopted in 2015, into national law (Directive EU 2015/849). Under Article 6 of that Directive, the European Commission is currently conducting an assessment of the risks of money laundering and terrorist financing on the internal market. A report containing its preliminary findings was produced in October 2016.

The non-profit sector was among 16 sectors and activities deemed to be “at risk” of terrorist financing. The justifications that were provided were that terrorist supporters could establish of non-profit organisations to “fund raise” for terrorist purposes domestically and overseas, or that terrorists funders could “abuse” existing non-profits in order to fund terrorist acts, or to transfer funds to terrorist groups abroad via organisations working at close proximity to terrorist groups (Non Profit Platform on the FATF 2016b).

As we shall see in the following section, it is this thesis that has long provided a justification for the imposition of onerous regulations on the non-profit sector worldwide.



## Chapter 3

# The FATF and the worldwide proliferation of restrictive non-profit laws

International policies designed to prevent money laundering and the financing of terrorist organisations are increasingly linked to the worldwide glut of restrictive regulations governing charities and non-profits (cf. Kiai 2013, 8-9). The hypothesis promoted by the FATF is that terrorists hide behind CSOs or use them to funnel money, and that this requires states to enact a range of counter-measures. The FATF's standards now represent an essential element of the global 'good governance' agenda promoted by the UN, EU, International Monetary Fund (IMF), World Bank and regional development banks. According to FATF Recommendation 8:

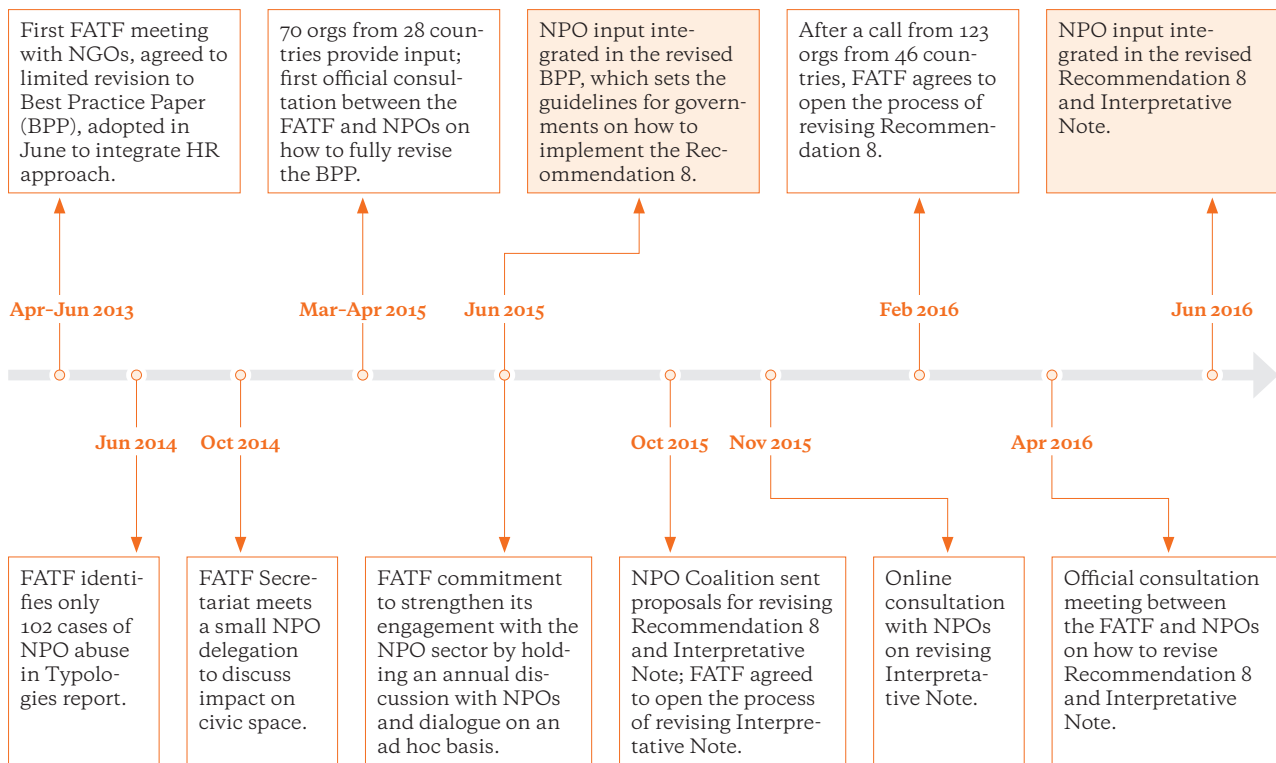
*Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:*

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

When Recommendation 8 was adopted, the FATF claimed that it had been "demonstrated that terrorists and terrorist organisations exploit the NPO sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organisations and terrorist activity" (Specifically, the Task Force identified five categories of possible abuse of non-profit organisations by terrorist entities: (a) diversion of funds; (b) affiliation with a terrorist entity; (c) support for recruitment; (d) abuse of programming; (e) false representation and "sham" non-profit organisations - see further Emmerston, 2015b: para. 17). These claims have been contested repeatedly by NGOs and regulators, who stress that despite a few high-profile cases, actual incidences of registered non-profits engaging in support for terrorism are extremely rare, and negligible compared with the overall size of the sector (A report for the European Commission, published in 2008, found "limited abuse of foundations" - see Matrix Insight 2008; The UK Charities Commission has also reported that "actual instances of abuse have proved very rare" - see Charity Commission 2008; while

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" - see Council on Foundations Press 2010). In July 2014, the FATF produced a new "Typologies report" on Recommendation 8 designed to highlight the modus operandi used by terrorist financiers (FATF 2014b). It was based on just over 100 (unpublished) case studies of terrorist abuse in the NPO sector, derived from governments and open sources. The report was strongly criticised by CSOs and non-profits for conflating "vulnerability" and "risk", implying that "the NPO sector as a whole faces systemic risk or abuse" in the absence of a credible evidence base. The report also failed to recognise the counter-risk of over-regulation to NPOs "doing critical work that saves lives and provides an alternative to the terrorist narrative" (Charity and Security Network 2014). Repeated assertions claiming a link between non-profits and terrorist groups are seen to have done considerable damage to the reputation of the sector as a whole, particularly to Muslim non-profits in western states (UN Counter Terrorism Task Force 2009). While no-one is questioning the need for transparency and accountability in the non-profit sector, many have questioned whether the FATF is an appropriate or legitimate venue for such a sensitive area of international standard-setting (see further Section 8).

Whereas FATF Recommendation 8 simply called on states to review the adequacy of their laws and regulations as far as they relate to non-profits, the FATF's "Interpretative Note" (FATF 2012, 54-58), "Best practices" (FATF 2015a) and "Handbook for countries and assessors" (FATF 2009) significantly expand the requirements stemming from the recommendations, calling inter alia for the licensing or registration of non-profits, the introduction of extensive record-keeping, reporting and vetting requirements (including a "know your beneficiaries and associates"-principle) and encouraging increased police scrutiny of the non-profit sector. When implementing FATF Recommendation 8, states were encouraged to use the guidance and best practice to inform their domestic policy development. Taken together, these documents expanded the focus of Recommendation 8 from counterterrorism to CSO transparency and accountability writ large. Crucially, the drafters of Recommendation 8 also tried to restrict the focus of the regime to legal entities or organisations primarily engaged in raising or disbursing funds. In their Interpretive Note to Recommendation 8, they further restricted supervisory measures to those organisations accounting for "a significant portion



**Figure:** Chronology of key global coalition inputs and revisions to FATF documents  
 Source: *European Center for Not-for-Profit Law (ECNL)*

of the financial resources and a substantial share of the sector's international activities" (FATF 2012, 56). Taken together, these measures should have limited the reach of Recommendation 8 to a small subset of what most countries would regard as their non-profit sector (i.e., excluding small and informal organisations, advocacy groups and many others). In practice, however, very rarely, if ever, is legislation regulating non-profits limited to specific types of organisation (Moreover, the FATF's Recommendation 8 "Typologies report" suggests that counterterrorism specialists are at least as concerned with smaller, informal organisations with little public visibility in donor countries as they are with more established INGOs - FATF 2014).

Transparency and accountability in the non-profit sector is of course as important and welcome as in any other area of public interest. Since the 1990s, a variety of national and international initiatives and best practice guidance around aid transparency, budget reporting, governance standards and due diligence have been

adopted by CSOs throughout the world. While compliance may be patchy and gaps remain, the extent of self-regulation and good practice has been largely overlooked by those enforcing Recommendation 8.

In 2016, following sustained pressure and advocacy by civil society and non-profit organisations, the FATF introduced changes designed to limit the scope of Recommendation 8 to 'vulnerable' NPOs. These changes are discussed in section 3.3.

### 3.1 Ensuring compliance

As noted in section 2, more than 190 countries are now committed at ministerial level to implementing the FATF standards. Their efforts are kept under continuous review by the FATF and its eight regional formations, with an extensive cycle of assessment and follow-up mechanisms used to evaluate and improve states' compliance with each of the 40 recommendations. As part of every cycle

(each lasts around six or seven years), all states committed to the FATF's standards are subject to a 'peer review' to assess their compliance with the 40 recommendations. The current (fourth) round of "mutual evaluations" commenced in 2014. Teams of inspectors made up of experts and practitioners from neighbouring states, FATF regional bodies, the World Bank or IMF, visit and analyse the laws and practices of each country, awarding a grade - "compliant", "largely compliant", "partially compliant" or "non-compliant" - for each of the recommendations (Basel Institute on Governance n.d.). Because the FATF standards have become a central feature of the global 'good governance' agenda, good compliance ratings from the FATF are imperative for developing countries seeking aid, trade and investment.

This process wields remarkable power. If countries fail to cooperate with the FATF, they are blacklisted as "high-risk" or "non-cooperative jurisdictions" (FATF n.d. b). Following an FATF evaluation, all countries must report back periodically on the measures they have enacted to address any shortcomings identified by their review. The governments of countries with "strategic AML/CFT deficiencies" - that is states that fail to comply or largely comply with ten or more "key and core" recommendations - are placed on what is known as the "grey list". This has serious implications for those countries' economies, with FATF sanctions indicative of significant risk to trade and investment. In turn, their governments must submit to an FATF International Cooperation Review Group and agree an Action Plan and timetable for reform, both of which are subject to further monitoring. So although the FATF's recommendations do not have the legal status of an intergovernmental convention (there is no formal basis in international law for the FATF, unlike comparable international standard-setting bodies created by international treaties, such as the UN, EU or CoE), in practice they can have at least as potent an effect on national law, which must be amended to implement the requirements therein. This process lacks democratic legitimacy because Action Plans are drawn-up by the FATF or its regional formations, adopted by national governments, and withheld from public scrutiny. In the case studies provided on the following section, the use or threat of grey/blacklisting by the FATF is shown to have a tremendous impact in terms of pushing through measures that lack democratic legitimacy, have been rejected by national parliaments, and in some cases heavily criticised on human rights grounds.

### 3.2 The impact on non-profits

In April 2012, Statewatch and the Transnational Institute published research examining the mutual evaluation reports on 159 countries with respect to Recommendation 8 (Hayes 2012). It found that 85 per cent were rated as "non-compliant" or only "partially compliant", fueling concerns that all of these countries could come under pressure to introduce new regulations that threaten civil society space during their next FATF evaluation (Shillito 2015). It should be pointed out that Recommendation 8 "is not unique in terms of its low levels of compliance; other recommendations are equally bad, if not worse" (ibid.). The report showed how the FATF and its regional formations had already endorsed or encouraged restrictive non-profit regulations in countries including Burma/Myanmar, Cambodia, Colombia, Egypt, India (see further Box 1, below), Indonesia, Paraguay, Russia, Saudi Arabia, Sierra Leone, Tunisia and Uzbekistan. Diplomatic cables released by Wikileaks also showed how the US government had encouraged strict Recommendation 8 compliance in (among other countries) Azerbaijan (Wikileaks 2009a), Bahrain (Wikileaks 2006d), Kuwait (Wikileaks 2006b), Morocco (Wikileaks 2006c), Nigeria (Wikileaks 2009b), Russia (Wikileaks 2008a), Saudi Arabia (Wikileaks 2008c), the United Arab Emirates (Wikileaks 2006a) and Yemen (Wikileaks 2007b). None of these countries are known for maintaining a favorable climate for non-profits.

In 2015, the Human Security Collective and Statewatch produced more qualitative research that examined the impact of Recommendation 8 in 17 countries participating in the MONEYVAL (Central and Eastern Europe) and Eurasian Group regional FATF formations (Hayes/Jones 2015). It found that "all have introduced some new legislation or regulatory standards in response to the MONEYVAL/EAG evaluation process, even though not all appear to be in agreement with the assumptions on which Recommendation 8 is based" (ibid.). The report also found that whereas Recommendation 8 requires that states undertake a full risk assessment of the terrorist financing threat in their non-profit sector to determine whether new regulations are necessary, this had not been done by many of the MONEYVAL and Eurasia group members. Where states did undertake such a review and concluded that their NPO sectors face a minimal risk (e.g. Andorra, Kazakhstan, Montenegro and Slovakia), the FATF evaluators still demanded that those countries



introduce new NPO regulations. Further, whereas the reach of Recommendation 8 is supposed to be expressly limited to a small subset of what most countries would regard as their non-profit sector (i.e. excluding small and informal organisations, advocacy groups and many others), the research found that in practice there was no attempt on the part of states meeting their Recommendation 8 obligations to limit their regulatory or supervisory measures in this way. It was also “clear that the demands for more stringent oversight and regulation of the NPO sector made by FATF regional formations were a significant factor in the passing of legislation subsequently used against NPOs.” Particular concern was expressed about the impact of this legislation on civil society actors in Bosnia and Herzegovina (see further Box 1, below), Croatia, Macedonia, Hungary, India, Kazakhstan, Kirgizstan, Poland, Serbia and Tajikistan (ibid., 55).

Concerns that the requirements of FATF Recommendation 8 have been abused by States seeking to reduce civil society space or suppress political opposition have been reiterated by the UN’s Special Rapporteurs on

Freedom of Assembly and Association (Kiai 2013, para. 25), and on Counterterrorism and Human Rights. The latter, Ben Emmerson QC, has stated that “Recommendation 8 has proved to be a useful tool for a number of States as a means of reducing civil society space and suppressing political opposition” (Emmerson 2015b, para. 24). As noted above, the laws adopted by states in the name of compliance with Recommendation 8 can take various forms and have multiple effects. Of particular concern are wholesale domestic statutes regulating the activities of non-profits which introduce licensing or registration procedures. These can provide governments with wide discretion in deciding whether CSOs can be established and/or allowed to continue operating. Similarly, laws restricting or introducing the power of veto over foreign funding can have tremendous consequences for donors and beneficiaries. These rules can be tied to terrorist financing requirements because states are encouraged to monitor international transactions. Box 1 provides examples of civil society laws related to FATF evaluations and procedures and their impact on CSOs.

## **Box 1: How the FATF has promoted restrictive non-profit and counterterrorism laws**

### **BANGLADESH: “Restricting the work of civil society” to “eliminate militant and terror financing”**

In 2009, the regional FATF body found that Bangladesh had “No overall strategy to identify and address AML/CTF risks within NPO sector”, that “Supervision of NPOs is inadequate” and that a “significant portion of the NPO sector remains outside of formal regulation and supervision” (Asia/Pacific Group on Money-Laundering 2009). The Bangladesh government agreed an Action Plan to address these and other shortcomings the following year, and in April 2012 announced that the finances of non-profits would be subject to greater scrutiny. This was reportedly to avoid the country being “downgraded from the current ‘grey list’ to ‘dark grey list’ of FATF” (Ahsan 2012). Later that year, the government established a commission to work towards bringing all NGOs under the jurisdiction of a single authority, to investigate the operations of NGOs allegedly “involved in terror financing and other anti-state activities”, and to develop a new law to

regulate their activities (International Center for Not-for-Profit Law n.d. a). The government also established a database of NGOs at the Ministry of Finance to support the work of the Commission (ibid.). In 2014, a Bill regulating NGOs in receipt of foreign funding was approved (bdnews24.com 2014), with the stated goal of “eliminat[ing] militant and terror financing and ensur[ing] a terrorism-free Bangladesh by 2021” (New Age 2015). If enacted, the Foreign Donations (Voluntary Activities) Regulation Act would require organisations to register with the NGO Affairs Bureau and obtain prior approval to receiving foreign funding for any voluntary activity on a project-by-project basis. Human rights groups have called on the Bangladesh Parliament to reject these measures, which they say are part of a “systemic approach by the Bangladesh authorities to stifle free expression and severely restrict the work of civil society” (OMCT 2015).

### **BOSNIA & HERZEGOVINA: Parliament rejects proposed NGO laws, FATF adds BiH to blacklist**

In 2009, a regional FATF evaluation of Bosnia and Herzegovina (BiH) conducted by MONEYVAL found the country to be “non-compliant” with the requirements of Recommendation 8 (Hayes/Jones 2015, 18-21). Reasons given for this included “deficiencies of the registration mechanism” and “deficiencies of the supervisory activities and inspections”. In 2011, the government approved a MONEYVAL Action Plan to address these and other failures with respect to the FATF recommendations. Over a three year period, the BiH government submitted eight compliance reports to MONEYVAL detailing the work it had undertaken. The last

of these explained that “With regard to steps taken to remedy the deficiencies in [Recommendation 8 compliance], the Ministry of Justice of [BiH] prepared amendments to the Law on the Establishment of a Joint Registry of Non-Governmental Organisations in [BiH], which also did not receive support and has also been rejected by the Parliamentary Assembly [along with proposed amendments to the Criminal Code]”. In 2015, the FATF added BiH to its list of countries with strategic AML/CFT deficiencies, citing, among other reasons, the failure to implement “adequate AML/CFT measures for the non-profit sector” (FATF 2015d).

### **BRAZIL: Counterterrorism law criminalising social movements opposed by UN, demanded by FATF**

In February 2016, Brazil’s House of Representatives passed a counterterrorism bill described by domestic human rights groups as “a serious setback for democracy because, under the justification of protecting the country, the law aims to criminalize social movements and activists fighting for their rights” (Conectas 2016). Human Rights Watch has urged the Brazilian President to veto the bill (Human Rights Watch 2016a), which was also condemned by the UN Commissioner for Human Rights in South America (Telesur 2016) and four UN Special Rapporteurs (Conectas 2015). The Bill was published in 2013 in response to a 2010 evaluation by the FATF which had found Brazil to be “non-compliant” with key FATF terrorist financing recommendations, and strongly criticised the absence of dedicated counterterrorism legislation (GAFISUD 2010). How-

ever, there are no active terrorist groups in Brazil and all previous legal proposals in this area have been rejected by legislators, in large part because they had been unable to agree on a definition of ‘terrorism’. In November 2015, the FATF named Brazil in a report to the G20 on combating the funding of ISIS as one of the few countries not to have adopted a dedicated law (FATF 2015e). Then on 19 February 2016, just days before the final vote in the Brazilian congress, the FATF plenary issued a statement demanding that Brazil “fulfil its FATF membership commitment” by adopting the legislation, and threatening “follow-up” measures if it failed to do so (FATF 2016). In advance of the vote, government ministers warned lawmakers that if Brazil did not approve the measure it would face sanctions from the FATF (Telesur 2016). The Bill was adopted.

### **CAMBODIA: New law “threatens the very existence of a free and independent civil society”**

Cambodia was rated “partially compliant” with FATF Recommendation 8 by a regional evaluation conducted in 2007. Despite the absence of effective rule of law in Cambodia, the FATF report called on the government to adopt a “comprehensive legal framework to govern the activities of NPOs” (Hayes 2012, 32-3). A first draft of the new law was published by the Royal Government of Cambodia in 2010. Revised drafts were published in 2011, with a final draft of the Law on Associations and NGOs promulgated in August 2015 - despite, according to the International Center for Not-for-Profit Law, “wide protests from

citizens, civil society and the international community regarding both its content and the lack of meaningful public participation in crafting the law” (International Center for Not-for-Profit Law n.d. b). During the legislative passage, the ruling Cambodian People’s Party maintained that the measures were “a necessary defence against international money laundering and terrorist groups aiming to funnel their funds into Cambodia via NGOs” (Naren 2015). By contrast, the Office of the UN Human Rights Commissioner said that the law “threatens the very existence of a free and independent civil society” (UN

News Centre 2015). The law introduces mandatory registration for all domestic and international associations, provides unfettered ministerial discretion over registration (*ibid.*), and requires “political neutrality” of all associations and NGOs (International

Center for Not-for-Profit Law n.d. b). The Cambodian government has also taken the unprecedented step of placing civil society leaders within the scope of its 2010 Anti-Corruption Law by requiring them to disclose their assets (*ibid.*).

### **ETHIOPIA: FATF’s blacklisting of Ethiopia leads to consolidation of repressive laws**

Ethiopia ranks 174<sup>th</sup> out of 188 countries on the UN’s Human Development Index and is one of the world’s largest recipients of development aid (UN Development Programme n.d.). Following widely criticised elections in 2005, the international community suspended support for the Ethiopian government after it cracked down on civil society and detained an estimated 40,000 opposition supporters (Tronvoll 2012, 275). This stance was short-lived due to the country’s humanitarian situation and its strategic importance relative to the wider region. The Ethiopian government emerged stronger and proceeded to adopt far-reaching laws restricting the financial and public operations of political parties, civil society, the media and INGOs in the country, as well as publishing a draconian anti-terrorism proclamation (*ibid.*, 274-5). In 2010, the FATF added Ethiopia to its blacklist of countries that had not committed to implementing its recommendations, and demanded it work with the FATF “to develop a viable AML/CFT regime in line with

international standards” (FATF 2010). As a result of this cooperation, which began with the adoption of a joint Action Plan in 2012, Ethiopia passed a new terrorist financing law in 2013 which cemented the existing anti-terrorism regime and extended oversight of the charitable sector (Proclamation No. 780/2013). In October 2014, the FATF removed Ethiopia from its blacklist and congratulated the country on the progress it had made in addressing its AML-CFT deficiencies (FATF 2014c). A month earlier, six UN Special Rapporteurs had urged the Ethiopian government “to stop misusing anti-terrorism legislation to curb freedoms of expression and association in the country” (UN OHCHR 2014). The EU, UN, US State Department and numerous human rights organisations have assessed the existing laws as extremely restrictive and in 2015 even the FATF questioned the “broad level of oversight” which it said was “not justified” by the terrorist financing risks facing the country (ESAAMLG 2015, para. 153).

### **INDIA: From US-led FATF courtship, to the systematic silencing of dissent**

India has long been of strategic importance to the FATF. Despatches from the US embassy in Delhi between 2006 and 2009, published by Wikileaks, show how “strong interest” from “top GOI [government of India] officials” in joining the FATF was used by the US government to solicit AML-CFT reforms (Wikileaks 2006e, 2006f, 2007a). One of the cables specifically welcomed amendments to the Prevention of Money Laundering Act (PMLA), which brought “non-governmental bodies including charitable trusts, temples, churches, mosques and educational institutions under the purview of the PMLA” (Wikileaks 2009c). It further explained that “The amendments will place NPOs under higher scrutiny by banks and financial institutions for large money transactions and suspicious transactions” and dismissed “NPO concerns that the amended PMLA may make receiving [financial] assis-

tance more difficult” (*ibid.*). Nevertheless, in July 2010 an FATF evaluation found India “non-compliant” and called on its government 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” (Asia/Pacific Group on Money-Laundering 2010). Later that year, the Indian government amended the already restrictive Foreign Contributions Act (FCRA) to allow it to withdraw the permits of NGOs designated as “organisations of a political nature” (Ministry of Law and Justice India 2010). US Treasury officials welcomed the reform as “considerable thinking” on CFT that “would provide an excellent example to other countries in [the] South Asia region” (Wikileaks 2008b); it has clearly inspired not only Bangladesh (above), but also Pakistan. In May 2015 Pakistan’s Federal Government finalised a revised

draft law in line with the National Action Plan (NAP) to monitor activities and foreign funding of local and international NGOs. Under the draft law, international NGOs will be required to register with the Economic Affairs Division and sign a Memorandum of Understanding (MoU) valid for up to five years. A central data system would be set up to enable NGOs to post their annual financial, performance and audit reports (see The Non Profit Platform on the FATF website). As part of the evaluation follow-up process, the FATF noted in 2013 that “The Review of Foreign Contribution by NPOs and the new Foreign Contribution (Regulation) Rules, 2010, together with the outreach activities being undertaken, enable the authorities to focus on higher risk NPOs”, although it still found that India’s “level of compliance was not yet equivalent to LC [largely compliant]” (FATF 2013b).

By this time, more than 4,000 Indian civil society organisations had had their FCRA permits suspended, including almost 800 in Tamil Nadu, location of massive protests against the Kudankulam nuclear site (Hayes 2013). Almost 9,000 more had their permits cancelled in 2015 (Kalra 2015), leading to widespread concern at the government’s systematic use of the FCRA to silence dissent (Mathur 2015). In October 2016, 25 NGOs were refused to renew their FCRA licences, as “they were found to be indulged in ‘activities that are inimical to the national interest.’” Most of these 25 NGOs were working in the field of human rights and community empowerment (Daily News and Analysis 2016a). At the end of 2016, the Home Ministry declared that its review of NGOs led to the cancellation of FCRA licences of around 20,000 NGOs (Daily News and Analysis 2016b).

#### **TURKEY: Terror-financing law adopted on threat of FATF sanctions, welcomed by ratings agencies**

In a very similar process to that observed in Brazil, a controversial Terrorism Financing law approved by the Turkish Parliament in February 2013 was a direct result of pressure from the FATF. Critics had long argued that the draft law would be used to further stifle political opposition in a state that has been strongly criticised by the UN Human Rights Committee (among others) for using counterterrorism laws against politicians, activists, lawyers, journalists and human rights defenders. At its October 2012 plenary, the FATF issued a formal threat to suspend Turkey’s member-

ship by February 2013 unless the Bill was adopted. Prior to the Parliamentary vote, the Turkish Justice Minister warned legislators that if they failed to back the bill “the Turkish economy may face serious problems... money transfers from and to Turkey would be possible only after checks by the FATF... caus[ing] serious problems for Turkey’s exports, imports and hot money flow.” To underscore the extent of the pressure attached to FATF compliance, the global credit rating agency, Fitch, issued a written statement welcoming the subsequent adoption of the law.

#### **UGANDA: Broad counterterrorism and NGO laws linked to AML-CFT deficiencies**

Uganda was first evaluated by the regional FATF body in 2007 and deemed to be only “partially compliant” with Recommendation 8, and similarly weak with respect to many of the other recommendations (see Know Your Country: Uganda). Draft AML legislation was drawn up in 2003 but only presented to Parliament in 2009, and not adopted until 2013. According to US diplomatic cables from 2009, the “Finance Ministry would like to propose legislation that would closely monitor the financial transactions of NGOs, but cannot do so until Parliament passes the AML bill” (Wikileaks 2009d). The delay has been attributed to political corruption within Uganda (ibid.), but may also reflect the fact that it was not until February 2014

that the country was finally put on the list of countries with strategic AML-CFT deficiencies (FATF 2014a). In October that year, the regional FATF formation called upon Uganda “to expedite the amendments to the Anti-Terrorism law in conformity with the Financial Action Task Force (FATF) Standards” (see Know Your Country: Uganda). New counterterrorism legislation was duly adopted in June 2016, with opposition parties arguing that the new powers to freeze funds held in financial institutions or seize other funds or property with alleged ties to ‘terrorist’ activities were excessive and could potentially be used to stifle political opponents (US Library of Congress Legal Monitor 2015). With a second FATF evaluation pending, the

NGO bill was proposed in April 2015 and adopted six months later. Domestic civil society groups argue that the legislation gives the government “unprecedented powers, including the ability to shut down non-governmental organisations and jail their members” (News24.com 2015). LGBT rights groups have expressed particular concern about the new law, given Uganda’s stance and prior attempts to criminalise homosexuality (ibid.). The Robert F. Kennedy Center for Human Rights suggested that “Uganda’s NGO Bill is part of growing authoritarian contagion in the region, with Ethiopia’s 2009 Charities and Societies Proclamation serving as the ultimate blueprint” (Attiah 2015). The second regional FATF evaluation of Uganda was completed in April 2016 using the new ‘effectiveness-led’ methodology (see further below). The report was mildly critical of the Ugandan government for failing to conduct an assessment of terrorist-financing

risks in the non-profit sector. It did not disapprove with the new law for being overbroad. However, it criticised for failing to include provisions requiring non-profits to “maintain information on the purpose and objectives of their pronounced activities, issue annual statements describing breakdowns of their income and expenditure, be licensed and registered, have controls in place to ensure that all the funds they receive are accounted for and are used consistent with the purpose and the objectives of the NPO’s stated activities, maintain records of domestic and international transactions which are made available to competent authorities upon appropriate authority and follow a know your beneficiaries and associated NPOs rule” (ESAAMLG 2016). As such Uganda was rated “non-compliant” with Recommendation 8 and is by default now expected to adopt even stricter regulations in this area.

### 3.3 Incremental reforms

The USA, Canada, France, Italy, Japan and the UK responded to the first critiques of Recommendation 8 at the FATF plenary in October 2012. They circulated a statement, endorsed by the World Bank, expressing concern that Recommendation 8 “is being used as justification to suppress the activities of legitimate NPOs and charitable and civil society organisations” and clarified that this was not the intention of the Recommendation. The following year, in preparation for the fourth round of mutual evaluations, the FATF revised its assessment methodology to make it more “effectiveness-led” (FATF 2013a), and to encourage states to take a more pragmatic, “risk-based” approach (FATF 2013a, 15 & 116). Instead of simply asking whether states had the correct laws in place to implement the FATF recommendations (technical compliance), assessors are now also tasked with evaluating the practical effectiveness of the measures in question: “the extent to which the defined outcomes are achieved.” In respect to R8, the result of national implementing measures is supposed to be that “Terrorists, terrorist organisations and terrorist financiers are prevented from raising, moving and using funds and from abusing the NPO sector” (see FATF 2013a). In respect to Recommendation 8, assessors are now explicitly asked to weigh “to what extent, without disrupting legitimate NPO activities, has the country

implemented a targeted approach, conducted outreach and exercised oversight in dealing with NPOs that are at risk from the threat of terrorist abuse” (FATF 2013a, 116). However, in the absence of further guidance, it remains unclear if and how evaluators will factor into their assessment any negative impacts of restrictive legislation and practice on CSOs and non-profits.

The FATF has also launched a formal dialogue with representatives of the non-profit sector, which until very recently, and unlike other stakeholders, had not been consulted on the development or implementation of those recommendations that impacted them (see further The Non Profit Platform on the FATF website). In June 2015, the FATF revised its “Best Practices” guidance for “Combating the Abuse of Non-Profit Organisations” in accordance with Recommendation 8 (FATF 2015a). This document takes into account some of the concerns raised by representatives of the non-profit sector in nascent discussions with the FATF Secretariat. In particular it:

- stresses the importance of legitimate charitable activities;
- affirms the importance of a risk-based approach to NPO regulation,
- recognises that a “one size fits all” approach to all NPOs is not appropriate;



- states that “as a matter of principle, complying with the FATF recommendations should not contravene a country’s obligations under [...] international human rights law;”
- clarifies that Recommendation 8 “does not apply to the NPO sector as a whole” and is intended “to apply only to those NPOs that pose the greatest risk of terrorist financing abuse” (FATF 2015a).

Despite greater recognition of the importance of civil society’s role and an ostensibly more nuanced approach to non-profit regulation, it remains to be seen if it will be applied consistently by those evaluating and implementing Recommendation 8. While there were some encouraging signs in the form of the 2015 regional FATF evaluation of Ethiopia making critical remarks about the country’s restrictive NGO law in the context of the risks it faces (ESAAMLG 2015, para. 153), the evaluation of Uganda, which had recently adopted very similar legislation, does not bode well (see case studies above).

Regardless, concerns remain with respect to the impact of AML-CFT measures on fundamental rights guaranteed by international law, and over whether the FATF is the appropriate body to deal with the regulation of the non-profit sector. As several of the case studies above demonstrate (in particular that of Brazil), the FATF has used blacklisting and the threat of sanctions in order to push through the adoption of domestic terrorist-financing legislation. The breadth and criticism of some of the resulting statutes has made a mockery of the principle that complying with the recommendations should not result in statutes that contravene human rights.

In January 2016, 123 groups from 46 countries signed an open letter to the FATF calling for the revision of Recommendation 8 (The Non Profit Platform on the FATF website). In the letter, the coalition argued that the “unproven assumption that the entire NPO sector is ‘particularly vulnerable’ to terrorism financing abuse... has lent a veneer of legitimacy to States that have adopted legislation without due respect for their international human rights obligations.” It called for a revision of Recommendation 8 to ensure “a proportional and targeted approach” applicable only to those non-profit organisations identified as at risk.

In June 2016, the FATF duly amended Recommendation 8 as follows:

*Countries should review the adequacy of laws and regulations that relate to **non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse...** [emphasis indicates new wording].*

The Interpretative Note (IN) to Recommendation 8 was also amended to incorporate the aforementioned “Best Practices” guidance for “Combating the Abuse of Non-Profit Organisations”. Additional amendments to the IN include:

- stating that Recommendation 8 does not apply to all NPOs, just those at risk of terrorist financing, defined as an organisation that “primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of “good works”;
- the requirement that states ‘should’ introduce licensing, registration, record-keeping and reporting is now optional (states ‘could’ still introduce these measures);
- NPOs are not required to conduct customer ‘due diligence’, but ‘could be required to take reasonable measures to document the identity of their significant donors’).

That all NPOs are no longer viewed as ‘particularly vulnerable’ to terrorist financing is a welcome step and will be particularly helpful to established civil society organisations; so to the relaxing of the KYC requirements. However, as noted above, how the new ‘risk-based’ approach will be applied by states in practice remains to be seen. CSOs working at close proximity to conflict zones or ‘suspect communities’, particularly smaller, less-established or community-based groups will likely still be viewed as de facto ‘at risk’, while the potential for repressive governments to continue to use the IN as a justification for the implementation of onerous and/or restrictive CSO laws remains.



## Chapter 4

# Don't bank on it: How due diligence and 'de-risking' is limiting civil society's access to financial services

In addition to bringing non-profits into the purview of counterterrorism, the FATF recommendations place an obligation on financial institutions and other businesses to police their customers for involvement in crimes under the FATF mandate. Increasingly, these obligations are impacting on relief and development work.

The proliferation of terrorist designations arising from UN Security Council Resolution 1373 (see further section 5) has meant that the risk of inadvertently providing financial services to a blacklisted terrorist group has increased exponentially. The FATF recommendations require states to impose “effective, proportionate and dissuasive” penalties on entities that breach sanctions regimes or fail to carry out proper due diligence (FATF 2012, 26). Led by the USA, states have levied fines running into billions of dollars for such derelictions of duty. For example, in 2012 HSBC reached a settlement with US prosecutors and regulators by agreeing to pay \$1.9 billion in relation to poor money laundering controls in Mexico (Viswanatha/Wolf 2012). According to an analysis by the Center for Global Development of AML, CFT and sanctions-related fines, a quarter of the 40 largest non-US banks by assets have been fined by US regulators in the last five years (Center for Global Development 2015, 4). The banking sector as a whole now has little or no appetite for this type of exposure, and appears to be engaged in extensive ‘de-risking’. This entails denying or withdrawing financial services from individuals and organisations with the wrong ‘risk profile’. While some financial experts distinguish between blanket and case-by-case ‘de-risking’, arguing that the latter is a more legitimate business practice, it is the perception that the activities of INGOs and local civil society organisations are ‘high-risk’ that is impacting those in the sector. The effects are particularly acute for those organisations working in or at close proximity to conflict zones and ‘suspect communities’, many of which have found themselves unable to send or receive money internationally, or significantly constrained by the conditions attached to the execution of such transactions.

### 4.1 Due diligence and non-profits

The FATF’s customer due diligence (CDD) recommendations include straightforward measures such as verifying

customers’ identities, including any beneficial owners, assessing the purpose and nature of their business, and vetting financial transactions greater than 15,000 EUR/USD to ensure that they are consistent with the institution’s knowledge of the customer, their business relationships and the source of the funds. Beneficial ownership occurs where a person enjoys property rights even though the legal title of the property belongs to another person. Financial institutions are to ensure that they do not keep anonymous or fictitious accounts and confirm the veracity or adequacy of previously obtained customer identification data (see FATF Recommendation 10 in FATF 2012, 14).

“Enhanced customer due diligence” (ECDD), meaning extra scrutiny, is required for all non-resident customers (FATF 2012, 59-67), and for all transactions with persons and companies in countries that have been evaluated by the FATF/FATF regional formations as having inadequate anti-money laundering and counterterrorism systems – some 53 countries at the time of writing (FATF n.d. b). The scope of ECDD is widened significantly by its application to money sent to or from countries that are or have been subject to international sanctions or embargos; to countries which have significant levels of corruption or crime; and to countries that have designated terrorist organisations operating within their territories. ECDD measures include obtaining additional information on the customer and the reasons for intended or performed transactions, and conducting enhanced monitoring of business relationships and transactions. Crucially, CDD/ECDD must be exercised on both senders and recipients of wire transfers and international remittances as well as the intermediary sending institution (FATF Recommendation 16 in FATF 2012, 15).

Researchers are only now beginning to explore the different ways in which the financial services sector interprets and implements due diligence obligations, and in turn how this affects the non-profit sector. Discussions to date have focused on three particular issues. Firstly, as suggested above, banks appear to be implementing risk-averse protocols that go beyond the FATF recommendations in order to minimise their exposure to risk (Metcalfe-Hough/Keatinge/Pantuliano 2015, 13). In practice, this means no longer processing transactions involving high-risk environments or actors. The increasing difficulties in sending money to Somalia have been well-documented, for example (see further Box 2, below), restricting

the inflow of remittances from the Somali diaspora on which many people in the country depend (UN OHCHR 2016). Secondly, the FATF due diligence requirements are seen to have increased the administrative burden on non-profits using financial services, thereby raising the cost of humanitarian action and “reducing the efficiency and timeliness of aid” (Emmerson 2015b, para. 41). This is observed not only in respect to dealings with financial institutions, but the increased time which some INGOs now spend complying with counterterrorism regulations more generally (ibid.). Thirdly, due to the difficulties they now face, it is suggested that some non-profits and their supporters are seeking alternative means to move money around the world. This may involve taking cash into the field or bypassing the banking system, for example by using personal rather than corporate accounts to transfer money, or using unregulated means to make and receive donations. Paradoxically, this leads to a reduction in the transparency and accountability that the FATF is trying to instil (Metcalf-Hough/Keatinge/Pantuliano 2015, 9).

## 4.2 The role of the compliance industry

Because customer and transactional due diligence obligations have become so onerous, the FATF recommendations encourage banks to rely on third party service providers to perform CDD on their behalf (FATF 2012, 18). These companies perform functions such as screening customers against private sector databases to identify individuals and entities included in national and international sanctions lists, and conducting enhanced due diligence investigations on high risk customers. In practice, this has seen financial institutions effectively re-outsource a significant part of the due diligence process to a burgeoning, global AML-CFT compliance industry that is already worth billions of dollars annually (KPMG estimates that global annual expenditure on risk management is likely to exceed \$10 billion within the next two years (Metcalf-Hough/Keatinge/Pantuliano 2015, 18).

In particular, banks have turned to private sector intelligence databases derived from ‘open source’ material to check their customers for links to crime or terrorism. One of the AML/CFT compliance market leaders is World-Check. Founded in 2000 and bought in 2011 by *Thomson-Reuters* for \$530 million, World-Check provides services to more than 4,500 institutions, including 49 of the

world’s top 50 banks and 200 law enforcement and regulatory agencies (Thomson Reuters n.d.). World-Check started out consolidating the names from the multitude of national and international sanctions lists so that their clients wouldn’t break the law by inadvertently providing financial services to blacklisted entities. World-Check and its competitors then went further; collecting and adding to their databases the names of people identified in the media or online as potentially associated in some way with terrorism. In 2008, World-Check’s database was reported to contain approximately 750,000 names; by 2010 this number had grown to 1.2 million and by 2015 it had surpassed 2.5 million – higher by an order of magnitude than the number of people who have been convicted of actual offences within the FATF mandate.

The fundamental rights implications for those added to the World-Check database are substantial. In February 2016, VICE news published an exposé of World-Check’s files which showed that the Executive Director of the Council on American-Islamic Relations, Nihad Awad, UK Liberal Democrat politician Maajid Nawaz, who founded the counter-extremism think tank Quilliam, former World Bank and Bank of England advisor Mohamed Iqbal Asaria CBE, the UK Palestine Solidarity Campaign, the Cordoba Foundation and “a number of other major British non-profits” had all been given a ‘terrorism’ designation in the database. It also showed that World-Check was relying on unsubstantiated or discredited online media reports (Shabibi/Bryant 2016).

Because of World-Check’s confidentiality clause, the overwhelming majority of people affected by its profiling will have no idea why they have been refused a bank account or had a transaction blocked. As a result, there is no quantitative data demonstrating the impact on non-profits. However, numerous reports (see further Box 2, below) have suggested that the inclusion of civil society organisations in World-Check’s databases has fundamentally affected their ability to access financial services (cf. Mackintosh/Duplat 2013, 110; Metcalf-Hough/Keatinge/Pantuliano 2015, 14). Several UK-based non-profits have launched defamation proceedings against World-Check, seeking recompense for these damages (cf. Donaghy 2016). Moreover, because the database is used by intergovernmental organisations, donors and INGOs, the inclusion of organisations or their employees can result in specific actors being rendered ineligible for funding or pending grants being blocked or withdrawn. As one former World-Check board member put it: “If someone had a [terrorism]



Civil society is recognised as an actor in development in its own right, which is especially valid for the challenging area of land reforms and land rights. Important elements to improve the situation and to achieve more equality for disadvantaged groups and landless people are their empowerment, but also awareness raising, information and advocacy at all levels of society.

hit on World-Check, that's really end of story...you can't do business with them anyway" (Shabibi/Bryant 2016).

### 4.3 The impact on development activities

'De-risking' is the financial sector's response to the risks they face with respect to failures in due diligence – failures for which financial institutions may be held liable in the event that their customers are indeed, or later become, involved in money laundering, terrorist financing and other crimes under the FATF mandate. Although it is a relatively new phenomenon, it is clear that some banks have a lower appetite for risk than others, and are thus 'de-risking' more extensively, and that some institutions interpret the FATF's due diligence requirements far more rigidly than others.

Financial inclusion is a key part of the 'good governance' agenda promoted by the World Bank, UN, OECD and FATF, and investment in development in fragile states is seen as imperative to mitigate conflicts, prevent migrant and refugee flows and push back on violent extremist groups. 'De-risking' threatens to derail these objectives.

As several UN Special Rapporteurs have explained, the restrictions faced by NGOs because of risk aversion

or 'de-risking' include the inability to open bank accounts, arbitrary closure of accounts, inordinate delays or termination of transactions, onerous obligations requiring detailed knowledge of donors and beneficiaries, and vulnerability to accusations of terrorist links (FATF 2015a, para's 68-70).

Civil society appears to have been hardest hit in the USA and the UK, where banking regulations are particularly stringent. A 2016 report commissioned by the UK's Financial Conduct Authority suggested that "Top 'household name' charities are not de-risked, but small charities are... There was a fear that an avalanche of de-risking in the not-too-distant-future that might affect hundreds of charities" (Artingstall et al. 59). It is important to stress that the suspension or withdrawal of financial services can be devastating for small charities and civil society organisations, who are rendered unable to receive grant payments, maintain grass roots funding (such as standing orders or memberships), pay wages and suppliers, implement projects, or find alternative banking facilities.

Forthcoming research is expected to demonstrate that increasing reports of financial exclusion and disenfranchisement is indicative of a much wider geographical and political trend (see forthcoming research (2016) on this topic by Duke University and the Women Peacemakers Programme). In March 2016, for example, the Jordanian

## Box 2: How due diligence ‘de-risking’ hampers relief and development

In 2011, a USAID grant to one of South Africa’s largest humanitarian organisations was blocked because the Director’s name had a ‘terrorism’ designation in the World-Check database (source: personal correspondence between author and party to the case). The designation was refuted by the organisation.

In 2011, Sunrise Community Banks, the largest provider of banking services for US-Somali remittances, decided to close all service provider accounts in order to better comply with US CFT regulations (Center for Global Development 2015, 16).

In 2012, Islamic Relief Worldwide, which has operations in over 30 countries, reported that incoming donations and outgoing payments were being blocked “on a daily basis” (Young 2012). At the end of 2015, HSBC closed the charity’s bank accounts (Mandhai 2016).

In 2012, the UK Muslim Charities Forum reported that three of its eight members had experienced difficulties in opening a bank account. Four members said that their most serious challenge in accessing financial services was transferring funds, in particular in relation to their aid operations in Somalia, Sudan, the occupied Palestinian territories and Iraq (Metcalf-Hough/Keatinge/Pantuliano 2015, 7).

In the spring of 2013, over 140 UK-based remittance companies received a notice from Barclays Bank indicating that their accounts would be closed within sixty days and that the bank would no longer do business with them as a result of its new risk-based eligibility criteria (Center for Global Development 2015, 16).

An informal survey of humanitarian organisations in late 2013 by the Charity and Security Network found that more than half of the 51 respondents faced delays

or blocks when moving money abroad and 15 per cent had experienced account closures (Transnational NGO Working Group on FATF 2014). A more in-depth survey is to be published by the network in late 2016.

In March 2015, the Guardian reported that millions of pounds of donations to charities had been inadvertently held up, blocked or returned by banks – including HSBC, UBS and NatWest – which had frozen accounts held by UK-registered charities and INGOs delivering aid in Syria, Gaza and Iraq.

An INGO wishing to remain anonymous, that was interviewed for an Overseas Development report published in 2015, estimated that it had foregone £2 million in donations in the space of a year as a result of funds being blocked (Metcalf-Hough/Keatinge/Pantuliano 2015, 7).

The US-based Syria Relief & Development organisation, which funds a hospital in Aleppo, had its account closed by Bank of America in the spring of 2015. The group moved its money to Wells Fargo but had its account closed after it tried to transfer funds to employees in Syria. Staffers didn’t get paid for four months in 2015 because of these problems (Barry/Ensign 2016).

In March 2016, the Wall Street Journal reported that the Chicago-based Zakat Foundation of America had had their accounts closed at three US banks. The charity said that in each case, the banks, which it declined to identify, did not provide a reason for the closures (ibid.).

A charity that funds a school in Turkey, which provides education to around 400 refugees from Syria, had their account closed by JP Morgan for no stated reason. After an inquiry from the Wall Street Journal, the bank reversed their decision (ibid.).

banking association warned that “De-risking practices will likely result in the further isolation of vulnerable communities, particularly women, from the formal financial sector and may have wide-ranging humanitarian, economic and security implications” (Kandah 2016).

Further research is needed, but many organisations affected by ‘de-risking’ are reluctant to speak out, fearing reputational damage from the perception that there is ‘no smoke without fire’. While Muslim organisations appear to be most severely impacted – and believe that they are



being discriminated against precisely because of their religious affiliations – secular and other faith-based INGOs have also reported difficulties (Metcalf-Hough/Keatinge/Pantuliano 2015, 14). UN human rights experts have clarified that “the denial of banking facilities... without reasonable suspicion that the targeted organisation or transaction constitutes support of terrorism or money-laundering... on the basis of stereotypical assumptions relating to characteristics, such as religion or the predominant race of the organisation’s membership or beneficiaries, constitutes unjustified discrimination and is prohibited under international law” (Kiai 2013, para’s 84-85).

#### **4.4 Nascent reform efforts**

In response to claims that its recommendations are to blame for these problems, the FATF has: launched an initiative to collect data on the phenomenon of de-risking; stated that financial institutions should not view NPOs as automatically high-risk simply because they operate in cash-intensive environments or in countries of great humanitarian need (FATF 2015a, para’s 68-70); clarified that banks should assess the risk of each client individually; and made it clear that high-risk clients can still be serviced subject to proper due diligence (FATF 2015b). However, as Oxfam USA suggests, banks are still “finding it easier to cut and run from small, high-risk clients” (Oxfam 2015).

De-risking is driven by a complex set of interrelated factors (these include perceived client risk, profitability, the cost of compliance, potential fines and penalties, reputational and legal concerns, and an overall shift from corporate to individual liability), but the two which appear to most influence the way that the majority of banks and other financial service providers deal with INGOs are profitability and risk. More simply put: “the limited revenue that most INGOs may generate for a bank is not sufficient to justify the risks that banks believe doing business with INGOs will expose them to” (Metcalf-Hough/Keatinge/Pantuliano 2015, 17). In the absence of specific instructions to the contrary, banks are spending billions building ever-more extensive risk and compliance departments – but they do not appear to be investing resources in enhancing their understanding of INGOs to the same degree as other categories of client (ibid.). In the meantime, INGOs have been liaising with national banks and regulators to provide short-term

solutions to the most pressing crises (see for example the safer corridor pilot project in the UK, which was designed to protect remittance flows to Somalia and focuses on the ability of NGOs to send money to support their own operations; see British Bankers’ Association, the Disasters Emergency Committee and Freshfields Bruckhaus Deringer llp 2013).

Initial concerns over the detrimental effects of de-risking on the non-profit sector were met with buck-passing by banks, regulators and governments. Financial service providers blamed the due diligence and CFT rules. Regulators and standard-setting bodies, including the FATF, said the banks were applying those rules too zealously. Governments claimed that individual decisions about financial services were a matter for the banks. While all apparently now recognise that the problem exists and research has been commissioned into its extent, concrete proposals for what to do about it are conspicuous by their absence. Addressing the matter in his thematic report on the abuse of counterterrorism, the UN Special Rapporteur suggests the emerging “right to banking facilities” – itself a response to the widespread denial of financial services to the poor – could also benefit NGOs (Emmerson 2015b, para. 41).

The FATF, which recently expressed “serious concern [that] de-risking may drive financial transactions underground which creates financial exclusion and reduces transparency, thereby increasing money laundering and terrorist financing risks” (FATF 2015c), remains silent on remedies for non-profits frozen out of the financial system. Given the FATF is a consortium of national governments, it is clear that leadership on this issue can only come from government quarters. In February 2016, 58 non-profit organisations representing more than \$8.3 billion annually in humanitarian aid wrote to the US Departments of Treasury and State asking them to convene a multi-stakeholder dialogue as part of a broader effort to ensure that registered, law-abiding NPOs are able to access the global financial system (Charity and Security Network 2016). Informal dialogue between non-profit organisations, regulators and the banking sector is underway in several European countries. It is clear that if there is to be global traction on this complex, interdependent and intractable issue, these efforts must be widened and addressed internationally.

## Chapter 5

# Undermining conflict resolution, hampering humanitarian action: terrorist ‘blacklisting’

As explained in previous sections, a complex web of international, regional and national ‘terrorist blacklists’ now spans the globe, containing hundreds of designated ‘terrorist’ groups and thousands of their alleged members and supporters. Festering conflicts and struggles for self-determination have been subsumed by the rubric and praxis of the ‘war on terror’, transforming the way in which political violence and armed conflict is understood and managed, and paving the way for new forms of warfare targeting ‘terrorist’ networks (Boon-Kuo et al. 2015).

The transnational impact of terrorist designation has long preoccupied legal scholars, who have struggled to reconcile the executive power exercised at supranational level by the UN Security Council and the EU Council with traditional notions of due process, fundamental rights and the rule of law – issues that have played out in national and international courts (Sullivan/Hayes 2010). While some groups and individuals have successfully challenged their ‘terrorism’ designations, the underlying legal tensions have not been resolved to the satisfaction of human rights experts (Council on Foreign Relations 2013).

As well as criminalising ‘terrorist’ groups, a whole host of others including political parties, NGOs, charities, activists and dissidents have inevitably been caught in the ‘terrorist’ net, whether listed directly or through their alleged association with listed parties. As noted by the UN Special Rapporteur on Counterterrorism and Human Rights, “the adoption of binding international and regional instruments proscribing material support for terrorism, together with overbroad national legislation implementing those obligations or otherwise criminalising such support, can pose a significant threat to civil society organisations, some of whose activities may – unwittingly – constitute indirect material support according to the definitions adopted” (Emmerson 2015b, 13-14). This might include organising or attending a meeting, paying ‘taxes’ or ‘providing information’ to banned organisations (Boon-Kuo et al. 2015, 32-33).

The political space of organisations working at close proximity to listed entities, particularly those with the objective of resolving conflicts through dialogue and engagement, is thus constrained by real or perceived threats of prosecution. This in turn has serious consequences for their programmes, partners and beneficiaries (Mackintosh/Duplat 2013; Boon-Kuo et al. 2015; Dumasy/Haspesslagh 2016). Organisations become more risk averse, concerned that this type of work could harm their reputation or endanger their staff; projects

involving groups in or around territories controlled by proscribed organisations are harder to fund and implement; and communities already sandwiched between armed factions and hostile state actors may lose support on which they depend. A recent report on ‘Terrorist Listing and Conflict Transformation’ commissioned by the Berghof Foundation argued that viewing these outcomes simply as ‘unintended consequences’, without questioning the broader legitimacy of the global counterterrorism architecture, is failing to capture a much more profound and transformative process – one which is reshaping the norms of conflict resolution, securitising relief and development organisations, and paralysing the prospects for grass-roots peacebuilding (Boon-Kuo et al. 2015).

In addition to concerns about ‘shrinking space’, the need to comply with counterterrorism regulations undermines the perceived neutrality of relief and development organisations, whose risk aversion and conformity may be placed above their humanitarian objectives and interpreted by non-state actors and local populations as ‘taking sides’. Just as military interventions in the name of ‘humanitarian intervention’ have undermined humanitarian action on the ground, the perception that INGOs have been co-opted into official counterterrorism initiatives can constrain their capacity to operate in contested territories (Mackintosh/Duplat 2013, 81; Boon-Kuo et al. 2015, 50-51; Emmerson 2015b, 18). This comes at a time when the credibility and legitimacy of humanitarian and development organisations is already undermined by other factors, including the broader mistrust of ‘western agendas’. Although humanitarian organisations continue to assert and abide by their neutrality, the perception that they are not neutral is growing. So too is hostility toward development agendas predicated on human rights and democracy, particularly in countries that have become less dependent on western aid.

## 5.1 The role of the FATF

Whereas the relationship between the FATF recommendations and the shrinking space and ‘de-risking’ discussed in the previous sections are increasingly becoming known, the role that the FATF has played with regard to the proliferation of terrorist proscription is not well understood. The FATF acts firstly to ensure that terrorist financing offences are defined extremely broadly in national law,

and secondly to encourage states to establish their own domestic terrorist blacklists.

With regard to terrorism offences, the FATF recommendations effectively expand the scope of the UN Terrorist Financing Convention by requiring states to “criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists *even in the absence of a link to a specific terrorist act or acts*” (Recommendation 5, emphasis added) (FATF 2012, 13). The FATF’s interpretive note on R5 goes even further, stating that “criminalising terrorist financing solely on the basis of aiding and abetting, attempt, or conspiracy is not sufficient” to comply with the recommendations, and that “financing offences should not require that the funds: (a) were actually used to carry out or attempt a terrorist act(s); or (b) be linked to a specific terrorist act(s)” (FATF 2012, 37). Following the adoption of UN Security Council Resolution 2178 (see section 2.1, above), the scope of Recommendation 5 was effectively expanded by FATF guidance which clarified that “terrorist financing” included the financing of would-be ‘foreign fighters’.

With regard to terrorist blacklisting, the FATF recommendations not only remind states of their obligations to implement targeted financial sanctions regimes

in order to comply with UN Security Council resolutions 1267 and 1373 (FATF 2012, 13), but also include minimum standards to which national implementing regimes should adhere. Recommendation 6 thus requires states to blacklist entities that meet the criteria for terrorist designation on the basis of a domestic assessment or request of a foreign country using “an evidentiary standard of proof of ‘reasonable grounds’ or ‘reasonable basis’”. This is a much lower standard than is typically found in criminal law, which requires proof beyond ‘reasonable doubt’ (FATF 2012, 39-46). Although R6 is one of only two out of the 40 FATF recommendations that contains an express reference to human rights, the reference is undermined by the use of executive powers and civil law evidentiary standards. Given the scope for overbroad definitions of ‘terrorism’ and politically-motivated terrorist designations, there is a significant risk of arbitrary application of these provisions.

As with all FATF recommendations, the stringent evaluation enforcement mechanism means that states who fail to implement provisions are named-and-shamed for non-compliance. While they are under a legal obligation to implement UN Security Council Resolutions, the demand that states make provision to



The United Nations Office on Drugs and Crime (UNODC) in Vienna is also responsible for implementing the United Nations’ lead programme on terrorism.





The growing body of counterterrorism legislation and regulation is also having a direct impact on humanitarian organisations by restricting funding and stalling project implementation.

blacklist their own citizens in the absence of a UN designation is globalising a far-reaching sanction that had been used only in exceptional circumstances by democratic states prior to 9/11. At its December 2015 plenary, the FATF announced that it would be initiating special measures against countries which had not criminalised terrorist financing or did not apply targeted financial sanctions (FATF 2015f). A few days later, the UN Security Council called on all states to implement FATF Recommendation 6, and called on the FATF to redouble its efforts to combat terrorist financing (United Nations 2015c). Additional pressure to do more in this area is coming from the 37 member “Coalition Counter ISIL Finance Group” which is co-chaired by the United States, Italy, and Saudi Arabia as part of the broader international effort to degrade and defeat ISIL.

## 5.2 Counterterrorism and humanitarian aid

Delivering humanitarian aid to civilian populations and running relief and development programmes in and around conflict zones is already fraught with difficulties and challenges that can threaten the safety of aid workers.

Counterterrorism has added significantly to the problems that INGOs and their local partners face by introducing criminal liability for activities related to humanitarian programmes. As noted above, the offences in question are intimately related to the criminalisation of ‘material support’ for proscribed ‘terrorist’ organisations and may include the provision of funds, property or technical assistance to listed parties (Boon-Kuo et al. 2015, ch. 1-2). Because banned organisations often control large swathes of territory and charge organisations fees for visas or entry permits, or impose taxes on their operations, the restrictions imposed by counterterrorism directly impact the mandate of humanitarian actors to provide relief to civilian populations (Emmerson 2015b, para. 38). INGOs face the risk that goods and services delivered to areas where terrorist groups are active may be diverted to those groups, or actors associated with those groups. The US listing of Al-Shabaab as a terrorist group in 2008 is seen to have paralysed aid to Somalia in the years that followed, with devastating effect. Combined with the disregard for international humanitarian law by armed groups in Iraq, Libya, Mali, Nigeria, Syria and Yemen, these restrictions have contributed to an extremely challenging climate for humanitarian relief organisations (see Box 3, below).



### **Box 3: How terrorist blacklisting hampers humanitarian and peacebuilding activities**

**Somalia:** Since 2008, at which time the US listed Al-Shabaab as a terrorist group, a single instance of diverted aid or payments to local authorities is potentially a crime under US law for which both USAID and its partners can be held accountable (Mackintosh/Duplat 2013, 88). The proscription of Al-Shabaab coincided with the intensification of the Somalian conflict, the expulsion of several aid groups, reluctance on the part of some humanitarian organisations to pay taxes to Al-Shabaab, and unprecedented scrutiny of aid organisations. The result was an 88 per cent decrease in aid to Somalia over the two years that followed (The Guardian 2013). In July 2011, the UN declared a famine in Somalia. By this time, nearly half of the country's population of ten million was in need of immediate assistance (Charity and Security Network 2012). While the urgency of responding to the famine engendered "a shift from a cautious environment to one where aid was delivered at all cost" (Mackintosh/Duplat 2013, 86), counterterrorism requirements continue to hamper peacebuilding efforts in the aftermath of the famine. For example, a project in the Bakool region of southern Somalia that sought to help 300 youth fighters defect from Al-Shabaab was blocked by European and US donors because it would have meant providing economic resources to clans in Al-Shabbab controlled areas to support the youth fighters' reintegration (Boon-Kuo et al. 2015, 91-92).

**Gaza:** After Hamas were elected in Gaza, their designation as a 'terrorist' organisation by the EU, US and other jurisdictions was augmented by a 'no-contact' policy with respect to Hamas officials. Some key donors also introduced 'anti-terrorism' clauses into grant agreements, which many key Palestinian organisations refused (and still refuse) to sign on the basis that the clauses are prejudicial to legitimate resistance to Israel's occupation and human rights abuses (Mackintosh/Duplat 2013, 95). In combination, these measures had a significant impact on the provision of humanitarian assistance and protection and paralysed many development efforts, leaving the territory suffering from both the 'economic blockade' and aid dependency (Boon-Kuo et al. 2015, ch. 4). Cash

assistance programmes, funding for schools, hospitals and mental health services, and peacebuilding efforts, were disrupted or rendered impossible. During Israel's operation 'Protective Edge' in 2014, some INGOs operating in Gaza refrained from delivering aid to displaced Palestinians who had taken refuge in schools run by the Hamas government because they feared that doing so would transgress US counterterrorism legislation. For the same reason, some INGOs felt unable to provide rehabilitation support to government schools damaged or destroyed by Israeli forces (Metcalf-Hough/Keatinge/Pantuliano 2015, 5). In August 2016 their fears were effectively confirmed as Israel charged staff from UNDP, World Vision and Save the Children with terrorist-funding (Beaumont 2016).

**Turkey/Kurdistan:** The terrorist designation of the PKK and its non-violent associates by Turkey, the EU, US and other jurisdictions has undermined the prospects for peacebuilding in Turkey and neighbouring Kurdish regions (Boon-Kuo et al. 2015, ch. 5). In the four years between 2009 and 2013, during the "democratic opening", Turkey prosecuted almost 40,000 people for the offences of membership of a terrorist organisation; aiding and abetting a terrorist organisation; and attempting to destroy the country's unity and integrity. This appears to have been the largest counterterrorism operation in the world (ibid., 150-151). The blacklisting of the PKK by much of the 'international community' means that there is no meaningful pressure on Turkey to resolve the Kurdish conflict. Moreover, by treating the military campaign against Kurdish self-determination as a domestic 'counterterrorism' issue, rather than an armed conflict governed by international humanitarian law, the Turkish state has been able to act with greater impunity with the tacit support of its allies.

**North Korea:** In May 2013, European aid groups said their banks in Europe had stopped sending money to North Korea in the wake of the blacklisting of Pyongyang's main foreign exchange bank, forcing "some agencies to carry suitcases of cash in from outside the country" (The Guardian 2013a; Rajagopalan 2013).

**Syria:** According to a recent Thompson Reuters report, a survey of NGOs operating in ‘jihadi-run’ areas reported widespread concern about “dealing with armed groups and fears of running afoul of anti-terrorism laws” (Esslemont 2016). INGO’s reported that demands for additional compliance were hampering their activities in the areas most affected by conflict. “Anti-terrorism legislation and licensing requirements reduce our nimbleness and slow down our effectiveness in reaching vulnerable people because of onerous

reporting,” one country director said. The Syrian NGO Alliance (SNA), a consortium of 90 NGOs working in the country, said its members were having to cancel projects because they could not keep up with the paperwork required by donors. “This is really bad for Syrian people, who end up being more vulnerable to joining the terrorist groups because they do not get the humanitarian assistance,” said SNA coordinator Fadi Hakim. “The other option for many of them is to then join the exodus of Syrian refugees.”

Practical challenges are compounded by legal uncertainty caused by the overlapping nature of different prescription regimes and a range of variables that shape potential liability. Such variables include whether the terrorist groups are proscribed at UN, EU or national level; the definitions of ‘terrorism’ or ‘material support’ attached to those regimes; where the NGO is registered, located or headquartered; the nationality of its staff and the origins of its funding; whether the applicable laws require actual intent to support a banned group or not; whether indirect support (i.e. to a third party associated with a terrorist group) can incur liability; and whether any of the relevant statutes apply extraterritorially (providing jurisdiction for states to prosecute offences that took place outside of their territory). In this context, it is often very difficult, even for well-resourced organisations, to ascertain the legal risks they face and to provide meaningful guarantees to their staff regarding their potential liability.

Engaging with proscribed groups for humanitarian purposes is implicitly recognised under the Geneva Conventions, which provide for “relief actions which are humanitarian and impartial in character and conducted without any adverse distinction” (Additional Protocol 1977). In response to widespread concern about the potential criminalisation of humanitarian aid workers, several initiatives to reduce or remove their legal liability have been developed. Security Council resolutions now mandate access to territory under the control of proscribed groups for humanitarian purposes (for example the UN Security Council’s Somalia and Eritrea sanctions regimes, see further Boon-Kuo et al. 2015, 39); some national laws criminalising material support have been amended to include humanitarian exemptions (for example the Australian and New Zealand statutes, see further Emmerson 2015b, para. 34); and provision has been made for aid

organisations to apply for government licenses that allow them to deal with proscribed groups for the purpose of providing humanitarian aid (The Office of Foreign Assets Control of the US Treasury can issue exemptions and the EU sanctions regime envisages the same – see further Boon-Kuo et al. 2015, 39). However, the exemptions have done little to restore the confidence of aid groups and the licenses have proved ineffective or inaccessible in practice. The US licenses do not provide immunity against the criminal prohibition on providing material support or resources to proscribed terrorist organisations (Emmerson 2015b, para. 34), while the UK government has not provided any information on how and under what circumstances an INGO could potentially apply for such licences (Metcalf-Hough/Keatinge/Pantuliano 2015, 14). As the UN Secretary-General observed in 2010, the increasing appreciation by member states of the importance of engagement for humanitarian purposes has yet to translate “into a willingness to refrain from adopting measures that impede or, in some cases, criminalize engagement with non-State armed groups” (United Nations 2010).

The prosecution of humanitarian organisations accused of supporting terrorist groups is relatively rare. But the conviction of the Holy Land Foundation for material support for terrorism in the USA (Charity and Security Network 2011), the shutting-down of the International Islamic Relief Organization in Indonesia and the Philippines, and the proscription of dozens of Islamic charitable and social organisations has had a wider chilling effect (Mackintosh/Duplat 2013, 108-111). The extra-territorial reach of US law coupled with scores of high profile investigations and a slew of allegations against European and Australian INGOs, often made by organisations and individuals pursuing an overt political agenda, have amplified these effects. Among the many organisations

subject to investigations predicated on allegations of association with proscribed terrorist groups are, in the USA, Benevolence International Foundation, Islamic American Relief Agency, KindHearts for Charitable Humanitarian Development and KinderUSA; in the UK, Interpal, Human Appeal International, Islamic Relief and the Palestinian Solidarity Campaign; in the OPT, the Union of Good and the Palestinian Authority; in Canada, the International Relief Fund for the Afflicted and Needy; in France, the Committee for Charity and Assistance to the Palestinians (CBST); in Italy, ABSPT; in the Netherlands, ORDAID, ICCO and Oxfam-Novib; in Austria, Belgium, Denmark and Sweden, the Al-Aqsa Foundation; in Norway, Muslim Aid and Islamic Forum of Europe; and in Australia, WorldVision and AusAID (Boon-Kuo et al. 2015, 110). Although these investigations often fail to find any evidence of support for terrorist organisations, the allegations have an adverse and lasting impact on an organisation's capacity to implement its programmes on the ground and raise funds internationally. As the Humanitarian Policy Group, a research and advocacy organisation funded by many of the world's best known humanitarian actors, has observed, "once these kinds of harmful allegations emerge in the public sphere, some reputational harm to humanitarian actors seems inevitable, regardless of whether the allegations are true... Reputational harm may result in reduced donor confidence and loss of funding, as donors may be reticent to fund groups that may be engaged in allegedly negligent or criminal activity" (Burniske/Modirzadeh/Lewis 2014, 11).

The risks that relief and development organisations face often require them to seek legal advice and be ready to handle accusations of violations of counterterrorism laws. According to the UK Financial Conduct Authority's 'Drivers of de-risking' report, "Charities have also encountered specific direct costs of obtaining legal opinions... One famous name charity required £40k of advice on sanctions regimes in order to maintain operations in a number of jurisdictions. It, like other charities, has had to invest donations in upskilling what used to be clerical level staff in its treasury department in order to deal with policy issues and complex requests" (Artingstall et al. 2016, 60). As with the strictures imposed on the financial system by counterterrorism, the net effect may actually be less transparency and accountability if humanitarian organisations refrain from acknowledging their engagement with proscribed groups (Metcalfe-Hough/Keatinge/Pantuliano 2015, 9), or seek unorthodox solutions to the

impasses they face (Boon-Kuo et al. 2015, 107-108 & 147 & 148). In February 2015, 32 European relief agencies signed a joint statement on the "threat" posed to the global humanitarian principles of humanity, neutrality, impartiality and independence. Calling on governments to "reaffirm and protect" people's fundamental right to humanitarian aid, they stated that "growing numbers of counterterrorism laws and measures adopted by States and intergovernmental organisations are restricting humanitarian actor's ability to develop partnerships, run projects in complex environments, and are delaying programs implementation" (Christian Aid 2015).

Giving evidence to the UK's International Development Select Committee in March 2016, two former international development secretaries, Andrew Mitchell and Clare Short, said Britain's counterterrorism measures are making the delivery of aid in dangerous scenarios even more difficult, particularly for domestic and Islamic NGOs. Short suggested that the extra burden counterterrorism policies impose represents "something that's gone deeply wrong and is very foolish and unfair" (Rumney 2016). Mitchell said that Islamic organisations were "some of the few charities that can get into Syria and help the benighted people of that country, yet they are being held back" (Wintour 2016).

### 5.3 Counterterrorism and peacebuilding

The impact of counterterrorism on humanitarian activities is particularly pronounced in the area of peacebuilding. Some distinction between 'liberal peacebuilding' and 'conflict transformation' approaches is helpful in understanding these impacts. The former is a state-centric process involving 'liberal intervention' (including military intervention), state-building and economic development to resolve conflicts and bring about peace. The latter seeks to address the root causes of conflicts and aims to transform the structures, behaviours and attitudes of those involved. In practice, peacebuilding and conflict resolution usually takes on a hybridised form that draws on both approaches (Boon-Kuo et al. 2015, 48-49). Most important in the context of counterterrorism is the central role that terrorist blacklisting plays in liberal peacebuilding, which views criminalisation, disruption and isolation as the best way to bring non-state armed groups into a formal peace negotiation, with demilitarisation as a

prerequisite. Conflict transformation approaches, on the other hand, acknowledge that both state and non-state actors are accountable for their actions, that all social groups must be engaged in an inclusive process, and that such a process must include all parties to any given conflict (ibid., 46-47). As such, counterterrorism has had relatively little direct impact on the professional negotiators, mediators and conflict resolution NGOs involved in formal peace negotiations and the 'quiet diplomacy' used in advance of those negotiations. It is inconceivable that these actors, whose legitimacy is grounded in their relationship with the state actors involved in such negotiations, would be prosecuted under counterterrorism or material support laws (ibid., 119-120). The same is not true of the broader peacebuilding community - the organisations involved in funding and delivering projects aimed at conflict transformation - whose activities, such as human rights advocacy and support for marginalised groups, often lack legitimacy in the eyes of state parties. It is this wider group of humanitarian actors that finds itself constrained and vulnerable to counterterrorism laws constructed for the exact purpose of criminalising activities that could be seen as indirectly supporting the objectives of 'terrorist' entities.

Peacebuilders have contested the counterterrorism framework developed in the aftermath of 9/11 by mounting legal challenges to the USA's material support laws. But in a case brought by the Humanitarian Law Project, the Supreme Court of the United States upheld the statute, and confirmed that NGOs providing training on humanitarian and international law, including how to petition bodies such as the UN, to groups designated as 'Foreign Terrorist Organisations' by the State Department - in this case the Kurdish PKK and the Tamil LTTE - had provided 'material support' for terrorism (Center for Constitutional Rights, *Holder v. Humanitarian Law Project*). Lest there be any doubt, the judge in the case stated that even if initiatives were intended to promote peace and compliance with human rights law, such assistance could still be 'diverted' to advance terrorist objectives. Irrespective of their nationality, individuals working for civil society organisations anywhere in the world could now face prosecution in the USA and up to 15 years imprisonment for providing 'material support' to an entity they knew to be designated as a foreign terrorist organisation in the US (Emmerson 2015b, para. 36). More than any other, this judgment has had a chilling effect on peacebuilding, humanitarian and human rights organisations around

the world (Humanitarian Policy and Conflict Research Program 2012, 18-21; Mackintosh/Duplat 2013, 40-42; Boon-Kuo et al. 2015, 31-33).

It is important to stress that US-style material support provisions have been incorporated into a majority of counterterrorism statutes around the world. Offences including providing funds or property, which may include economic benefits or resources of any kind, offering advice and assistance, organising a meeting, or acting as a 'go-between', could ensnare peacebuilders acting at close proximity to designated terrorist organisations in numerous jurisdictions (Boon-Kuo et al. 2015, 28-34).

## 5.4 De-risking, self-censorship and securitisation

Just as banks are implementing risk-averse protocols, so too are donors, INGOs and philanthropists. This appears to be having a particularly pronounced impact on smaller civil society organisations doing politically sensitive work such as human rights and human security advocacy in and around conflict zones. While there is a lack of quantitative data, exploratory studies suggest that the parameters of humanitarian action have been shifted. Programmes that are specifically designed to avoid contact with, or provide support to, a designated group (so as to limit the organisation's exposure to criminal liability) have come to take preference over programmes that are designed to respond directly and effectively to humanitarian needs (Emmerson 2015b, para. 39). According to a report from the *Humanitarian Policy Group*, the fear of exposure to possible sanctions under counterterrorism measures has influenced "the programming priorities of many humanitarian organisations and made them reluctant to share information on their activities" (Metcalf-Hough/Keatinge/Pantuliano 2015, 9). This trend is accompanied by an increased reliance on the part of less 'risky' implementing partners, such as UN agencies and other international organisations, to the detriment of smaller or local NGOs (Mackintosh/Duplat 2013, 104). Exposure to counterterrorism measures is also seen to be contributing to a self-imposed restriction by civil society actors of their own space, with some NGOs preferring to reorient their operations to less risky areas. This self-censorship extends to the way in which INGOs communicate the work they are doing, or refrain from engaging in certain types of advocacy (Boon-Kuo et al. 2015, 116-119).



A second response on the part of donors and INGOs is to introduce counterterrorism clauses, security protocols and vetting procedures. The introduction of clauses demanding that NGOs actively exclude proscribed organisations and actors from their programmes has led to some refusing grants, while the introduction of stringent vetting procedures (The Guardian 2013b), which often require the collection of large amounts of personal information from programme staff and beneficiaries, has increased mistrust of the INGO community among those they seek to assist (Boon-Kuo et al. 2015, 122). According to documents leaked by Edward Snowden and released in July 2014 by The Intercept, data supplied to US intelligence agencies during partner vetting by USAID has been used to expand the Terrorist Identities Datamart Environment (TIDE) database, which now holds records on more than one million people, 95 per cent of them foreigners (Boon-Kuo et al. 2015, 42). These kinds of counterterrorism frameworks do not merely create an administrative burden for NGOs; they actively enrol them in intelligence-gathering processes. Securitisation is also taking place within INGOs, who are instituting increasingly robust due diligence procedures including using companies like World-Check (see section 4.2) to screen staff, partners and beneficiaries against lists of proscribed individuals or entities.

## Chapter 6

# Conclusions: facing-up to the disabling environment

The FATF clearly has a legitimate role to play in combating money laundering and terrorist financing. Indeed, the urgent need for enhanced financial transparency was highlighted recently by the leak of the ‘Panama Papers’, which showed how easily proscribed individuals can circumvent international sanctions regimes using offshore schemes. The leak also highlighted the disproportionate approach taken to non-profits: those individuals and companies shown to be circumventing counterterrorism and political sanctions have not exploited NPOs but used accountants and tax-havens operating in plain sight of the authorities.

The repression of the so-called ‘Arab Spring’ galvanised ‘pro-democracy’ governments in the West into a reaffirmation of their commitment to supporting civil society organisations working under repressive and authoritarian regimes. In the USA, the State Department launched a Strategic Dialogue with Civil Society in 2011, and two years later President Obama launched the #StandWithCivilSociety campaign, “a global call to action to support, defend, and sustain civil society amid a rising tide of restrictions on its operations globally” (The White House 2014). In Europe, the EU established the European Endowment for Democracy and committed to “a more

strategic engagement with CSOs” that would include the mainstreaming of CSO dialogue across “all external instruments and programmes and in all areas of cooperation” (EU Council 2012). The UN too has committed to an ‘enabling environment for civil society’, one in which the activities of CSOs are facilitated by the legal and political climate. This is viewed as central to the realisation of its Sustainable Development Goals (SDGs), even if attempts led by civil society to make the ‘enabling environment’ a goal in and of itself were rebuffed (UN OHCHR 2015).

Despite the recent amendments, the need for scrutiny of the FATF’s counterterrorism and non-profit rules – and the way in which they are applied by states in practice – remains paramount. This is essential if states are to meet their commitments to establishing an ‘enabling environment’ for civil society and establish a coherent policy framework in which the new SDGs can be implemented. Whereas some governments are keen to talk-up the ‘enabling environment’, none are yet taking seriously enough the ‘disabling environment’ engendered by counterterrorism regimes. Although by no means the only factor contributing to the closing of political space for civil society, it is the only factor in which international organisations like the FATF are so



Counterterrorism measures directed against one group, religion or ethnicity have the potential to stigmatise whole communities, to fuel resentments and even to bolster support for terrorist movements.

clearly implicated, and hence, at least ostensibly, the easiest of those factors to ameliorate.

This report has examined the ways in which the FATF has impacted and continues to threaten the political space of civil society groups across the world. It has combined previous research with new insights in this area and synthesised concerns expressed by INGOs, non-profits and civil society organisations with those of the UN's human rights rapporteurs. Three particular findings stand out.

First, while it remains to be seen what impact the FATF's new 'risk-based approach' to terrorist abuse of the NPO sector will have on the application of Recommendation 8 and the evaluation of states' compliance with the standard, continued vigilance and critical engagement of its implementation is essential. Factoring 'civil society space' into the evaluation process may provide a degree of delegitimisation of such laws after the fact, but may not substitute for reform or repeal of the core assumptions and proscriptions that remain at the heart of Recommendation 8 - i.e. that certain NPOs are by default 'suspicious' and that regulation of the sector is the key to reducing the threat they pose. Aspirational commitments to freedom of association and expression and the importance of preserving the 'legitimate' activities of non-profits will not be sufficient to prevent further abuse of Recommendation 8 by states using counterterrorism as a pretext for enacting repressive legislation. Moreover, there is a danger that this kind of conceptualisation serves to safeguard larger, more established non-profits at the expenses of smaller CSOs and activist groups.

Second, whereas the FATF has stated that, "as a matter of principle", complying with its recommendations "should not contravene a country's obligations under international human rights law", it is clear that the FATF itself is at times directly responsible for pushing through problematic legislation that violates fundamental legal norms by threatening legislators with sanctions. If international human rights law is to be respected (and of course the FATF and its members have an absolute and unequivocal responsibility to do so) then concern for the adverse impacts of national legislation that has been adopted to implement FATF standards must extend from Recommendation 8 to other key counterterrorism recommendations. Given the wide extent of national legislation required by the FATF to comply with its standards - covering policing, criminal law, surveillance regimes, executive powers and administrative measures, including statutes with broadly defined offences and low evidentiary

thresholds - there is broad scope for states to adopt legislation that may be used to silence dissent or otherwise restrict fundamental rights. Yet for all the powers granted to states, the protection of fundamental rights is only mentioned explicitly in two of the 40 FATF recommendations, and only then in a very limited context.

Third, it is clear that further research is needed into both the scope and impact of 'de-risking' and the financial exclusion of the non-profit sector. However, even were the scope of the problem to be clarified, the possible solutions discussed to date have mirrored the limited ambitions displayed in respect to the problems that have arisen with FATF Recommendation 8. The kind of leadership that will ultimately be required to address problems of financial exclusion will also require a rights-based approach - one in which the onus will be on banks and regulators to provide financial services, and offer effective remedies in cases where these are denied.

## Chapter 7

# Recommendations

### To civil society organisations

- Document and share your experiences with respect to the impact of government regulations and counterterrorism policies on your work.
- Join the Global FATF NPO platform (see over) to support demands for the reform of FATF counterterrorism recommendations that impact civil society.

### To national/regional parliamentary assemblies

- Conduct enquiries into the impact of the closing of civil society space, de-risking and the financial exclusion of non-profits on domestic, foreign, and international development policy objectives.
- Scrutinise the activities and decisions of the FATF and ensure that your governments are accountable for the positions they take.

### To national governments

- Implement a rights-based approach to financial inclusion by providing guidance to banks to prevent the de-risking of non-profits. Support those subject to the denial of financial services through effective remedies and assistance in finding alternative service providers.
- Develop coherent positions on counterterrorism, fundamental rights, civil society space and international relief and development by engaging the ministries responsible. Ensure that they are not working at cross-purposes and are taking consistent positions across different intergovernmental fora.

### To the FATF

- Refrain from compelling states, upon threat of FATF sanctions such as grey/blacklisting, to adopt legislation that UN human rights bodies have deemed unacceptable from a fundamental rights perspective.
- Mainstream compliance with international human rights law and the development of an enabling environment for civil society throughout the FATF recommendations and Mutual Evaluation cycle.
- Provide civil society organisations and the non-profit sector with equal treatment to other organised interest groups by granting them formal FATF consultative status.
- Recognise the impact that de-risking is having on non-profits, 'suspect communities' and underdeveloped countries and address these problems by reviewing the FATF's due diligence requirements and issuing additional guidance as appropriate.

- Enhance transparency with respect to the enforcement of FATF standards by ensuring that all Action Plans agreed with national governments following FATF/regional FATF style-body evaluations are published and made available to parliaments and civil society organisations.
- Review the impact, legitimacy and effectiveness of terrorist blacklisting in the context of fundamental rights, the liability of relief and development organisations, and the use of 'off-shore' accountants and tax havens to evade sanctions regimes.



## Annex

# The Global Coalition of Nonprofits on the FATF

**The Global NPO Coalition on FATF** is a loose network of diverse nonprofit organisations that advocate for changes in FATF's recommendations affecting NPOs, particularly Recommendation 8, with the aim of eliminating the unintended consequences of FATF policies on civil society. Since 2014, four organisations, Charity & Security Network, European Center for Not for Profit Law, European Foundation Center and Human Security Collective have developed strategies, facilitated and coordinated the Coalition. They are supported by a core group of NPOs representing a wide range of interests across countries and regions

The Coalition **focuses on** a risk-based approach to preventing terrorism financing and improvement in the quality and effectiveness of FATF mutual evaluations without disrupting legitimate NPO activities. The advocacy agenda is driven by FATF's policy changes that require swift action and engagement by NPOs. The Coalition has established a constructive relationship with the FATF Secretariat, Policy Development Group and the Evaluation Group for exchange of ideas, enabling transparent engagement.

**Coalition achievements** so far include:

- Revision of Recommendation 8 and its Interpretive Note: the recent (June 2016) revision retracts the claim that the NPO sector is 'particularly vulnerable' to terrorist abuse.
- In-depth revision of the Best Practices Paper (June 2015), a policy guidance document that countries use to help them implement the standards.
- Formalisation of a risk-based approach, which means more proportionate and context-specific implementation of FATF standards.
- Establishment of a regular engagement between the FATF Secretariat and NPOs, which allows for more effective NPO participation.
- Awareness-raising and coalition-building at the global, regional and national level.

The Global NPO Coalition on FATF **communicates** via:

- this dedicated online platform ([www.fatfplatform.org](http://www.fatfplatform.org))
- twitter (@fatfplatform)
- email (from [npos@fatfplatform.org](mailto:npos@fatfplatform.org))
- conference calls, national, regional and global meetings.

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