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Restrictive Laws:
How the FATF Is Used to Justify Laws That Harm Civil Society, Freedom of Association and Expression

The Financial Action Task Force (FATF) is an intergovernmental policy making body that sets counter-terrorist financing and anti-money laundering (CFT/AML) standards used in nearly 180 countries. Jurisdictions undergoing the FATF's compliance evaluation process are strongly encouraged to introduce specific laws and financial regulations, including Recommendation 8 (R8), on the operations and activities of non-profit organizations (NPOs), or risk serious economic consequences that could affect foreign aid, remittances, and trade.[1]

As part of its compliance assessment process[2] the FATF evaluates each country on its commitment to implement its entire legal and regulatory framework. Twice a year, in February and October, the FATF publicly categorizes the countries it monitors into three lists including the "gray list" for those making a high-level political commitment to address its CFT/AML deficiencies, the "dark gray list" for those with deficiencies but without a commitment, and the "black list" for those which are non-cooperative.[3]

This analysis shows the preliminary results of our ongoing research on the implementation of FATF standards, focusing on where R8 has been over-implemented in misguided attempts to score high in FATF assessments or outright abused by repressive governments seeking to quash political opposition. It is not an exhaustive list, and will be updated as our research continues. Commentary explaining why cited laws are problematic is included for each entry. For general background on freedom of association and expression see the April 2013 UN Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association.

Jurisdictions with Laws Harming Civil Society, Freedom of Association and Expression

Azerbaijan
Bangladesh
Bahrain
British Virgin Islands (BVI)
Kyrgyzstan
Nigeria
Russia
Sri Lanka
Turkey

Azerbaijan

Since 2009, a number of restrictive measures have been passed that effectively restrict the freedom of association and access to funding of Azerbaijani NPOs**.** The latest round occurred in February 2013 when the Azerbaijan Parliament introduced and passed amendments to the Code of Administrative Offenses, the Law on Grants, the Law on Freedom of Religion, and the Law on Non-Governmental Organizations. On March 11, President Ilham Aliyev signed the amendments into law.

Before the amendments were adopted, 62 Azerbaijani civil society leaders and organizations had sent a statement to Parliament asking it to reject the proposed amendments. "Past experience shows that if the proposed amendments to legislation are ratified, the role of the NPOs in increasing transparency and accountability of state agencies will be reduced and their impact on decision-making processes will be weakened," the statement said, in part.

The amendments put in place hefty fines on NPOs that fail to register grants with authorities in a timely manner and other restrictions on funding, such as penalties on accepting most cash donations. They also threaten the operations of many smaller and unregistered Azerbaijani NPOs that lack bank accounts and therefore will not be able to meet the new reporting requirements.

In an official justification to the proposed amendments, the drafters stated:

> The main purpose of the draft is to ensure transparency in the reception and usage of voluntary donations by NPOs and religious organizations, as well to enforce international obligations of the Republic of Azerbaijan in the area of combating money-laundering.

Effects of the new measures:

- *Increased penalties for NPOs that fail to register a grant*
  The current penalty for failure to register a grant is 1000-2500azn ($1275-3185). Under the proposed amendments, the penalty for legal entities will be increased to 5000-7000azn ($6370-8890) and NPO managers will also now be liable for the penalties in the amount of 1000-2500azn ($1275-3185).

- *Introduction of a penalty for failure to include donation information in financial reports*
  NPOs as well as representative and branch offices of foreign NPOs are subject to fines of 5000-8000azn ($6370-10200) for failure to include information about the amount of the donation and the donation's source in financial reports submitted to the Ministry of Finance. For NPO managers, the penalty is 1500-3000azn ($1900-3800).

- *Introduction of a penalty for donors giving cash donations*
  Any person or entity who provides a cash donation to an NPO (including to a representative or branch office of a foreign NPO) is subject to the following fines: 250-500azn ($320-640) for natural persons, 750-1500azn ($955-1910) for managers of legal entities, and 3500-7000azn ($4460-8920) for legal entities.

- *Introduction of a penalty for receiving cash donations*
  NPOs (including representative and branch offices of foreign NPOs) receiving cash donations are

subject to fines of 1000-2500azn ($1275-3185), while NPO managers are subject to fines of 7000-10000azn ($8920-12740). This excludes an NPO whose primary statutory goal is charity and whose cash donations amount to less than 200azn ($255)***

- *Definition of the term "donation"*
  Under the proposed amendments, "donation" is defined as "aid in the form of financial assets and (or) in other material form given to a NPO in accordance with this law without any contingency."

- *Requirement that donations to be paid by bank transfer*
  Donations must be made by bank transfer to the bank account of an NPO unless it is a NPO whose primary statutory goal is charity and it receives cash in an amount less than 200azn ($255).

- *Introduction of confiscation and a penalty for implementation of projects without a grant contract*
  The assets derived from an unregistered grant will be confiscated from the recipient NPO. In addition, such NPOs will be subject to penalties in the amount of 8000-15000azn ($10200-19100), and NPO managers will be subject to fines of 2500-5000azn ($3185-6370). These penalties apply to local NPOs as well as to representative and branch offices of foreign NPOs.

According to Azerbaijani legislation, in order to transfer grant funding, the parties must execute a grant contract and register it with the Ministry of Justice. To be valid, a grant contract must be concluded in written form and include the names and contact information for the parties to the contracts. In order for the contract to be registered with the Ministry of Justice, the signatures of the parties must be notarized, and the contract must be translated into Azeri. Penalties apply if there is no written contract that meets these requirements.

Commentary:

The harsh penalties and high level of government intrusion into NPO operations and restrictions on fundraising and use of resources in Azerbaijani law exceed what is necessary or reasonable to protect against terrorist financing or fraud. The UN Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association makes it clear that, "The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources...from domestic, foreign, and international sources." It notes that transparency and accountability regulations for civil society "must be the least intrusive means to achieve the desired objective."

Bangladesh

Despite already having an onerous NPO regulatory framework, in late August 2012 the Bangladeshi government initiated the process of establishing a new 11 member commission which, according to the International Center for Not for Profit Law, would be responsible for "bringing all non-governmental organizations under a single authority to hold them accountable and ensure transparency in their financial transactions." The commission would also draft a new law to regulate NPO activities, and be responsible for investigating any allegations of “anti-state” activities or “terror financing” carried out by NPOs and other voluntary organizations.

The drive for these changes is rooted in the country’s desire to be removed from the FATF sanctions list. "If we fail to regulate the unethical activities of the NGOs and micro- credit organizations, the country might be downgraded from the current 'grey list' to 'dark grey list' of FATF, one official said.

The NPO Affairs Bureau, which is a regulatory body authorized to coordinate and regulate the activities of civil society organizations operating with foreign funding, released The Foreign Donations (voluntary activities) Regulation Ordinance 2011 in January 2012. If enacted, it would:

- Prohibit individuals and organizations from receiving foreign donations/contributions for the purpose of carrying out any voluntary activity without prior government approval.
- Require all organizations wishing to receive and use foreign donations/contributions to register with the NPO Affairs Bureau.
- Require all organizations seeking to carry out activities with foreign donations to secure advance project approval.
- Require every NPO registered with the Bureau to establish a board of directors (consisting of at least 7 members) and a general board (consisting of 21 members).
- Penalize NPOs if the Director General of the NPO Affairs Bureau believes that NPOs are engaged in activities which are "illegal or harmful for the country".

Commentary:

These limits on foreign donations and government control exerted over NPO operations using foreign funds are inconsistent with the right of association. International human rights law does not limit the right to associate only with one’s fellow citizens, but to all people. The Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association makes a special point of such restrictions must be strictly limited to those necessary to protect national security or public safety, and even then, must be both necessary in a democratic society, proportional and the least restrictive means necessary to achieve a legitimate end.

The power to impose penalties on NPOs engaged in a very vaguely defined “harmful to the country” activities opens the door to politically motivated action against NPOs that may publicly criticize or disagree with government policy, thereby violating freedom of expression.

Bahrain

Despite having a relatively small NPO sector, with just over 420 organizations, Bahrain has an extensive regulatory framework governing it. According to the UK Charity Commission, the primary law regulating associations operating in Bahrain is the Law of Associations Decree No. 21, issued in 1989 and Decree No. 1 issued in 1990. The legal framework for NPOs contains specific rules covering issues such as licensing procedures, the funding sources of NPOs, and their relationship with government.

In June 2012, Bahrain officials began clamping down on NPOs as part of their efforts to meet international AML/CFT standards. Fatima Al Beloushi, Bahrain's social development minister, called on NPOs and other local groups to comply with the regulations concerning receiving or sending funds overseas. "The law clearly specifies that sending or receiving funds from abroad requires the approval of the ministry, and while societies in general have upheld the rules, others have failed to report the transactions," Al Beloushi said. She did not identify the NPOs which had not reported transactions with foreign entities, but described the dealings as "suspicious."

Commentary:

The need for government approval on foreign funding for NPOs, which implies it can be withheld, infringes on the right of association. As UN Special Rapporteur on the rights to freedom of peaceful assembly and association Kiai said "The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources...from domestic, foreign, and international sources."

British Virgin Islands (BVI)

The British Virgin Islands' (BVI) proposed Non-Profit Organizations Bill seeks to register and monitor the operations of all non-profit organizations in the BVI. Proponents of the bill, including Ronnie Skelton, the Minister for Health and Social Development, explicitly linked passage of the bill to meeting the recommended standards of the FATF. In October 2012, Skelton told members of the BVI's House of Assembly that adopting the bill would make the country more likely to be compliant with FATF standards in future assessments.

After recapping the history of FATF, the "Objects and Reasons" section of the bill states:

> Special Recommendations VIII (SR VIII) of the Financial Action Task Force (FATF) concerns non-profit organizations. It requires countries to review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism.
>
> When the Virgin Island's Anti-Money Laundering Combating the Financing of Terrorism regime was assessed by the Caribbean Financial Action Task Force (CFATF) in 2008, the Territory's non-profit organizations regime was evaluated not to be at the desired level.

Sections of the proposed bill of concern for non-profit organizations include:

- Section 11(1) would require the annual registration of all nonprofit organizations. The definition of a "nonprofit organization" includes a "body of persons" promoting "social purposes." Under Section 11(2), the penalty for failing to register is "a fine not exceeding fifty thousand dollars or imprisonment for a term not exceeding three years, or both."

- Under Section 23(2) and 23(3), a nonprofit with more than three employees must appoint a Money Laundering Reporting Officer. Under Section 23(4), and as confirmed by the FSC, nonprofits with less than three employees are required to "perform the Money Laundering Reporting Officer functions" though they need not appoint a MLRO. Under Schedule 3 of the bill, fines range from $3,000-$30,000 (including a $5000 for "failure to maintain any records required to be maintained"). This issue was a particular concern to smaller nonprofits, including those with all-volunteer staff.

- Under Section 24, organizations with gross annual income over $25,000 are required to submit audited financials.

Several organizations, both large and small, expressed distress over meeting the administrative and financial costs outlined in the bill if it's passed. These groups include ones working on crisis intervention, family support, a group cataloguing species of plants and animals, the local chamber of commerce, and the local "search and rescue" league.

Commentary:

UN Special Rapporteur Kiai notes that unregistered associations have protection under international human rights standards and "are eligible to access funding." He also notes that the International Covenant on Civil and Political Rights makes no distinction between registered and unregistered associations. The BVI universal registration requirement clearly violates freedom of association. The other provisions are unnecessarily burdensome and are disproportionate, violating the international law standard that requires restrictions on association to be both necessary in a democratic society, proportional and the least restrictive means necessary to achieve a legitimate end.

In addition, the BVI rules go beyond what the FATF's own Interpretive Note on Nonprofits (IN) recommends:

- IN para 3(e) which calls for a "targeted approach";

- IN para 6(b), which states that supervisory measures should apply to NPOs that account for a significant portion of the financial resources under the control of the sector, and a substantial share of the sector's international activities.

- IN para 3(b), which states that "Measures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities";

- The BPP, which states that oversight should be flexible, effective, and proportional to the risk of abuse. In addition, it states that "Small organisations that do not raise significant amounts of money from public sources and local based organisations or organisations who primary function is to redistribute resources among members may not necessarily require enhanced government oversight."

Kyrgyzstan

Kyrgyzstan's money laundering/anti-terror finance law, The Counteracting Terrorist Financing and Legalization of Proceeds from Crime, was adopted in November 2006 and amended in 2009 in accordance with the FATF's recommendations, according to the Eurasian Group (EAG) on Combating Money Laundering and Terrorist Financing, an FATF-style regional organization. The law creates a regulatory body which is directed to develop rules aimed at use of non-commercial entities and charitable operations for terrorist financing. Charitable financial transactions are among those listed as subject to “compulsory control,” which is defined as regulatory acts “in relation hereto on control over operations with financial means or property based on data provide by the entities engaged in such operations, as well as on check of such provided data in accordance with legislation of the Kyrgyz Republic.”

In April 2013, Kyrgyzstan’s financial investigative unit, the State Financial Intelligence Service, asked the legislature to pass a law to address the country’s AML/CFT deficiencies cited by the FATF in its February 2013 assessment, so the country can be removed from the “dark gray” list. These deficiencies include failure to: “adequately criminalizing terrorist financing” and “clarifying the legal framework for identifying, tracing and freezing terrorist assets.”

Possibly inspired by neighboring states like Russia, a member of Kyrgyzstan’s Parliament also called for checking the foreign funding sources for NPOs. “What’s their purpose here? What ideologies they have? They might be financed by terrorists. Their members get several thousands of dollars cash not through banks but in the U.S. Embassy,” MP Tursunbay Bakir uulu said.

Commentary:

If Kyrgyzstan moves in the direction of excessive control of foreign funding for NPOs, or if its regulations under the “compulsory control” provision of the 2009 are overly intrusive, there could be human rights issues. At this time we do not have sufficient information to comment.

Nigeria

Laws passed in 2011 on curbing money laundering and financing of terrorism in Nigeria are creating problems for the country’s non-financial institutions, including attorneys who say the laws violate the client-lawyer privilege. Under the requirements of The Money Laundering (Prohibition) Act 2011 and The Terrorism (Prohibition) Act 2011, attorneys must register with the country’s Special Control Unit against Money Laundering (SCUML), report financial transactions above certain levels to regulatory authorities, and establish internal AML/CFT policies and procedures.

According to *Emeka Nwadioke, a Nigerian attorney familiar with* The Money Laundering (Prohibition) Act 2011*,* several sections of the law are troublesome for lawyers. These include:

- “Section 5(1) says that non-financial institutions whose businesses involve cash transactions shall submit to the relevant ministry "a declaration of its activities." Section 5(1) (b) enacts that prior to any transaction involving a sum exceeding $1,000 or its equivalent (about N150, 000), the legal practitioner shall "identify the customer by requiring him to fill a standard data form and present his international passport, driving license, national identity card or such other document bearing his photograph as may be prescribed by the ministry." Section 5(1) (c) which enacts that the legal practitioner shall "record all transactions under this section in chronological order, indicating each customer's name, forenames and address in a register numbered and forwarded to the ministry."

- Section 6 directs legal practitioners to report suspicious transactions to the appropriate government agency within seven days, failing which they will be liable to N1 million fine for each day which the offence subsists (Section 6(9)). These customer identification and transaction records shall be preserved by the legal practitioner for at least five years (Section 7) and communicated on demand to authorities

- Section 9(2) says the license of legal practitioners may be suspended by the government for default in developing programs to combat money laundering.

- *S*ection 5(6) says entities who fail to comply with the law will be fined and could find their license to operate in jeopardy "by the appropriate licensing authority as the circumstances may demand."

Commentary:

The American Bar Association has said these laws "undermine the traditional role of state courts in regulating lawyers, erode the attorney-client privilege and interfere with the confidential attorney-client relationship, impose excessive new federal regulations on lawyers engaged in the practice of law, and impinge on the delivery of legal services in general."

These types of rules are not exclusive to Nigeria. Efforts to extend AML/CFT obligations on lawyers, real estate agents, accountants, or other service providers conducting transactions with undisclosed parties that affect national and international monetary systems, commonly called "Gatekeeper Rules," have been advocated by the FATF and other governments. But there has been pushback. In Canada, for example, a court ruling stopped the government from imposing similar style rules on attorneys after a 10 year legal battle that sought their reform. These rules infringe of the rights of attorneys, the judge found in her ruling, "because it puts both lawyers and their clients' liberty interests in jeopardy by requiring lawyers to collect and retain information about clients, and make the information available to the government to aid in combating money laundering and terrorist financing."

These rules are very similar to government imposed vetting requirements for non-governmental organizations receiving government grants to implement humanitarian or development programs. For instance, in the U.S. the Partner Vetting System, imposed in the West Bank and Gaza and in the pilot stage for expansion, requires grantee organizations to collect personal identifying information on the leaders and employees of local partner organizations and turn it over the U.S. government.

Russia

In Russia, a number of laws have been adopted in recent years that have had a chilling effect on NPO activities. According to a European Union coalition of civil society organizations, an NPO law adopted by the Duma in 2006:

- Increases the intrusive power of the state by allowing unprecedented control over independent NPOs;

- Creates an overly complicated registration procedure for NPOs and permit government officials to deny registration arbitrarily;

- Subjects NPOs to inspections and audits at any time and without limitation;

- Liquidates NPOs unable to obtain registration;
- Outlaws foreign representative offices;

Despite these severe restrictions, in 2008 the FATF found Russia to be only partially compliant with its standards. Since then, Russia has introduced additional measures, including one from July 2012 that requires NPOs that receive foreign funding to register as "foreign agents" and provide increased financial data to the government. Failure to comply with the law could result in four-year jail sentences and/or fines of up to 300,000 rubles ($9,200). Another law passed in October 2012 altered the definition of treason so that it allows the government to brand anyone or organization as a traitor. "This overly broad and vague definition seems deliberately designed to make people think twice before doing international human rights advocacy," said Hugh Williamson, Europe director at Human Rights Watch.

These laws opened the door for Russian authorities in March 2013 to raid hundreds of NPO offices across the country, including Amnesty International, Human Rights Watch, and Memorial, Russia's oldest human rights organization.

Commentary:

Victoria Nuland, the former State Department spokeswoman described the raids as a "witch hunt" against NPOs. "The sheer scope of these inspections now -- which are now, as I said, targeting not just NGOs who are subject to the changes under Russian law but also targeting civil organizations that are not subject to those laws, like religious organizations, educational organizations -- really gives us concern that this is some kind of a witch hunt," she said. "We think that these laws are extremely restrictive, that they are chilling the environment for civil society, which is taking Russian democracy in the wrong direction."

Sri Lanka

In June 2012, the FATF's assessment of Sri Lanka's compliance with its standards praised its "regulations to establish freezing procedures to implement [UN Security Council Resolutions] 1267 and 1373," but said the country needs to "address the remaining issue regarding adequate criminalization of terrorist financing" or the country would remain on the gray-list.

As a result, Sri Lanka's parliament amended The Suppression of Terrorist Financing Act No 25 of 2005 just days before the FATF's February 2013 meeting. The updated law gives authorities the power to seize property and other assets of suspected terrorists without first obtaining a court order. A previous version of the law only applied to recognized terrorist groups and property in the country. But now the law has been expanded to include individuals suspected of being a terrorist and any kind of assets whether tangible or not in or outside of Sri Lanka, going further than the standards found in FATF policy.

Opponents of the law said its definitions of the word "terrorist" and "act of terrorism" are so vague that they infringe on basic political expression. Ajith Kumara, an opposition lawmaker, said it could deny Sri Lankans the right to take their grievances to the United Nations or from "holding demonstrations or conducting hunger strikes to seek redress."

Commentary:

Freedom of expression is endangered by the volatile combination of a vague definition of terrorism and a narrow, technical approach to anti-terrorist financing laws. The result could be that asset freezing and other sanctions could be imposed on NPOs or individuals for political reasons, with the end result that FATF standards are implicated in human rights violations.

Turkey

Turkey's parliament adopted an anti-terror finance law in February 2013 under pressure from FATF, but it drew widespread criticism from civil society and opposition lawmakers who fear it will be used to wrongly label people or organizations as terrorists and freeze their assets without notice. Critics of the law say it expands an already overly broad definition of a terrorist organization, going further than the definition used by the United Nations, and that it allows alleged terrorist assets to be seized without first obtaining a judge's ruling. Prominent members of Turkish civil society say the law will impede the delivery of humanitarian aid.

Turkish politicians also voiced objections over the possibility of the law's misuse. "Considering the fact that those who oppose the ruling party have been put in jail for being 'terrorists,' a government-authorized commission will be able to freeze financial assets of all dissident media outlets, associations, companies, labor unions, political parties, businesspeople, foundations and trade bodies," opposition lawmakers said in their dissenting comments on the law. "Nobody should be surprised if an operation is launched against individuals who provide financial assistance to a dissident association," they added.

In October 2012 the FATF had said it would suspend Turkey's membership in late February 2013 unless the country adopted CFT legislation and established a "legal framework for identifying and freezing terrorist assets consistent with the FATF recommendations." Despite passing the law, the FATF says Turkey remains partially non-compliant.

Commentary:

As with Sri Lanka, above, freedom of expression is endangered by the volatile combination of a vague definition of terrorism and a narrow, technical approach to anti-terrorist financing laws. The result could be that asset freezing and other sanctions could be imposed on NPOs or individuals for political reasons, with the end result that FATF standards are implicated in human rights violations.

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[1] The FATF includes avoiding the risk of sanctions "or other action by the international community" as one of the benefits of following its policy. http://www.fatf-gafi.org/media/fatf/documents/reports/Global%20Threat%20assessment.pdf

[2] While the FATF does not make public a "white list" of countries, it is widely believed to include jurisdictions like the EU and Hong Kong, and the following countries: United States, Brazil, Canada, India, Japan, South Korea, Mexico, Singapore, Switzerland, and South Africa.

[3] As of February 2013, only North Korea and Iran are on the black list and do not participate in any FATF activities.