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## **FATF SPECIAL RECOMMENDATION VIII: IMPACT ON COUNTERING TERRORIST FINANCING**

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### **A. INTRODUCTION**

Two international research institutes recently published a new report entitled *Counter-terrorism, 'Policy Laundering' and the FATF: Legalising Surveillance, Regulating Civil Society* (the "Report"),<sup>1</sup> which examines the global framework for countering terrorist financing which was developed by the Financial Action Task Force ("FATF") and other international law enforcement bodies.

The FATF, an inter-governmental body that sets anti-terrorist financing and anti-money laundering standards, has developed an internationally-recognized series of Recommendations for the regulation of the non-profit sector, which were first issued in 1990 and later revised in 1996, 2001, 2003 and most recently in 2012.<sup>2</sup> Canada has been an FATF member since 1990 and the FATF conducted an assessment of the implementation of anti-money laundering and counter-terrorist financing standards in Canada in February 2008.<sup>3</sup>

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<sup>1</sup> Transnational Institute and Statewatch, *Counter-terrorism, 'Policy Laundering' and the FATF: Legalising Surveillance, Regulating Civil Society* (2 March 2012), online: <<http://www.statewatch.org/analyses/no-171-fafp-report.pdf>>.

<sup>2</sup> See Nancy E. Claridge and Terrance S. Carter, *FATF Revises Recommendations on Combating Terrorist Financing* (29 March 2012) in *Anti-terrorism and Charity Law Alert No.30*, online: Carters Professional Corporation <<http://www.carters.ca/pub/alert/ATCLA/ATCLA30.pdf>>.

<sup>3</sup> The full *Mutual Evaluation Report of Canada* can be found online: FATF <[http://www.fatf-gafi.org/countries/a-c/canada/documents/name\\_1481.en.html](http://www.fatf-gafi.org/countries/a-c/canada/documents/name_1481.en.html)>.

The 68-page Report co-authored by the Transnational Institute and Statewatch includes a thorough examination of the impact of FATF's "Special Recommendation VIII" on countering the threat of terrorist financing said to be posed by non-profit organizations ("NPOs"). This *Anti-terrorism and Charity Law Alert* provides a brief summary of the Report.

## B. SPECIAL RECOMMENDATION VIII

FATF's "Special Recommendation VIII" ("SR VIII") states that:

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

- (i) by terrorist organisations posing as legitimate entities;
- (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.<sup>4</sup>

For the purposes of SR VIII, "non-profit organisation" is defined as a "legal entity or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of 'good works'".<sup>5</sup>

In the *Interpretative Note to Special Recommendation VIII*, the FATF sets out specific measures that countries should implement to regulate their respective non-profit sectors: (a) outreach to the NPO sector concerning terrorist financing issues, (b) supervision or monitoring of the NPO sector, (c) effective information gathering and investigation, and (d) effective capacity to respond to international requests for information about an NPO of concern.<sup>6</sup> Each of these measures contains a corresponding set of specific actions that participating countries should take in order to become FATF compliant.

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<sup>4</sup> Financial Action Task Force, *IX Special Recommendations*, online: <<http://www.fatf-gafi.org/topics/fatfrecommendations/documents/ixspecialrecommendations.html#viii>> at VIII Non-profit Organisations.

<sup>5</sup> Financial Action Task Force, *FATF IX Special Recommendations* (October 2001), online: <<http://www.fatf-gafi.org/media/fatf/documents/reports/9%20Special%20Recommendations.pdf>> at 21.

<sup>6</sup> *Ibid* at 22-24.

### C. THE REPORT

SR VIII encourages participating countries to introduce government licensing or registration procedures for NPOs, ensure transparency and accountability of NPOs, introduce financial reporting systems, exchange such data with law enforcement agencies, and impose sanctions for non-compliance. The Report points out that this kind of regulation is not without its problems where the FATF measures disrupt and discourage legitimate charitable activities. Community organizations, non-governmental organizations, charities and human rights groups face suspicion, coercion and outright hostility from the state, meaning that the SR VIII can and does have profound negative consequences.

The Report argues that “a lack of democratic control, oversight and accountability of the FATF has allowed for regulations that circumvent concerns about human rights, proportionality and effectiveness” and legitimizes coercion and repression.<sup>7</sup> The FATF evaluation system has endorsed some of the most restrictive NPO regulatory regimes in the world and encourages governments to introduce new rules that are likely to restrict the political space in which NPOs operate. Such highly restrictive regimes make it difficult for organizations working on human rights issues and democratic reform to operate, let alone play a meaningful role in society. As a result, NPOs around the world face unprecedented attacks on their autonomy, ability to operate and the right to provide international assistance.<sup>8</sup>

The Report further argues that “[i]n elaborating an international law enforcement framework that contains no meaningful safeguards for freedom of association and expression... the current FATF regime is facilitating and legitimising these more nuanced forms [of] NPO/CSO repression.”<sup>9</sup> The Report comments that:

research has documented the way in which many less developed and less democratic states already make it very difficult for NPOs to operate without undue restraint; many of their governments now have the express endorsement of the FATF, World Bank or IMF to introduce or expand regulatory frameworks that facilitate their intrusions into activities of NGOs and civil society organisations.<sup>10</sup>

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<sup>7</sup> *Supra* note 1 at 9-10.

<sup>8</sup> *Ibid* at 10.

<sup>9</sup> *Ibid* at 10.

<sup>10</sup> *Ibid* at 36.

The Report questions that the current “top-down, ‘one size fits all’ approach to NPO regulation” is appropriate and proportionate to the vulnerabilities and exploitations of NPOs for anti-terrorist financing purposes.<sup>11</sup> The Report asks if “the framework for NPO regulation elaborated by the FATF [is] commensurate to the actual threat of terrorist exploitation of non-profit organisations?”<sup>12</sup> The SR VIII regime is not based on proportionality as the available evidence does not support the proposition that terrorist financing is a major problem across the world.<sup>13</sup> The SR VIII regime was created to review the adequacy of laws to address potential vulnerabilities of NPO sector to abuse by terrorism, but instead has gone beyond that to requiring states to regulate their NPO sector as a whole.<sup>14</sup>

As the Report suggests, when the entire FATF regime is taken together, what is evident is a dense web of international law and policy converted into national rules and regulations with endless bureaucracy and a shield from accountability. The Report calls for wide-ranging urgent reforms that will halt international counter-terrorism legislation from continuing to restrict the political space in which people exercise their democratic freedom to organize, debate, campaign, protest and attempt to influence those who govern them.<sup>15</sup>

The Report speaks of the fact that the FATF is not regulated by any formal legal agreement. In the Report’s recommendations for change, it calls for the FATF to recognize the crucial role of civil society in developing effective and proportionate counter-terrorism policies, and begin an active dialogue on SR VIII with NPOs and human rights experts.<sup>16</sup>

#### D. COMMENTARY

The Recommendations on countering terrorist financing are undermining the legitimate charitable activities of many NPOs and are preventing such activities from continuing to flourish. SR VIII does not incorporate basic humanitarian principles and instead creates tension between anti-terrorist financing efforts and principles of humanitarian action. The FATF regime requires only a *suspicion* of terrorist financing through an NPO before there is a “need to undertake immediate and effective actions to advance the immediate

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid* at 11.

<sup>16</sup> *Ibid* at 38.

interest of halting terrorist financing or other forms of terrorist support provided by NPOs”.<sup>17</sup> This opens the door to governments criminalizing social protest and clamping down on NPOs with little or no provocation on their part.

Some measures recommended by FATF, taken together, promote rules that are impractical and often impossible for NPOs to implement. For example, an NPO handing out food into an overcrowded refugee camp cannot do a background check on every individual receiving a meal in order to determine whether there are any ties to supporters of terrorism. Even if this were possible, like the Report argues, basing aid eligibility on anything other than need would contravene basic principles of humanitarian action.

Like Canada, the U.S. also had an evaluation conducted on its anti-money laundering and counter-terrorist financing laws, regulations and other measures that have been put in place.<sup>18</sup> The U.S. is one of the few countries of the world that has been designated as “compliant” by the FATF for SR VIII.<sup>19</sup> Interestingly, the U.S. has some of the strictest counter-terrorism-related NPO regulations in the world.<sup>20</sup> The U.S. has also controversially prosecuted charities for “material support”,<sup>21</sup> “providing material aid and support to a terrorist organization”,<sup>22</sup> and has designated charities as “specially designated global terrorists” without affording basic due process.<sup>23</sup> And yet the U.S. is SR VIII compliant, making it a model for the regulation of NPOs, when the reality is that complying with the FATF Recommendations comes at an extremely high cost to human rights and the rule of law.

<sup>17</sup> *Supra* note 5 at 21.

<sup>18</sup> See *Mutual Evaluation of the United States* (23 June 2006), online: FATF <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf>>.

<sup>19</sup> *Ibid* at 5.3.3.

<sup>20</sup> *Supra* note 3 at 30.

<sup>21</sup> See Nancy E. Claridge and Terrance S. Carter, *Patriot Act/Holder Decision : Continued Concerns for Canadian Charities* (19 August 2011), in *Anti-terrorism and Charity Law Alert* No. 25, online: Carters Professional Corporation <<http://www.carters.ca/pub/alert/ATCLA/ATCLA25.pdf>>.

<sup>22</sup> See Nancy E. Claridge and Terrance S. Carter, *HLF Decision: Terrorist Financing Victory or Troubling Precedent for Charities?* (28 February 2012), in *Anti-terrorism and Charity Law Alert* No. 28, online: Carters Professional Corporation <<http://www.carters.ca/pub/alert/ATCLA/ATCLA28.pdf>>.

<sup>23</sup> See Nancy E. Claridge and Terrance S. Carter, *Due Process and Anti-terrorism Initiatives Worldwide – Recent Developments* (26 February 2009), in *Anti-terrorism and Charity Law Alert* No. 16, online: Carters Professional Corporation <<http://www.carters.ca/pub/alert/ATCLA/ATCLA16.pdf>>. See also Nancy E. Claridge, *KindHearts Charity Gets Favourable Settlement* (May 2012), in *Charity Law Update – May 2012*, online: Carters Professional Corporation <<http://www.carters.ca/pub/update/charity/12/may12.pdf>>.

## E. CONCLUSION

The FATF misrepresents the non-profit sector as a security threat, as there is little evidence to support the claims that are made. According to the U.S. Department of Treasury's data, U.S. domestic charities represent less than one percent of organizations with suspected ties to terrorists.<sup>24</sup> While the FATF's Recommendations are implemented internationally, by extension, the effects of those Recommendations are also felt internationally. In recent years, measures adopted to counter terrorism have themselves posed serious challenges to human rights and the rule of law, and international authorities have commented on the effects of anti-terrorism efforts.<sup>25</sup>

What is not being acknowledged is the "chill-effect" that international governments' implementation of the FATF's Recommendations have on the non-profit sector, and the inequitable resources that might be brought to bear against an NPO that has been imposed with intermediate sanctions as a result of a suspicion of terrorist financing. In many instances, an intermediate sanction, or even the threat of one might exhaust the resources of a charity in defending its reputation. It is a stark reality that few charities have the resources to properly defend the reverse onus that is placed on them with regard to accusations of impropriety in relation to terrorism.

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<sup>24</sup> See Nancy E. Claridge, *U.S. Treasury Data Confirms Charity Terrorism Threat Unfounded* in Charity Law Update- April 2012, online: Carters Professional Corporation <<http://www.carters.ca/pub/update/charity/12/apr12.pdf>>.

<sup>25</sup> See Nancy E. Claridge and Terrance S. Carter, *Effect of Anti-terrorism Laws on Humanitarian Aid Remain a Concern* (1 December 2011) in Anti-terrorism and Charity Law Alert No. 26, online: Carters Professional Corporation <<http://www.carters.ca/pub/alert/ATCLA/ATCLA26.pdf>>.