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Preventing the Financing of Terrorism

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PREVENTING THE FINANCING OF TERRORISM

*Richard Barrett**

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I. INTRODUCTION

Ten years after the terrorist attacks of September 11, 2001 (9/11), it is inconceivable that any terrorist group, let alone one connected with al-Qaeda, could raise enough money to mount an attack on a similar scale through donations. Furthermore, given the visibility and scrutiny of transactions conducted through the formal banking system, any financier of terrorism would take a huge risk today were he to transfer money to a known terrorist entity without covering his tracks.

Global terrorism is in decline. As far as al-Qaeda is concerned, the theories of people like Abdullah Azzam, who promoted the idea of global terrorism,¹ and of Osama bin Laden, who carried it out,² no longer appeal as

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¹ See, e.g., Asaf Maliach, *Abdullah Azzam, al-Qaeda, and Hamas: Concepts of Jihad and Istishhad*, 2 MIL. & STRATEGIC AFF. 79, 81 (2010) (“Abdullah Azzam designated the [first

they did. Even among the al-Qaeda leadership, the emphasis is now on action at a local level, or against the 'near enemy,' as it came to be called, rather than attacks on the 'far enemy.'³ Although some local groups certainly retain a capability to mount attacks elsewhere, they are less threatening to global peace and security than at any time since the beginning of the century. The association between terrorist groups that profess similar ideologies is now far more evident in their verbal communications than in any effective operational cooperation between them.

II. HAVE CFT REGIMES CONTRIBUTED TO THE DECLINE IN TERRORISM?

The first question: Is the difficulty that terrorist groups face in raising, storing and moving money connected to their increasing lack of viability?

It is tempting to say yes; and indeed many people do so without reservation, particularly those legislators and regulators who are the architects and supporters of the Counter Financing of Terrorism (CFT) regimes that now cover most of the world.

A. *Progress and Challenges in CFT*

There has been a huge investment in countering the financing of terrorism as a result of regulations introduced since 9/11, most of it extracted from the private sector.⁴ Almost all of this effort has focused on terrorist financing through the formal banking system, with some more recent attempts to include other money or value transfer services, cash couriers and the not-for-profit sector.⁵

wave of jihad supporters] as the force to implement the global Islamic jihad doctrine that he preached in Afghanistan.”)

² See *id.* at 90 (discussing Bin Laden's adoption of Azzam's philosophies).

³ See Murad Batal al-Shishani, *Al-Qaeda Leader Targets "Near Enemy,"* ASIA TIMES (June 17, 2001), http://www.atimes.com/atimes/south_asia/mf17df01.html (discussing the thematic shift in speeches and other materials from "far enemy" to "near enemy" among emerging al-Qaeda leadership after bin Laden's death). *But see, e.g.,* Ken Sofer, *The Evolution of Terrorism Since 9/11*, CENTER AM. PROGRESS (2011), http://www.americanprogress.org/issues/2011/09/evolution_of_terrorism.html (discussing bin Laden's focus on the "far enemy" and noting that, even after bin Laden's death, al-Qaeda is one of the few U.S.-recognized, transnational terrorist groups).

⁴ See Sir James Sassoon, Pres. Fin. Action Task Force, Keynote Address at the Countering Financing of Terrorism Seminar 4 (Feb. 12, 2008), available at <http://www.oecd.org/dataoecd/60/51/40144609.pdf> (discussing the importance of working with the private sector because of the significant impact on and role of the financial sector in combating terrorism financing).

⁵ See FIN. ACTION TASK FORCE [FATF], TERRORIST FINANCING 11–26 (2008) (outlining the variety of ways terrorists acquire and transfer funds and the need to regulate these outlets).

Not only have CFT regulations made it harder for potential donors to send money to terrorist groups, but along with the introduction of new rules in areas such as customer due diligence, they have raised awareness of possible terrorist financing among front end staff at banks and other financial institutions.

The 9/11 Commission found that the nineteen hijackers responsible for the attacks in the U.S. on September 11, 2001 had opened bank accounts, established inter-connected drawing rights, received several international money transfers and generally paid little heed to the possibility that their financial activity might alert anyone to their plans.⁶ There is no doubt that if an investigator had had reason to suspect one member of the group, given time, he could have unraveled the plot, as well as its overseas sponsors, with the help of relevant banking records. Indeed, the hijackers were so unconcerned about surveillance of their financial transactions that they made arrangements to return any surplus in their accounts at the time of the attacks to the al-Qaeda central pot.⁷

If there was a failure to connect the dots before 9/11, it was not in the area of investigating al-Qaeda's financial arrangements. The nineteen hijackers did nothing that stood out or was in any way illegal. Even in the state of high anxiety and raised awareness that followed the attacks of September 2001, similar transactions would very likely have gone unnoticed.

This may be less true in 2012, but in the millions of transactions that take place every day, it generally requires an additional piece of information to draw one's attention to any specific activity, even in the formal sector. The search for terrorist financing indicators, as shown by the study conducted by Professors Sue Eckert,⁸ Richard Gordon⁹ and Nikos Passas¹⁰

⁶ See JOHN ROTH, DOUGLAS GREENBURG & SERENA WILLE, MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 52–53 (2004) (providing an extensive overview of the funding mechanisms prior to 9/11).

⁷ See *id.* at 141–42 (discussing the return of funds to al-Qaeda after the 9/11 attacks).

⁸ Professor Sue E. Eckert is a senior fellow at the Watson Institute, Brown University's center for research and education on global security and international political economy. Her current research focuses on issues at the intersection of international security and political economy—terrorist financing, targeted sanctions, cybersecurity, and critical infrastructure protection. At the Watson Institute, she co-directs the projects on Terrorist Financing and Targeted Sanctions and a new cybersecurity initiative. Ms. Eckert works extensively with U.N. bodies to enhance the instrument of targeted sanctions, having participated in series of multilateral initiatives (the Interlaken, Bonn-Berlin, and Stockholm Processes), and organizing workshops and simulations for the Security Council. From 1993 to 1997, as Assistant Secretary of Commerce for Export Administration, Ms. Eckert was responsible for U.S. dual-use export control policy and defense industrial base programs.

⁹ Professor Richard Gordon teaches courses on corporate governance, financial sector regulation, money laundering and terrorism financing, and international and comparative taxation at Case Western Reserve University. Previously, Mr. Gordon practiced law at Dewey Ballantine (now Dewey & LeBoeuf) in Washington and taught at the School of Oriental

through 2010 and 2011,¹¹ on the information available to them, has turned up little that could be used as a guide to CFT. They have found a similarity between money-laundering techniques and some financing of terrorism techniques, but nothing that reliably indicates the latter.¹²

Every terrorist attack needs funding, and any attack, even those perpetrated by an individual acting on his own, will involve some form of detectable financial transaction. On many occasions this will pass through the regulated financial sector and it is important that banks and other financial institutions look out for anything that might give intelligence and law enforcement officials a useful lead.

B. *Terrorist Fund-Raising*

Where and how terrorists raise money is as important to their security and their ability to mount attacks as how they move it and store it. Raising and spending money involves people and transactions outside the terrorists' immediate circles, and therefore beyond their control. This is when they become more vulnerable to detection. Furthermore, donors, especially wealthy ones, have become more cautious about giving to terrorist

and African Studies of the University of London and the Harvard Law School, where he was Deputy Director of the International Tax Program. While at Harvard, Mr. Gordon completed extensive field work on law and development in both Indonesia and India and advised the government of Indonesia on the reform of tax, company, and securities laws. After leaving Harvard, he joined the staff of the International Monetary Fund (IMF), where he was both Senior Counsel and Senior Financial Sector Expert. In this capacity, he worked on a wide variety of issues, including governance, debt restructuring, financial integrity, and taxation. Following the 9/11 attacks he was appointed to the select IMF Task Force on Terrorism Finance and was a principal author of the report on the role of the IMF and World Bank in countering terrorism finance and money laundering.

¹⁰ Dr. Nikos Passas teaches at Northeastern University and specializes in the study of terrorism, white-collar crime, corruption, organized crime and international crime. He served as Northeastern University Press series editor on transnational crime and as associate editor on several journals. He is the editor of *Crime, Law and Social Change: An International Journal*. In 2005, he was elected to serve on the Board of Directors of the International Society of Criminology. He acts as a consultant to law firms, private security companies, prosecutors, defendants, and various organizations, including the World Bank, the IMF, the U.N. Centre for International Crime Prevention, the U.N. Office on Drugs and Crime, the U.N. Development Program, the Commission of the EU, the German Parliament, and government agencies from various countries, including the U.S. Department of Treasury and the U.S. Department of Justice. After September 11, 2001, Dr. Passas conducted research into the financial control of militant and extremist groups, trade diversion, *hawala* and other informal value transfer systems, crime vulnerabilities of the online payment infrastructure and financial misconduct hidden behind commodity trade transactions for the Financial Crimes Enforcement Network and the National Institute of Justice.

¹¹ SUE ECKERT, RICHARD GORDON & NIKOS PASSAS, REPORT ON TERRORISM FINANCING INDICATORS (forthcoming 2012).

¹² *Id.*

groups, as the risks to their livelihood, reputations, and even their liberty, have grown as investigators have increased their knowledge of terrorist groups and their scrutiny of their contacts.

Donors are growing more cautious about dealing with people they do not know. At the same time, the capture, death, and exposure of many old-time fund-raisers have forced terrorist groups to deploy new faces. There have been several cases reported where a fund-raiser has had his picture together with a known terrorist leader on his cell phone along with a message from the leader vouching for his *bona fides* to reassure a prospective donor that this is not an entrapment or sting operation.¹³

Donors are also increasingly aware of the gap between what terrorist groups promise and what they deliver. The non-violent mass protests of the Arab Spring have been more effective at challenging oppressive or unpopular regimes than terrorists have. Also, terrorist groups have become increasingly obsessed with local, inter-communal or inter-ethnic disputes that have nothing to do with fighting foreign intervention or combating government policies.

Therefore, terrorists have increasingly had to look to other ways to raise money, mainly by increasing their criminal activity. Kidnapping for ransom has become particularly popular, with the senior leadership of al-Qaeda also resorting to this method of fund raising. Al-Qaeda in the Islamic Maghreb, active in West Africa, has made hundreds of thousands of euros from kidnapping foreigners and demanding huge ransoms for their safe return. These acts have enabled it to fund its own activities, as well as the activities of Boko Haram in Nigeria.¹⁴

In addition to this income, Boko Haram has robbed banks, hijacked cars and raised money from other forms of violent crime.¹⁵ In Iraq as well, kidnapping, bank robbery and the robbing of jewelry stores are favored

¹³ Cf. Jonathan Wald, *Trial Begins for Alleged Terrorist Financiers*, CNN (Jan. 28, 2005), http://articles.cnn.com/2005-01-28/justice/yemeni.trial_1_qaeda-and-hamas-al-moayad-mohammed-mohsen-yahya-zayed?_s=PM:LAW (discussing the trial of terrorists whose defense accused the government of entrapment).

¹⁴ See *Al Qaeda in the Islamic Maghreb*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/organizations/a/al_qaeda_in_the_islamic_maghreb/index.htm (last updated Oct. 13, 2009) (discussing al-Qaeda kidnapping Westerners in order to finance terrorism efforts). Boko Haram killed over 250 people in January 2012 alone. *Boko Haram Killed 935 Since 2009—HRW*, VANGUARD (Jan. 24, 2012), <http://www.vanguardngr.com/2012/01/boko-haram-killed-935-since-2009-hrw/>.

¹⁵ See Nkrumah Bankong-Obi, *2011: Boko Haram is Nigeria's Demon of the Year*, NEWS NIGERIA (Jan. 2, 2012, 9:40 AM), <http://thenewsafrika.com/2012/01/02/the-demon-of-the-year> (discussing various violent acts of Boko Haram).

ways for al-Qaeda to raise money.¹⁶ Al-Shabaab, the Somalia-based group that achieved further notoriety in February 2012 when it was accepted into the al-Qaeda fold after more than three years of pleading, raises money from many sources: taxing local businessmen; mounting 'tolls' on roads under its control; participating in the charcoal trade; and operating the port of Kismayo, a main center for imports into and exports from southern Somalia.¹⁷

Terrorist groups therefore are still able to raise money, though less easily and more sporadically than before. For most terrorist groups, especially small cells in Western countries cut off from the larger groups and lacking their capacity to commit high-profile crimes, the retreat of donors has seriously undermined their capacity to mount mass-casualty attacks.

Nonetheless, terrorists remain active, and although we are unlikely to see another attack on the scale of the 9/11 attacks, the attacks that do occur are still devastating. The killings in Oslo and on the island of Utoya in Norway in July 2011, which killed seventy-seven and injured a further 151, were traumatic for more than the victims and their families.¹⁸ The perpetrator, Anders Behring Breivik, raised the money on his own and through credit card borrowing.¹⁹ His attacks were not cheap,²⁰ but others have committed terrorist attacks for almost nothing, and although perhaps less lethal, they were no less effective in drawing attention to their cause and raising levels of public anxiety.²¹

¹⁶ *Al-Qaeda in Iraq Looks for Fundraising Ideas*, TELEGRAPH (U.K.) (July 26, 2011), <http://www.telegraph.co.uk/news/worldnews/al-qaeda/8664536/Al-Qaeda-in-Iraq-looks-for-fundraising-ideas.html>.

¹⁷ Muhyadin Ahmed Roble, *Al-Shabaab Razes Somali Forests to Finance Jihad*, TERRORISM MONITOR, Nov. 18, 2010, at 5, 5–6, available at http://www.jamestown.org/uploads/media/TM_008_dadc5d.pdf.

¹⁸ *Norwegian Serial Killer Declared Insane*, SAVISTA MAG. (May 2012), available at <http://www.savistamagazine.com/news/norwegian-serial-killer-declared-insane>.

¹⁹ See Erica Alini, *The Meticulous Planning of the Oslo Massacre*, MACLEANS (July 28, 2011), <http://www2.macleans.ca/2011/07/28/the-meticulous-planning-of-the-oslo-massacre/> (reviewing Breivik's personal manifesto and noting his detailed recording of accounting, stock market options, savings, and other financial efforts in preparation for the attack).

²⁰ See *id.* (noting Breivik's meticulous financial recording, including trying to raise three million euros via the stock market, moving in order to save money on rent, taking out a credit card for an additional thirty thousand euros in funding, and selling personal affects for funding).

²¹ See, e.g., Vikram Dodd & Alexandra Topping, *Roshonara Choudhry Jailed for Life Over MP Attack*, GUARDIAN (Nov. 3, 2010), <http://www.guardian.co.uk/uk/2010/nov/03/roshonara-choudhry-jailed-life-attack> (describing Choudhry's stabbing attack on a former government minister in May 2010); *Kosovan Admits Shooting US Airmen at Frankfurt Airport*, BBC NEWS (Aug. 31, 2011), <http://www.bbc.co.uk/news/world-europe-14727975> (describing that Arid Uka's jihad inspired attack in March 2011).

C. *Assessing the Threat from Terrorism*

Although terrorists cannot be starved of all financial resources, and can mount attacks at their own expense and at little cost, the threat from terrorism, especially in Western countries and regions like Southeast Asia, has declined dramatically since 2007.²² In fact, there has not been a major terrorist attack in a Western country—apart from the Breivik attack—since the London bombings of July 2005.²³

The reason for this decline is a combination of factors, mostly a growing appreciation among vulnerable communities that terrorism does not deliver what its proponents advertise. Furthermore, apart from this lack of credibility, terrorist groups have lost any claim to legitimacy. Terrorism in Muslim-majority countries in particular, such as Iraq and Pakistan, does far more harm to the community it professes to defend than to any real or imagined enemy. The justification for terrorist activity is increasingly exposed as bogus and unsubstantiated, even by those who agree with its stated aims. The third area where terrorism has lost momentum is in the growth of popular, non-violent movements and the evidence of their success.

This is not just a factor of the Arab Spring, although the examples of Tunisia and, perhaps to a lesser extent Egypt, have shown the irrelevance of violence to the achievement of lasting political change. The spread of social media and the ability of oppositionists to find each other and join forces have empowered new groups of activists all over the world and amplified their voices. It was no more likely that al-Qaeda flags would be seen fluttering above the crowds in Tahrir Square, or on the streets of Tunis, than it was that they would appear in Zucotti Park in New York or at other Occupy Wall Street venues, or during the anti-corruption protests in New Delhi led by Anna Hazare. During these demonstrations, there has also been very little unprovoked use of force against the authorities.

This spread of popular, non-violent protest has challenged the relevance of al-Qaeda and other terrorist groups that claim to be the only effective vanguard of change. Aiman Al Zawahiri has said repeatedly that real change in Egypt is not possible without violence, but the protestors in Cairo achieved more in a few months than he has achieved in a terrorist

²² Stephen Fidler, *EU Terrorist Attacks Continue to Fall*, WALL ST. J.: REAL TIME BRUSSELS BLOG (Apr. 26, 2012, 5:22 AM), <http://blogs.wsj.com/brussels/2012/04/26/eu-terrorist-attacks-continue-fall/>; see also NAT'L COUNTERTERRORISM CENTER, 2010 REPORT ON TERRORISM 8 (2011) ("Terrorist attacks in East Asia dipped to their lowest level in five years despite election-related attacks in Thailand and the Philippines.").

²³ Geoffrey Garrett, *A Costly Diversion*, AM. REV. (2011) ("There has been no major Islamist terrorist attack on the West since the London bombings more than six years ago.").

career that has lasted more than forty-five years.²⁴ Even where protests have turned violent, such as in Libya or Syria, terrorist groups have had no role in this process.²⁵

So I answer my question, whether the difficulty that terrorist groups face in raising, storing and moving money is the reason for their increasing lack of viability with a qualified 'yes.' These two things are connected, but not in a direct, cause and effect relationship. Terrorists are facing difficulties in all areas, not just financial. They have difficulty projecting their message, gaining support, proving their relevance and, most importantly, mounting major attacks.

III. ARE CFT REGIMES WORTH THE EFFORT?

The second question is: Are international initiatives to counter the financing of terrorism worth the effort and resources required?

It is inevitable that the bureaucratic response to a problem should lag behind the problem itself, and it is perhaps only now that the international community is beginning to work out the best approach to counter the financing of terrorism. Eight of the nine Special Recommendations of the Financial Action Task Force (FATF) on terrorist financing were adopted in October 2001;²⁶ commendably soon after the attacks of 9/11, but perhaps the worst time to craft an effective and balanced response.

A. *The FATF Standards and a Risk-Based Approach*

It was only in February 2012, after well over two years of consideration and debate, that FATF recast its forty recommendations on

²⁴ See President Barack Obama, Remarks on Egypt (Feb. 11, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/02/11/remarks-president-egypt>.

Egyptians have inspired us, and they've done so by putting the lie to the idea that justice is best gained through violence. For an Egypt, it was the moral force of non-violence—not terrorism, not mindless killing—but non-violence, moral force that bent the arch of history toward justice once more.

Id.; see also Jed Lewison, *President Obama on Egypt: "It Was the Moral Force of Non-Violence,"* DAILY KOS (Feb. 11, 2011), <http://www.dailykos.com/story/2011/02/11/942863-President-Obama-on-Egypt-It-was-the-moral-force-of-non-violence-> (noting that President Obama's assertion that the violence was no longer an accepted method of change was clearly a reference to al-Zawahiri).

²⁵ See *Syrian Protesters Take Inspiration from Libya*, USA TODAY (Oct. 21, 2011), <http://www.usatoday.com/news/world/story/2011-10-21/syria-clash-casualties/50855440/1> (observing that during revolutionary activities in each nation, the civilian protesters and the current regime were the sole, central players).

²⁶ *UN Instruments and Other Relevant International Standards on Money-Laundering and Terrorist Financing*, U.N. OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/money-laundering/Instruments-Standards.html> (last visited May 19, 2012). The ninth Special Recommendation was adopted in October 2004. *Id.*

Anti-Money Laundering and its nine Special Recommendations on Countering the Financing of Terrorism, and amalgamated them into one group.²⁷ This process provided a timely reappraisal of the Special Recommendations. Most notably, it emphasized the importance of states taking a risk-based approach to terrorist financing.²⁸ This means that states may do less in areas where they assess the risk to be low, though, conversely, they should do more where they see the risk as high.

The proponents of a risk-based approach have long argued that a blanket application of rules and regulations, especially in states with a less developed financial services sector, sets the stage for failure.²⁹ The near impossibility of achieving full compliance with all nine Special Recommendations, let alone of assuring effective implementation, may have led some states to try less hard to become at least partially compliant.³⁰ Where states are encouraged to focus on areas of particular vulnerability, and judged by their neighbors on their performance against those risks, they are perhaps more likely to achieve an appropriate level of protection.

FATF recommendations on terrorist financing are universally accepted as the standard for states to reach. The core FATF membership of

²⁷ See generally FATF, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION (2012) [hereinafter FATF INT'L STANDARDS], available at <http://www.fatf-gafi.org/topics/mutualevaluations/key/fatfrecommendations2012.html> (FATF final report consolidating the Forty Recommendations and the Nine Special Recommendations).

²⁸ See *id.* at 8 (recognizing the need for stronger requirements that also allow countries to tailor their approach in order to most effectively combat terrorism financing); see also Robert E. Elliott & Koker Christensen, Fasken Martineau LLP, *The Evolution of International AML and CTF Standards: A Review of the Revised FATF Recommendations*, FIN. INST. BULL., Mar. 15, 2012, at 1, available at <http://www.fasken.com/en/the-evolution-of-international-aml-and-ctf-standards-a-review-of-the-revised-fatf-recommendations/> (“The FATF Recommendations address new and emerging risks and, importantly, will allow countries to choose to implement a more flexible risk-based approach that would allow countries . . . to focus scarce resources on higher-risk areas.”).

²⁹ See FATF, RBA GUIDANCE FOR LEGAL PROFESSIONALS 9–10 (2008), available at <http://www.fatf-gafi.org/dataoecd/5/58/41584211.pdf> (stating adoption of risk based approach requires resources and expertise, development of procedures and systems, and personnel training).

³⁰ *Id.* at 8 (noting that the risk-based approach of the Recommendations should encourage resources to be used efficiently, but can sometimes lead to a “tick box” approach that focuses on regulation rather than combating terrorist financing). FATF and affiliated FATF-Style Regional Bodies conduct mutual evaluations of compliance with the FATF recommendations, scoring countries as Compliant, Largely Compliant, Partially Compliant or Non-Compliant. See FATF, ANNUAL REPORT 2010–2011, at 12–13 (2012), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/FORMATTED%20ANNUAL%20REPORT%20FOR%20PRINTING.pdf> (listing all FATF members and their compliance rating for each Recommendation).

thirty-four states³¹ includes all Permanent Members of the Security Council and all but two states members of the G20.³² Security Council resolutions encourage states to implement the standards and in all, including the membership of the FATF-Style Regional Bodies (FSRBs), over 180 of the 193 members of the U.N. have agreed to try to implement the forty FATF recommendations and to open themselves to an evaluation of their progress by their peers.³³

In the context of terrorism, the two most relevant FATF recommendations are Recommendation 5 on the criminalizing of terrorist financing,³⁴ and Recommendation 6 on targeted financial sanctions related to terrorism and terrorist financing.³⁵ These two recommendations, and their accompanying interpretive notes, set out a thorough set of principles for governments to follow. The interpretive note for Recommendation 6 explains in detail the criteria for designation under Security Council resolutions 1373 (2001) and 1267 (1999), both adopted under Chapter VII of the U.N. Charter, which require that states have the legal ability to impose a financial assets freeze against terrorists as defined nationally (1373) or by the Security Council (1267).³⁶ The note also has useful things to say about the need to do so “without delay,” which it recommends should mean in a matter of hours.³⁷ Recommendation 8 on non-profit organizations; Recommendations 14, 15, 16 and 32 on money transfer systems, including cash couriers, Recommendations 20 and 29 on Suspicious Transaction Reporting and Financial Intelligence Units, and Recommendations 36 to 40 on international cooperation are also highly relevant to an effective CFT regime.³⁸

³¹ *FATF Members and Observers*, FATF, <http://www.fatf-gafi.org/pages/aboutus/member-sandobservers/> (last visited May 19, 2012). The European Commission and the Gulf Cooperation Council are also members of FATF. *Id.*

³² *Compare id.*, and *Membership in 2012*, U.N. SECURITY COUNCIL, <http://www.un.org/sc/members.asp> (last visited May 19, 2012), with *G20 Members*, G20 INFO. CENTRE, <http://www.g20.utoronto.ca/members.html> (last visited May 19, 2012) (Indonesia and Saudi Arabia are G20 members but not FATF members).

³³ *See, e.g.*, S.C. Res 1617, ¶ 7, U.N. Doc. S/RES/1617 (July 29, 2005); *see also* Press Release, FATF, FATF Steps up the Fight Against Money Laundering and Terrorist Financing (Feb. 16, 2012), available at http://www.fatf-gafi.org/document/17/0,3746,en_32250379_32236920_49656209_1_1_1_1,00.html.

³⁴ FATF INT'L STANDARDS, *supra* note 27, at 8.

³⁵ *Id.*

³⁶ *Id.* at 43–44 (providing the legal basis for countries' to freeze assets as necessary).

³⁷ *See id.* at 122 (“The phrase *without delay* means, ideally within a matter of hours of a designation by the United Nations Security Council or its relevant Sanctions Committee.”); *see also id.* at 43, 49 (providing detail of circumstances that would require a country to act to freeze assets without delay).

³⁸ *See id.* at 4–5 (listing the Recommendations by number and name).

But the first two Recommendations, one on assessing risk and applying a risk-based approach, and the other on national cooperation and coordination, set the tone for the rest and are as significant as any other in terms of ensuring that the response in the financial sector is properly calibrated to the threat.

The issue that remains largely unaddressed is the methodology by which states and Designated Non-Financial Businesses and Professions (DNFBPs) should make their assessment of the threat.³⁹ The interpretive note to Recommendation 1 sensibly suggests that states should identify and assess their money laundering and terrorist financing risks on an ‘on-going’ basis, keep the assessments up-to-date, and have mechanisms to relay it to those that need it in both the public and private sector.⁴⁰ But when it comes to how to do all this, the interpretive note suggests only that countries take “appropriate steps.”⁴¹ However appropriate the steps, the destination can often remain elusive.

The interpretive note to Recommendation 1 also deals with the obligations for financial institutions and DNFBPs to assess the risk, and says that they should have “appropriate mechanisms” to provide these assessments to the competent authorities.⁴² The development and implementation of an effective risk-based model to counter the financing of terrorism depends on a close collaboration between national authorities and the private sector, drawing on the complementary skills of both groups; FATF rightly recognizes the importance of the public-private partnership in this respect.⁴³

However, a frank exchange between the public and private sector has not thus far proved easy, not least because of the difficulty of sharing classified information with a non-governmental body. But without some enhanced dialogue between national authorities who know about terrorism, and private sector experts who know about finance, it is unlikely that any risk assessment will be as rich as it needs to be to ensure sufficient and

³⁹ FATF INT’L STANDARDS, *supra* note 27, at 50, ¶ 6 (c) (providing only that countries should have mechanisms for financial institutions and DNFBPs to freeze assets, but no guidance in identifying the targeted assets). However, FATF is currently up-dating its guidance for states on risk-based analysis, and the World Bank is in the process of developing a Risk and Vulnerability Assessment Methodology and Tool.

⁴⁰ *Id.* at 32.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See FATF, FATF GUIDANCE ON THE RISK-BASED APPROACH TO COMBATING MONEY LAUNDERING AND TERRORIST FINANCING ¶ 1.6 (2007), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20ML%20and%20TF.pdf> (“The Guidance recognises that each country and its national authorities, in partnership with its financial institutions, will need to identify the most appropriate regime, tailored to address individual country risks.”).

proportionate counter measures, or, as the interpretive note for FATF Recommendation 5 puts it, action that is “effective, proportionate and dissuasive.”⁴⁴

B. The Role of the Private Sector

Effective CFT work depends on the active and committed involvement of the private sector. It is here that financial activity related to terrorism is most likely to become visible; and banks and related businesses are ideally placed to help in the detection and investigation of terrorist offences, given an appropriate legal framework and accepting the need to protect the privacy rights of the individual. Banks know where their customers are, where they have been, and often where they are going. They know their spending patterns and their sources of income. They know their business relationships and their job history.

Much of the private sector has been—and remains—an enthusiastic partner in trying to counter the financing of terrorism.⁴⁵ Banks and other financial institutions have been prepared to absorb the costs associated with complying with a raft of new regulations; they have effectively paid to turn away business. However, they have also looked to states for guidance, and in the absence of feedback on the value of their contribution and briefing on where their efforts could do most good, many private sector companies have fulfilled their CFT obligations as much out of fear of falling foul of the regulator as in the hope of making a significant contribution to the suppression of terrorism.

This is not a criticism. States cannot expect the private sector to have a better idea of what terrorist financing looks like than states do themselves. States generally only learn how a terrorist crime has been financed once it has happened and an investigation has turned up the information. Even then, the financing of one operation has rarely, if ever, replicated the financing of another. Also, where a terrorist attack has been funded by credit card fraud, or some other common form of crime, it has generally not been possible, even with hindsight, to find an indicator that might have suggested the true purpose of the offence.⁴⁶

⁴⁴ FATF INT'L STANDARDS, *supra* note 27, at 37.

⁴⁵ See generally David J. Rothkopf, *Business Versus Terror*, FOREIGN POL'Y, May–June 2002, at 52, 52–64 (describing the many ways in which the private sector will be central to the fight against terror).

⁴⁶ See Anne L. Clunan, *U.S. and International Response to Terrorism Financing*, 4 STRATEGIC INSIGHTS 1 (2005), available at <http://www.nps.edu/Academics/centers/ccp/publications/OnlineJournal/2005/Jan/clunanJan05.pdf> (noting that the use of funds for the planning and execution of a terrorist attack is often made of many small, individual, and legal transactions that cannot be linked to a crime until after the crime occurs).

To illustrate the problem, although bank staff and others who work in the financial sector are far more knowledgeable and better trained than they were ten years ago, and well-versed in the importance of customer due diligence checks and the system for reporting suspicious activity or transactions, their dedication has not resulted in any great number of disrupted plots. The reporting in the U.S. of nearly one and a half million incidents of suspicious activity under the Bank Secrecy Act⁴⁷ in 2011 (and not many less in 2010) may have helped move forward several terrorism-related investigations, but initiated only a tiny number of cases which led to a prosecution related to terrorism.⁴⁸

C. *The Importance of Proportionality*

It is right to ask then if all the effort demanded of both the public and private sector is worth the resources required. If the international community is to maintain public confidence in the efficiency and value of its CFT activity, it is important to ensure a general agreement that the measures taken to combat terrorism are proportionate to the threat. The reason that terrorism survives is that it can be a successful political tactic for groups that lack the capacity or support to oppose or promote policies through other, legitimate means. The objective of terrorists is to persuade a government or international organization to do something or to abstain from doing something by terrorizing their public constituency. Killing is a means to this end, not an end in itself. Terrorists will not do more than they have to in order to achieve their objectives.

If the main terrorist objective is to raise public anxiety to the level that forces governments to change their policies, it seems perverse that governments should help them do so. But public anxiety can be as responsive to terrorist counter measures as it can be to terrorism itself. The checks at airports have become routine; passengers accept them as part of the cost of travel, but they do not build the resilience of the travelling public to the idea of terrorism. These and other visible and less visible counter-measures, tend to suggest that terrorists are ubiquitous, and that they may strike at any moment, should we lower our defenses.

This is clearly not the case, but counter-measures seem to be increasing at the same time as both politicians and experts agree that the threat is in decline. The evolution of the bureaucratic response to the

⁴⁷ C.M. Matthews, *Fincen Says SARs Reached All-Time in 2011*, WALL ST. J.: CORRUPTION CURRENTS BLOG (May 14, 2012, 5:54 PM), <http://blogs.wsj.com/corruption-currents/2012/05/14/fincen-says-sars-reached-all-time-in-2011/>.

⁴⁸ See *Investigations Assisted by FinCEN Data: Involving SARs*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/news_room/rp/sar_case_example_list.html?catid=00002 (last visited May 19, 2012) (providing a comprehensive list of FinCEN's investigations involving SARs, with only two directly related to terrorism).

problem is lagging too far behind the evolution of the problem itself. It has become disproportionate to the threat. If the perception of disproportionality seeps into the public consciousness, the measures taken to protect society from terrorism, whether in the financial sector or elsewhere, will begin to lose their effect. Those responsible for implementing the rules will become less rigorous, and those responsible for complying with the rules will become less caring.

IV. DEVELOPING PROPORTIONAL TECHNIQUES

The third and final question is: How do we develop counter-terrorist financing techniques in a way that ensures their proportionality to the threat and the most effective use of resources?

It would be both politically and practically unacceptable to roll back the measures taken since September 2001 to counter the financing of terrorism. But just as FATF recommends that countries keep their threat assessment up-to-date,⁴⁹ so too must the international community keep its counter-measures up to date.

The best way to do this is by encouraging greater cooperation between states through regional and international consultations that also allow for input and reaction from the private sector. As well as introducing better mechanisms to ensure the proper sharing of information between agencies, governments should follow the lead of states that have exploited the potential contribution from, and understood the cost to, the private sector in designing and implementing CFT measures. Inevitably, the line is thin between rules designed to prevent terrorism financing and rules that are more generally intended to regulate the financial sector. States should be clear about their main objective, and where it is clearly focused on terrorist financing, they should be prepared to enlist the help of the private sector in spotting the opportunities for terrorist financing to go unnoticed.

Although by no means universally applied, the trend towards a more inclusive approach is noticeable in many countries.⁵⁰ FATF itself has placed great importance on consulting with the private sector, and led by example in the redesign of its forty recommendations.⁵¹ But old habits die

⁴⁹ FATF INT'L STANDARDS, *supra* note 27, at 85.

⁵⁰ *See id.* at 9 ("FATF is committed to maintaining a close and constructive dialogue with the private sector, civil society, and other interested parties, as important partners in ensuring the integrity of the financial system.").

⁵¹ *See* MARTIN SAUNDERS ET AL., CLIFFORD CHANCE, THE NEW FATF 40 RECOMMENDATIONS: A FRAMEWORK FOR THE FUTURE 4 (2012), available at http://www.cliffordchance.com/publicationviews/publications/2012/02/the_new_fatf_40_recommendationsframeworkfo.html ("The revised FATF Recommendations also recognise the difficulties that the private sector face in relation to data protection and privacy laws in relation to intra-group cooperation and reliance, and FATF have indicated that it is considering a coor-

hard, and there are still too many barriers to effective information sharing and consultation. Governments could do more to ensure that their security and intelligence bodies share information about terrorist trends between each other and with law enforcement agencies. Governments should also harness the commitment and expertise of the private sector in their overall efforts to combat terrorism.

Clearly, there are important confidentiality issues that limit the ability of states to share complete details of the terrorist threat with other governments, let alone with the private sector, just as there are privacy issues that quite properly limit the ability of the private sector to release information about their clients to the states. Within a proper legal and administrative framework, the public and private sectors could and should work more closely together, at a local, national and even at an international level.

A. *Keeping CFT Measures Flexible*

It is important that the expectations of what financial sanctions and other CFT measures can achieve remain realistic; they can only ever be just one dimension of a far wider counter-terrorism strategy. Perhaps forced in part by the steady evolution of CFT activity, but also in responding to opportunities as they present themselves, terrorists are constantly changing the ways by which they raise and use funds. The international response needs to be equally dynamic. Despite the work done by FATF, the basic framework, focusing on preventing the use of formal sector institutions for cross-border transfers of value, remains largely unchanged. Further work is necessary to ensure that alternative and new methods of financing terrorism, such as cash-couriers, stored-value instruments, and informal value transfer systems (IVTS), are properly considered and form part of the international regime.

CFT measures are considered to be among the most effective ways to limit the incidence of terrorism, yet the value of sanctions as a tool does not rate particularly high among them. In order to maintain public support for international and national sanctions, states should be ready to explain both the symbolic and practical value of this method of restricting financing, and ensure that the targets of the sanctions regimes are individuals and groups who are clearly affected by them. Sanctions are a fairly blunt instrument, but a flexible and dynamic approach can ensure that the collateral damage they cause is limited to the greatest extent possible,

minated process to further examine the issue.”). Also, the interpretive note to Recommendation 1, albeit in a footnote, recognizes the relevance of “supra-national” risk assessments to national action. FATF INT’L STANDARDS, *supra* note 27, at 32, n.1.

especially when applied in the nonprofit sector, where terrorist financing is hiding behind ostensibly charitable activity.⁵²

B. The Need to Share Intelligence

All CFT activity should take place according to a well-considered evaluation of the risks of terrorist attack. Just as CFT regulations address the international dimensions of terrorism, so too should the threat assessment. The FATF recommendations acknowledge this,⁵³ but intelligence is rarely shared beyond a bilateral basis, except between close allies.⁵⁴ The circumspection about sharing intelligence is based on a lack of trust and a desire to protect sources.⁵⁵

Good intelligence is both a valuable and tradable commodity, as well as being difficult to acquire, and it is hardly surprising that the traditions of secrecy are hard to break down. Even the best intelligence has no value unless it can be used, and intelligence on terrorist threats does not need to be guarded by the same rules as other political or commercial information. No state is in competition with another in the world of terrorism. The international consequences of an attack on any one country are well accepted, and it is in the interest of every state to collect and disseminate as much intelligence on terrorism as possible, provided that the mechanisms for doing so are robust enough to withstand discovery by the terrorists or their sympathizers, and provided that the supplying state is consulted before any action is taken based on the information.

Another advantage of sharing terrorist intelligence is that it offers an opportunity to put small snippets of information into a broader context;

⁵² See WATSON INST. FOR INT'L STUD., STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES 24–38 (2012), available at http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf (describing the current practices U.N. Security Council Sanctions Committee and how to improve the sanctions process in the areas of designation or listing procedures, procedural operations of the committees, and delisting procedures).

⁵³ FATF INT'L STANDARDS, *supra* note 27, at 11 (discussing the dimensions to consider under the FATF risk-based approach in assessing threats).

⁵⁴ See, e.g., *Welcome to the Technical Cooperation Program*, TECH. COOPERATION PROG., <http://www.acq.osd.mil/ttcp/> (last updated June 14, 2011) (“The Technical Cooperation Program (TTCP) is an international organization that collaborates in defence scientific and technical information exchange; program harmonization and alignment; and shared research activities for the five nations.”). Australia, Canada, New Zealand, the U.K., and the U.S. are all members of the TTCP, also known as the “five eyes” arrangement. DEP'T OF DEFENSE, CLASSIFICATION AND CONTROL MARKINGS IMPLEMENTATION MANUAL 42 (2008), available at http://qaisc.org/uploads/QAISC_DoD_Classified_Markings_Manual.pdf.

⁵⁵ See generally RICHARD A. BEST JR., CONG. RESEARCH SERV., INTELLIGENCE INFORMATION: NEED-TO-KNOW VS. NEED-TO-SHARE (2011) (reviewing the challenges and benefits presented by the information sharing environment).

to pool together pieces of information that on their own have little meaning or significance. Where the intelligence concerns possible terrorist financing, the involvement of experts from the private sector adds to the likelihood that the interpretation and context are correct.

Financial Intelligence Units (FIUs) have made enormous advances towards genuine cooperation, both in regional groupings and through the Egmont Group which incorporates the FIUs of 127 states.⁵⁶ However, in some countries the FIU lacks sufficient political support to contribute to its full potential, and in most countries FIUs, despite their specialist skills and knowledge, are not fully accepted as part of the intelligence and law enforcement structure that is charged with combating terrorism.⁵⁷ In addition to following and plotting trends in terrorist financing, FIUs could provide a useful means of bringing the public and private sectors into closer alliance. This role may develop, but it will probably follow successful local initiatives; national and international bodies should find ways to accelerate the process.

C. *The Focus of Future Effort*

The decline in the terrorist threat may lead in due course to the reduction of budgets for counter terrorism and the diversion of interest elsewhere, but the momentum created by the response to the attacks of 9/11 will not die away quickly. While it remains, we should accept that although the regimes set up to combat the financing of terrorism have not shown dramatic results, they have contributed to the current difficulties that terrorist groups face in raising, storing and moving significant amounts of money. Moreover, they have acted as a deterrent to donors.

However, the international community should use the breathing space before another major wave of attacks forces it back into over-reaction, to take a long hard look at what we are doing and why. We need to identify better ways to measure our successes and recognize our failures, and be quick to reinforce the former and change our methodology to eliminate the latter. We must ensure that action taken to combat terrorist financing is proportionate to the threat and reflects what is going on in the terrorists' world rather than in our own. Furthermore, we should draw on the investment made in all countries to understand how terrorists operate and what they plan to do. We can save a great deal of time, money and anxiety

⁵⁶ *List of Members*, EGMONT GROUP, <http://www.egmontgroup.org/about/list-of-members> (last visited May 19, 2012).

⁵⁷ See J.F. Thony, *Processing Financial Information in Money Laundering Matters: The Financial Intelligence Units*, 4 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 257, 277 (1996) (observing that anti-laundering tools are often seen as a political arm, rather than part of the law enforcement structure).

by sharing our experiences and knowledge, both within national and international governmental structures, and within the private sector.

Getting counter-terrorism right in all its aspects, including in countering the financing of terrorism, will not only lead to less terrorism, but also help build the resilience of the public to terrorist attacks. This will lower the impact of terrorism and reduce its attraction as a political tool. Our success will not necessarily come from further rules and regulations, it will come from ensuring that the rules and regulations that we do have, or introduce, produce the results that we want. This will require flexibility and regular reassessments of the cost effectiveness of what we are doing.