Asia Pacific Law Review

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rplr20

The Financial Action Task Force entrapped within hypocrisy and rhetoric: using India as a case study

Ishita Chakrabarty

To cite this article: Ishita Chakrabarty (2023) The Financial Action Task Force entrapped within hypocrisy and rhetoric: using India as a case study, Asia Pacific Law Review, 31:2, 402-427, DOI: 10.1080/10192557.2023.2181757

To link to this article: https://doi.org/10.1080/10192557.2023.2181757

Published online: 28 Feb 2023.

ASIA PACIFIC LAW REVIEW
2023, VOL. 31, NO. 2, 402–427
https://doi.org/10.1080/10192557.2023.2181757

The Financial Action Task Force entrapped within hypocrisy and rhetoric: using India as a case study

Ishita Chakrabarty [a,b]

[a]Geneva Graduate Institute of International and Development Studies (IHEID), Geneva, Switzerland; [b]Quill Foundation, Centre for Research and Advocacy, Delhi, India

ABSTRACT

This paper discusses the FATF and its relationship with other normative frameworks (security, human rights), and actors (states, private institutions, civil society). It explains how the FATF, was appropriated willingly by states, beyond the peer-pressure, or financial repercussions explanations. It finds that one of these reasons was that states could use them to their own benefit through 'rhetorical adaptation'. At the same time, it explains that the FATF's frameworks go beyond merely being 'vague and broad'; they are erroneous in terms of their methodology and contradict certain human rights such as the freedom of association, and the rights to due procedure. To illustrate this, it takes the case of India which has been coerced by the FATF to amend its security legislations to comply with its standards, but which has also instrumentally used these standards against minorities and political dissenters – particularly those that have organized themselves into some form of association (a segment specifically identified by the FATF as being vulnerable to money laundering and financing terrorism). Despite drawing attention to these issues, the FATF continues to operate with empty promises, and the standards continue to be supported and endorsed by the UN mechanisms, in what would otherwise be 'hypocrisy'. This is because the FATF and the UN too, operate within institutional and material limitations – in this case, that its primary members are states or (in fact) representatives of the states, for whom security and political expediency stand at the forefront. Under these circumstances, the organizational doublespeak is but necessary.

KEYWORDS

FATF and UN; terror financing; India; rhetorical adaptation; organized hypocrisy

I. Introduction

Sometime last year, Reuters correspondents published a Special Report over a 'little known G7 task force', the Financial Action Task Force or 'FATF', that has provided ammunition to authoritarian governments across the world, to target their critics.[1] The Report

CONTACT Ishita Chakrabarty ishita.chakrabarty@graduateinstitute.ch

[1]Angus Berwick, 'Special Report – How a Little-Known G7 Task Force Unwittingly Helps Governments Target Critics' *Reuters* (5 August 2021) <www.reuters.com/article/businessnews/iduskbn2f616z> accessed 17 January 2022.

covered regimes spread across Uganda, Serbia, Turkey and India, who had a similar trajectory of using repressive measures under the pretext of their international obligations towards anti-money laundering (AML) and counter terror financing efforts (CFT), as defined by the FATF standards.[2]

The FATF conceived as a 'club' of G7 member states grew from its modest beginnings in the early 90s, to a transnational regulatory body sitting at the heart of a financial crime governance network. Initially an 'obscure one year task force' meant to build a stronger anti-money laundering framework,[3] its mandate now covers terror financing and proliferation of weapons of mass destruction, alongside their incidental matters. The organization boasts of a limited membership – including the original G7 members and remains open to countries who exhibit in its terms, 'quantitative' and 'qualitative' merits[4] – but issues standards and recommendations that are supposedly universal. Unlike some international organizations which restrict themselves to recommendations, the FATF engages in enforcing its standards. It subsequently assesses member states on their performance across its standards, both in terms of their technical compliance, and effectiveness, and engages in regular follow-ups. As will be discussed later, although not explicitly expected to do so, non-members also have to comply with their standards or face significant financial exclusions.

Scholars in compliance theory have spent much ink in speculating upon the nature of these recommendations and standards – whether they are 'soft' law or 'hard' law, or an incidence of soft law 'hardening', and what informs their high rates of compliance by even non-state members, despite the ambiguity behind their binding character and intrusion into policy matters.[5]

Critical theory scholars more specifically, have focused on how the FATF is yet another tool of 'agency capture' and exhibits hegemonic tendencies in coercing the majority states to act in the minority's interests.[6] While a significant contribution, the discussions restrict their subject of analysis often to states – arguing that the composition of member states is skewed in favour of the great financial powers (like the US, EU) who expect the minority to follow the western imagery, that developing states may not possess requisite capacities to adapt, and that their priorities may be different from those of powerful actors. Whereas the percolating effects of the FATF's own standards in individual countries, and their interactions with the FATF, are far less explored.

A newer strand of scholarship, mostly led by the civil society (CSO) (Statewatch, CIVICUS, FIDH) has criticized governments, both authoritarian and democratic, who have unnecessarily broadened the scope of their legislations,[7] quoting the dictates of

[2]Dr Saby Ghoshray, 'Compliance Convergence in FATF Rulemaking: The Conflict Between Agency Capture and Soft Law' (2015) 59(3) NYLS Law Review 521, 522–23.

[3]Mark T Nance, 'Rethinking FATF: An Experimentalist Interpretation of the Financial Action Task Force' (2017) 69 Crime Law Soc Change 131.

[4]See, FATF Membership Policy <www.fatf-gafi.org/about/membersandobservers/fatfmembershippolicy.html> accessed 15 February 2022 (the FATF considers the 'strategic importance' of a country across indicators such as the gross domestic product, size of the financial sector, population, technical capacities, etc.).

[5]See, Doron Goldbarsht, *Global Counter-Terrorist Financing and Soft Law: Multi-Layered Approaches* (Edward Elgar, 2020); Chris Brummer, *Soft Law and Global Financial System Rulemaking in the 21st Century* (CUP, 2015); James T Gathii, 'The Financial Action Task Force and Global Administrative Law' (2010) J Prof Law 197, 200.

[6]Ghoshray (n 2) 532; Gathii (n 5).

[7]For e.g. see, Ben Hayes, 'Counter-Terrorism, "Policy Laundering" and the FATF: Legalising Surveillance, Regulating Civil Society' *Statewatch* (March 2012) <www.statewatch.org/analyses/no-171-fafpreport.pdf> accessed 15 February 2022.

an 'international organization' or an 'amorphous international pressure'.[8] The ambiguous terminology and broad scope within the FATF's standards, have legitimized government actions. They have allowed governments to only allege that an individual or entity has engaged in, or supports money laundering, or terrorist efforts, prior to a taking of punitive measures.[9] The scholarship criticizes the FATF's omission in taking any measures to remedy these allegations and to hold governments to account,[10] although it is not clear how far the FATF's mandate would allow it to do so.

This Paper uses the specific case of India and its continuing engagement with the FATF, to concretely show how such measures work in practice. Instead of relying simply on desk research, the Paper is largely drawn from situational familiarity over working with the non-profit sector. However, it does not fully adopt such a linear approach as the CSOs mentioned above. As opposed to their arguments over how governments are the primary actors in constraining civil liberties with the FATF's role only that of a bystander, in India's (an FATF member) case, the FATF actively pushed the government to adopt measures despite their resistance, a fact that was reported to the relevant Parliamentary committee formed to address human rights concerns stemming from counter-terror legislative amendments.[11] This accompanied by literature over how the FATF adopted a similar approach towards other states where human rights violations are prominent, shows how the FATF reacts despite cognisance of the situation.

A closer examination of its follow-ups process led to the finding that the FATF's standards not only contradict with its own claim of respecting state sovereignty under the risk-based approach (RBA), but also the core principles of other international organizations, including the United Nations (UN), which it closely collaborates with, and which itself pushes states towards FATF compliance. The RBA model in FATF standards theoretically implies that states have the liberty to put in place systems that are tailored to their specific circumstances and constitutional frameworks – if they abide by the minimum requirements and fulfil the broader aims of the AML-CFT regime. Some of these minimum or core requirements include criminalizing financing of terrorism, customer due diligence, reporting requirements, recording beneficial ownership etc.

While India can be an exceptional case, the FATF's own flawed methodology as observed through its Typologies Reports (which all states are supposed to refer to), or its Best Practices papers, also add to the problem. In that sense, 'encouraging' compliance[12] with one set of international obligations (security) effectively nullifies compliance with the other (human rights). More importantly, however, this exhibits a 'hypocrisy' or 'doublespeak' within organizations (UN) that espouse higher ideals. This does not imply that governments are not motivated to employ repression (or what the FATF describes as the 'unintended consequences' of its standards and incorrect implementation). Rather, it cautions against an oversimplistic approach.

To explain these related and reinforcing phenomena, this Paper engages in a multi-theoretical approach at two levels: the domestic, and the international. At the

[8]Guilherme France, 'The Impacts of AML/CFT Regulations on Civic Space and Human Rights' (April 2021) Transparency International & U4 Anti-Corruption Resource Centre 9.
[9]Ibid, 3.
[10]Ibid, 5.
[11]See, discussions in section IV.A. and V.
[12]Nance (n 3) 2 (discussing how the FATF practices 'experimentalist governance').

international level, Nils Brunsson's theory of 'organized hypocrisy'[13] (and its subsequent adaptation by Michael Lipson) and at the domestic level, Jennifer Dixon's theory of rhetorical adaptation[14] primarily underpin this paper.

The Paper however suffers from a set of limitations, some of which are inherent. For one, it is difficult to ascertain the veracity of reports such as the Mutual Evaluation Reports (MERs), which rely on information not publicly available, such as information provided by officials of the reviewed countries to their assessors.[15] Subsequent follow-up reports which assess the improvements made towards addressing any deficiencies identified in the MERs are also absent. The consultations are not fully transparent, and there are doubts as regarding the rules of engagement in these processes. Publicly available information on the FATF website is also restricted to responses to what the FATF perceives as 'high priority issues'.[16]

The Paper proceeds as follows: Part I introduces the concepts 'organized hypocrisy' and 'rhetorical adaptation' that form its core theoretical approaches; Part II introduces the FATF and the various mechanisms it has at its disposal to effect compliance, including the UN and other multilateral organizations like the IMF, and the World Bank; Part III, provides an overview of how the vagueness of the FATF standards have spelt doom for human rights (more specifically those of association and due process), how they have been instrumentally used by member-states; and finally, Part IV provides an account of the methodological issues underlying the FATF's standards, drawing from the all-too familiar academic and empirical knowledge of the implications that the 'security' rhetoric has had on individuals and communities, and thus the 'hypocrisy' of the FATF and UN mechanisms in nevertheless espousing it.

II. Theoretical underpinnings: the hypocrisy and the rhetoric

In his work on open organizations, Brunsson first introduced the concept of 'organized hypocrisy' to understand discrepancies between rhetoric and internal practice. While critics claim that these discrepancies between talks and practice only create confusion, and are motivated by personal interests, Brunsson normalizes this phenomenon. In his opinion, they are not only necessitated by material and institutional constraints but are also beneficial.[17] Brunsson and other supporters argue that even such hypocrisy could lead to a subsequent internalization of norms, and changes in the long run.[18] Brunsson therefore desisted from attaching any pejorative consequences to this practice.

[13]See, Charles H Cho and others, 'Organisational Hypocrisy, Organisational Facades and Sustainability Reporting' (2015) 40 Accounting, Organizations and Society 78; Oldrich Bures and Eurgenio Cusumano, 'The Anti-Mercenary Norm and United Nations' Use of Private Military and Security Companies: From Norm Entrepreneurship to Organized Hypocrisy' (2021) International Peacekeeping 579 (referring to Brunsson and Lipson's work).

[14]Jennifer M Dixon, 'Rhetorical Adaptation and Resistance to International Norms' (2017) 15(1) American Political Science Association 83.

[15]FATF, 'Procedure for the FATF Fourth Round of AML/CTF Mutual Evaluation' (updated Jan 2021) 10 <www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf> accessed 25 July 2022.

[16]For instance, public consultations were held in 2011, prior to the 2012 revisions to the Recommendations (latest set of revisions). Although the FATF received responses from states, private sector (financial institutions, non-banking financial professions, and NPOs), its response over the concerns raised, were limited to issues such as RBA, customer due diligence, politically exposed persons or PEPs, wire transfers, beneficial ownership, data protection, concerns of the NBFPs, targeted financial sanctions.

[17]Charles and others (n 13) 79.

[18]Ibid, 84.

Michael Lipson subsequently appropriated and transformed this theory to an IR approach, where he observed the hypocrisy of the UN in the course of its peacekeeping operations. More recently, Bures and Cusumano (2021) have adopted this framework in the same policy sphere to show how the UN despite leading debates over the prohibition on mercenaries and stigmatizing the use of private military security companies (PMSCs) (through its Working Group on Use of Mercenaries), has itself resorted to the latter's use, including from those companies who also provide private military services to their clients in conflicts. According to Lipson, this hypocrisy affects the UN's legitimacy since it is supposed to act exemplarily.[19] Bures and Cusumano note that when confronted with this fact, the UN acknowledged its practice but cited constraints, including increasing demands, unstable conflict-situations, and supply constraints in troops, as justifications.[20] They also note how the UN subsequently changed its normative outputs over the use of mercenaries and PMSCs – drawing distinctions between the two uses, modifying its criticism over the latter, and prescribing exceptionality to the latter's use by itself.[21]

Brunsson considered such hypocrisy to be inherent in organizations, comprising of multiple stakeholders with varied interests. Organizations need to manage these variable expectations to retain their legitimacy.[22] Accordingly, they put up two or more facades[23]: rational, progressive, and reputational, that deal with actions, decisions, and talks, respectively. The rational facade deals with the majority of the stakeholders who are concerned with the primary objectives for which the organization was set up, whereas the reputation facade manages moral concerns associated with other stakeholders,[24] who are not intricately involved with the organizations' main operations.[25]

Of course, there always exists a possibility that these facades may become too apparent, and diminish the very legitimacy that these organizations seek, since they indicate that the organization has no control over its organs. To prevent this, the organization engages in further hypocrisy, a phenomenon termed as 'meta-hypocrisy', which it passes off as 'organizational reforms'.[26]

Dixons' theory on 'rhetorical adaptation' is similar to 'organized hypocrisy' in that it frequently involves 'window-dress'-ing. Rhetorical adaptation is a common strategy that states employ to evade international pressure or criticism, and to avoid compliance. Dixon identifies four categories of such adaptation of which except one (norm disregard), all refer to a norm and manoeuvre accordingly.[27] These include norm interpretation, norm avoidance, and norm signalling.

Accordingly, states can accept the validity of the norm itself, but either interpret their actions variably (interpretation); or accept the raw facts but claim that their actions do not fall within the scope of the norm because a different norm that is hierarchically superior applies to their case (avoidance); or express support for the norm in general although they

[19]Bures and Cusumano (n 13) 8.
[20]Ibid, 2–3.
[21]Ibid, 3.
[22]Charles and others (n 13) 80 (referring to Brunsson's quote: 'modern organisations are particularly apt to pretend that they can satisfy series of conflicting demands').
[23]Ibid, 90.
[24]Ibid, 80.
[25]Ibid, 83.
[26]Ibid, 82–84.
[27]Dixon (n 14) 84.

themselves do not comply with it (signalling).[28] Dixon uses this theory to track changes in the specific case of Turkey's official position on the Armenian genocide: from outright denial, to acceptance of the incident as an unfortunate event, to arguments modelled as legal-rebuttals to the world at large. Turkey's position followed the trajectory of the norm against genocide and norms on accountability for genocide.[29]

The advantage of Dixon's theory is that it shows that states, like individuals, feel compelled to refer to the law, although across a scale. It is easier for states to refute norms which are weaker and not so much institutionalized, whereas for the stronger ones, it uses the norms' contents to accordingly manoeuvre.[30] A state accordingly engages in one or more kinds of adaptation.[31]

Another important contribution of this theory is that it separates 'internalisation of norms' from the act of compliance.[32] Thus, even if some states don't comply with the norms, there are hardly any concrete negative consequences. For instance, in Turkey's case, while the state continued to support victims of genocide elsewhere, Dixon observes it failed to 'walk the talk' itself. Nevertheless, this 'signalling' allowed other states to comfortably support it, or in other words, allowed immunity to Turkey. Domestically, rhetorical adaptation also shapes the society's understanding of events.[33]

With these frames of reference in mind, the next section approaches the FATF's origin, structure, nature, and interrelationships with other organizations.

III. Wielding the whip: FATF and compliance

This section discusses the founding of the FATF, initially as a US project and then as a joint US-G7 endeavour to counter crimes of concern to them. It shows how the AML-CFT regime was consolidated as a global project since the US thought that dealing with 'financializaton of security' and 'securitization of finance' had to be a global-commons approach. The section further discusses the enforcement mechanisms that the FATF has in place – both reputational and financial, which convinced states to join them. At the same time, the FATF regime, as Anja P Jakobi notes, promised states 'security', which is of interest to them.[34] In this way, the section will show that the AML-CFT regime is both, strong and institutionalized, so much so, that Jakobi notes it would be difficult to replicate it in other issue areas.[35] Under these circumstances and following Dixon's theory, states cannot get away with disregarding the norms (norm disregard), or with passively signalling their support for its contents (norm signalling). In fact, the FATF conducts a set of peer evaluations which are called as mutual evaluations, to test states on their technical compliance with the FATF standards, and effectiveness. Each round of review is succeeded by follow-ups. Under these circumstances, states can either rely on norm interpretation – which the theoretical flexibility the RBA offers

[28]Ibid, 85–91.
[29]Ibid, 87.
[30]Ibid, 85–91.
[31]Ibid, 87.
[32]Ibid, 84–85.
[33]Ibid, 91.
[34]Anja P Jakobi, 'Governing Illicit Finance in Transnational Security Spaces: The FATF and Anti-Money Laundering' (2018) 69(2) Crime Law and Social Change 173.
[35]Anja P Jakobi, 'Global Networks Against Crime: Using the Financial Action Task Force as a Model?' (2015) 70(3) International Journal 391, 401–03.

them or claim that they are committed to higher norms. The subsequent sections show what options states have chosen for themselves.

A. Preliminary observations

Existing literature is replete with how the US managed to convince the G7 states that illegal acts such as drug trafficking, which began as a sole concern to the US, were in fact a global issue. The FATF was born in 1989 as a one-year task force,[36] out of the US and G7 member states' desire to secure the integrity of the financial system from such illicit proceeds of crime (then imagined as proceeds from drug trafficking).[37] By 1990 it had developed a set of 40 recommendations over AML. In the following years, under the cover of securing the financial system from all 'external stressors' and 'preserving stability', the organization came to exercise authority over terrorism and non-proliferation – domains which under traditional imagination, had nothing to do with financial crimes. The only explanation proffered has been that the system aims at stopping the flow of funds and assets to terrorist entities, that could be used to perpetrate an attack.[38] In this way, the FATF consolidated for itself, a risk-based regime that did not require the commission of an offence or predicate crime.[39] This extension of a preventative FATF regime has itself been a point of contention, with some scholars sceptical about whether the costs associated with such a regime (such as false positives, financial exclusion, and underdevelopment), indeed outweighs the benefits (increases public confidence in the system or deters crime since it eliminates potential escape routes).[40] As will be subsequently discussed in the following sections, this is doubtful since the FATF's methodology is fallible, and despite undertaking some recent efforts such as the 2021 study on the 'unintended consequences' of FATF recommendations, these core flaws persist.[41]

The FATF's assumption of power largely coincided with the September 11 (2001) terrorist attacks and the 2008 financial crisis, that saw member states, especially the United States (US) take the biggest hit.[42] By 2009, the FATF had issued nine further recommendations (eight specific to terror financing) and it continued to follow thereafter with Guidelines and Interpretive Notes. The FATF Recommendations along with the Interpretive Notes and the Glossary of definitions, are collectively referred to as the 'FATF standards'. In 2012, it published a revised (integrated) set of the 40 + 9 recommendations that set the benchmark for states' actions.

Alongside, the FATF has been regularly involved in limited enforcement measures. But these are 'limited' only in terms of their legality. In practice, they constitute 'the farthest

[36]Note that in 2019, the FATF ministers adopted an open-ended mandate for the FATF, it is no longer a taskforce.
[37]Jakobi (n 35) 399; Mark T Nance, 'The Regime that FATF Built: An Introduction to the Financial Action Task Force' (2018) 69 Crime, Law and Social Change 109, 114.
[38]Mari Takeuchi, 'Non-State Actors as Invisible Law Makers? – Domestic Implementation of Financial Action Task Force (FATF) Standards' in Karen N Scott, Kathleen Claussen, Charles-Emmanuel Cote, and Atsuko Kanehara (eds), *Changing Actors in International Law* (Brill Nijhoff, 2020) 211.
[39]A predicate crime in the context of money laundering refers to a crime, the proceeds (i.e. money, wealth, assets) of which are illegal, and are sought to be hidden to prevent the operation of the criminal machinery.
[40]Nance (n 37) 110–12.
[41]'High Level Synopsis of the Stocktake of the unintended consequences of the FATF standards' (27 October 2021) <www.fatf-gafi.org/media/fatf/documents/Unintended-Consequences.pdf> accessed 15 July 2022.
[42]Hayes (n 7) 7.

reaching' international monitoring mechanism possible.[43] Initially these involved ad-hoc 'blacklisting' where it would publish a list of non-cooperative jurisdictions (NCCT) drawn from not simply member states, but also non-member states. Subsequently because of opposition, it moved to an assessment process that sought to be more 'cooperative'. Henceforth, member states would be theoretically ranked based on their cooperation and not actual effectiveness,[44] as a part of the International Cooperation Review Group (ICRG). Member states participate in Mutual Evaluations that involve on-site evaluations, interviews, and analysis of both technical aspects such as laws, regulations, institutions, and their personnel, as well as effectiveness. The effectiveness component is ideally aimed at assessing actual performance, by assessing results across '11 immediate outcomes' including factors such as responses to requests received or number of requests made to countries seeking implementation of their policies, number of suspicious transaction reports, extent to which authorities use financial information in investigations for evidence and are able to trace the financial flows.[45] However, as will be discussed in the last section, measurements across these 'outcomes' are short-sighted and challenging the reports compiled out of them, is an exceptional process.

The reports or MERs produced are discussed during plenary sessions, and the assessed states are offered an opportunity to explain their positions. MERs subsequently result in MER reports on state compliance across a spectrum – compliant, largely compliant (LC), partially compliant (PC) and noncompliant. Non-compliant states may also be subjected to grey list or in extreme cases, the blacklist.[46] These states are periodically reviewed afterwards to evaluate their progress along the spectrum.[47] Thus, although different in nomenclature, the ICRG and the NCCT are in practice, no different.[48] As Recommendation 19 explains, those complying by these standards are expected to apply 'enhanced' measures against those found deficient, including enhanced monitoring of financial flows, supervision of foreign branches and subsidies of financial institutions, or in extreme cases, termination of business relationships with persons (natural and legal) from such jurisdictions. As will be discussed in the following sub-section, these are some of the reasons offered as explanation for its wide acceptance and implementation ('implementation' here refers to adoption of the FATFs standards under domestic laws).

Besides this, the FATF also issues the Typologies reports, which provides expert guidance on identifying actual instances of financial crimes, and the best methods to respond to risks and abuses;[49] a Methodology paper that outlines the methodology used in the preparation of the MERs, and a Best Practices paper which although the FATF claims is not mandatory, offers guidance as to the implementation of its standards.[50]

[43]Nance (n 3) 8.
[44]Ibid, 10–13.
[45]FATF, 'Consolidated Standards on Information Sharing, Relevant Excerpts from the FATF Recommendations and Interpretive Notes' (updated November 2017) 31–32 <www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/Consolidated-FATF-Standards-information-sharing.pdf> accessed 20 July 2022.
[46]There are currently only two states under the blacklist – North Korea and Iran.
[47]For a brief overview of the processes, see, Ghoshray (n 2) 539–42.
[48]Goldbarsht (n 5) 75.
[49]Nance (n 3) 9.
[50]The FATF calls these as 'illustrative examples' offering additional guidance over higher and lower risk factors, and not mandatory. See, FATF, 'FATF Response to Public Consultation on the Revision of the FATF Recommendations' (2012) 2 <www.fatf-gafi.org/media/fatf/documents/publicconsultation/FATF%20Response%20to%20the%20public%20consultation%20on%20the%20revision%20of%20the%20FATF%20Recommendations.pdf> accessed 20 July 2022.

B. 'Encouraging' compliance

The FATF does not have a constitution or internal charter of its own.[51] Despite the non-binding character of its standards and recommendations, scholars explain that their compliance has been procured by the nature, content and preciseness of these standards; the FATF's liaison with other regional initiatives (FATF-Style Regional Bodies or FSRBs) to which non-member states have also subscribed; its technical expertise over the matters in which it seeks to establish standards; the overlap of its scope and definitional matters with those of other international organizations; its constant monitoring and follow-up mechanisms over the implementation of its standards; and finally, its endorsement by international organizations who possess legally binding authority, or for whom the following of its standards are a prerequisite to receiving financial aid and assistance.[52]

This does not mean that scholars have willingly accepted its standards. Rather, its legitimacy has been hotly contested. Even the most optimistic of accounts cannot deny, that the argument that its composition (led by powerful state actors) has bearings on the rules it formulates, has some merit.[53]

Interestingly though, those on the receiving end (norm addressees or states) have been nominally compliant with it. The existing literature has sought to explain this divergence between scholarly criticisms and state's tacit acceptance in terms of peer pressure, that is, the feeling of participation in an international forum. Others explain that states are more readily agreeable to these standards since they are issued not by state representatives themselves, but experts dealing in areas where the states lack know-how. Critical theory scholars like Gathii however remind us that although not state representatives in law, they are so in fact, and hence carry similar convictions as those of state actors.[54] Finally, a third and more dominant set of explanations is that states apprehend exclusion, in case they are found to be not compliant in the course of the monitoring process.[55] While not a direct sanction,[56] the Recommendations ask state parties to adopt enhanced measures while dealing with high-risk jurisdictions, thus raising compliance costs for private actors, and making the state appear unattractive for investment.[57] In fact, financial exclusion and de-risking, or denying financial facilities to certain states, have been prominent issues under the FATF regime. The FATF attributes certain functions such as records keeping, due diligence in identification and verification processes, to actors at each stage, and clarifies that each actor bears the ultimate responsibility for the implementation of its standards. Failing this, responsibility could arise in the form of administrative, civil, or criminal sanctions. During the consultations prior to the 2012 revisions, when this issue was raised by the private sector, the FATF dismissed them

[51]Gathii (n 5).
[52]Takeuchi (n 38) and Ghoshray (n 2) believe that the 'hardening' of otherwise soft law has to do with a combination of these factors.
[53]France (n 8) 3 ('without rejecting the criticism of democratic deficit and a lack of transparency … ').
[54]Gathii (n 5) 7–8.
[55]Doron Goldbarsht and Hannah Harris, 'Transnational Regulatory Networks: A Study in Compliance and Legitimacy in Counter-Terrorist Financing' (2020) 27:3 Journal of Financial Crime 855, 858–59. <www.emerald.com/insight/1359-0790.htm> accessed 15 November 2021; Ghoshray (n 2) 529–30.
[56]Nance (n 3) 5.
[57]France (n 8) 7, 15–16 (discussing de-risking where financial institutions such as banks, can exclude entire categories of consumers or sectors, since they consider it too risky or unduly hard); Ghoshray (n 2) 529–30. On the contrary, Nance (n 3) 5, considers these mechanisms as only an instance of 'penalty default' where the goal is to impose 'sub-optimal' conditions, so that they resume cooperation.

briefly by reminding them that they must do so irrespective of costs for the sake of their own reputation, unless there are situations of low risk that can be exempted.[58]

Thus, while reputational issues may have a role to play, it is predominantly the financial exclusion implications that have largely triggered states to comply. This has been confirmed by scholars conducting interviews of state representatives, financial actors, representatives of professions, over what they perceived as reasons for 'compliance'.

In the subsequent section over member-states' violations of human rights, the Paper will use Dixons' arguments to offer another reason, over why its addresses are active or passive recipients.[59]

Most importantly, from an international standpoint, the FATF cleverly imports terminologies from legally binding instruments, such as the Terror Financing Conventions, as if to show that the only way to comply with them, is to follow the FATF's precise standards.[60] Intermixed with these terminologies, however, are also enhanced measures or broadened scope, that creep into member-states' obligations. For instance, the FATF's interpretive notes and guidelines seek to define professions that could be covered under the term 'other professions involved in financial transactions', that are not defined under the original provision in the Terror Financing Convention.[61]

In this way, it establishes a circuitous relationship with UN organs – including the UN Security Council, the International Monetary Fund (IMF), and the World Bank – which themselves also direct states to refer to the FATF's standards. The G7 states had asked the IMF and the World Bank as early as in 2000 to join their efforts against AML-CFT in preparing a joint paper, elaborating their own roles. This was met at the time, with substantial resistance from developing countries who did not want aid based on further conditionalities, while other states who were members to these financial institutions, were concerned with the institutions' lack of expertise in this matter. This concern appears to have soon waned. By 2002, the executive boards of both these institutions had adopted the FATF standards and were even willing to offer technical assistance/advice to borrowing countries for compliance. Hereinafter, governments were to accept 'financial integrity' criteria as remodelled by the FATF standards, to attract development aid and private investment.[62] The FATF Methodology document also details how the international financial institutions' assessment of financial sectors (under the Financial Sector Assessment Programme) use FATF standards as their key elements. On this ground, the FATF also proposed that the MERs and the FSAP Reports be coordinated in time, and the latter draw from the former's key findings.[63] The FATF maintains an 'observer status' for the IMF, World Bank, OECD, regional development banks, the World Customs Organization, INTERPOL, and several UN law enforcement bodies.[64] Finally, experts at these financial institutions can also participate in the assessment of states who participate in the mutual evaluation processes.[65]

[58]FATF Response to the Public Consultation (n 50) 1, 4.
[59]See discussion, section IV.B.
[60]Takeuchi (n 38) 213.
[61]Ibid, 218.
[62]Hayes (n 7) 25.
[63]Procedure for the FATF Fourth Round (n 15) 21.
[64]Hayes (n 7) 16.
[65]Procedure for the FATF Fourth Round (n 15) 3.

In this way, the FATF works closely with the UN Office on Drugs and Crime (UN ODC), the UN Counter Terrorism Committee (UN CTC) and the UNSC's Sanctions Committee (1267, 1540 committees), and the UNSC resolutions have endorsed its standards on several occasions. In fact, in his report over the establishment of surveillance societies, Ben Hayes pointed out the identical nature of provisions, criss-crossing the security and finance realms or 'policy laundering'. He noted how the first assertion about NPOs being used for terror financing, made by the G7 in 1995, was subsequently taken up by the UNGA in its 1997 Resolution, and further incorporated as part of the Terror Conventions (Terror Financing Convention in 1998, and the UN Convention on Transnational Organized Crime in 2000).[66] Similarly, the US National Money Laundering Strategy adopted in 1999 referred back to the FATF and the FSRBs, and its PATRIOT Act became the template as Hayes argues, for the UNSC's Resolution 1373, infamous for constituting the 'most sweeping sanctioning measures' adopted at the time.[67]

In this way, the assistance measures, resolutions, recommendations, and conventions, all refer to one or more instruments to consolidate themselves within the global security-financing system. Recently, the UN SC resolution 2462 of 2019 urged states to implement the FATF's recommendations and interpretive notes.[68]

Having established the compliance effecting powers or influence of the FATF, and its close collaboration with other international organizations, the Paper now turns to a general assessment of the decline in human rights standards amongst states that have used the FATF's standards, and to a more specific narrative of the Indian situation, for reasons of the Author's professional familiarity. As mentioned before, this section will illustrate what options states have chosen for themselves between 'norm interpretation' and 'norm avoidance'. In the latter case of avoidance, the norm against which security concerns are assessed, is human rights.

IV. FATF standards: death knell for human rights?

In 2012, Ben Hayes authored a report under the aegis of the Transnational Institute and Statewatch, over the FATF's place in the global anti-terror mechanism, and states' 'policy laundering', that is, pushing ahead with policies internationally that states otherwise could not pursue domestically without backlash, and then using compliance as an excuse to pursue them.[69] The Report focused extensively amongst others, on Recommendation VIII, pertinent to the non-profit sector (NPOs), where the FATF described NPOs as 'particularly vulnerable to terror financing risks and abuses', requiring reviews over adequacy of laws and regulations related to their functioning, and its subsequent impact on the sector. This included laws relating to licensing, registration, reporting procedures, data exchanges and sanctions over non-compliance.[70] The FATF also misdiagnoses, in Hayes' conception, by recommending slashing of funds at the receiving rather than the disbursing end, where most often the NPOs at the disbursing end are registered in

[66]Hayes (n 7) 21–22.
[67]Ibid, 22.
[68]Ghoshray (n 2) 529.
[69]Hayes (n 7) 12.
[70]Ibid, 9.

relatively less democratic societies.[71] Contrary to their stated aims, Hayes' report concludes that the recommendations have resulted in increasing terrorism, that often seeps into voids where NPOs that act as mediators, are absent.[72]

Ironically, the FATF found countries such as Egypt and Tunisia, infamous for their treatment of the civil society sector, as compliant, alongside the US, Belgium, and Italy. For others, it recommended increased surveillance, introduction of specific criminal and data laws, industry regulations and regulatory cooperation.[73]

Hayes' report also mentions India but dedicates less than a quarter of a page within the Report to it.[74] Some of the newer scholarship, including the one by Professor Doron Goldbarsht, takes India as one of their six case studies, to look at implementation and compliance. However, Goldbarsht's analysis again ignores the realities of non-profit operation in the global south, instead relying solely on political statements, and riotous situations (common within the sub-continent) to justify greater counter-terror standards.[75] The following sub-section on the contrary shows the interesting example that India serves – as a model democratic state with adequate judicial reviews and a fairly clean slate over terror financing crimes, but which the FATF nevertheless pushed towards tightening of norms, and with which the state 'technically' complied. Before proceeding further though, it is important to remember that these concerns are also sub-issue specific. CSOs such as Transparency International have been advocating in favour of greater FATF intervention through clarifications (reducing flexibility for states) regarding stricter standards on beneficiary ownership and centralized registries for targeted sanctions.[76] This is why, the Paper refers to a sub-set of human rights that have seen widespread 'misapplication' and push often to their detriment, from the FATF – the rights to association (whether or not formally organized as a legal person such as an NPO), and due process.

A. Test-run for repression: the specific case of India and the FATF standards

India has held a 'conditional membership' within the FATF since 2010, committing to actively recalibrate its legal system in accordance with the financial body's dictates.[77] It submitted its application for membership in 2003 and was granted an 'observer status' in 2006. In 2004, it set up the Financial Intelligence Unit (FIU), an autonomous and specialized body contemplated by the FATF to receive, analyse, and coordinate information received from and between financial institutions and law enforcement agencies, especially over suspicious transactions.[78]

[71]Ibid, 7 ('Countries, notably the USA, where NPOs are providing grants to international recipients in especially sensitive areas … ').
[72]Ibid, 7.
[73]Ibid, 9.
[74]Ibid, 10.
[75]Goldbarsht (n 5) 103.
[76]Transparency International, 'Progress: Financial Action Task Force Adopts New Standard on Transparency in Company Ownership' (7 March 2022) <www.transparency.org/en/press/financial-action-task-force-adopts-new-standard-transparency-company-beneficial-ownership> accessed 18 July 2022.
[77]Parliamentary Standing Committee on Home Affairs, *160th Report on the UAPA Bill, 2011*, iii <https://prsindia.org/files/bills_acts/bills_parliament/2011/SCR_Unlawful_Activities_Prevention_Amendment_Bill_2011.pdf> accessed 18 January 2022.
[78]Standing Committee on Finance, *2011–2012 The Prevention of Money Laundering (Amendment) Bill 2011*, *56th Report* 9–10 <https://eparlib.nic.in/bitstream/123456789/64156/1/15_Finance_56.pdf> accessed 18 January 2022.

Following the submission of its first Action Plan and its first MER in 2009, where FATF and APG officials visited India for on-site evaluations and discussions over then existing laws, regulations, institutions, and their implementation and capacities,[79] the former found India non-compliant on at least three core recommendations – including criminalization of terror financing and confiscation of funds or property, and provisional measures.[80] Accordingly, India submitted a revised Plan where it identified amendments to its primary counter-terror legislation (the Unlawful Activities Prevention Act, 1967, or 'UAPA') and money laundering legislation (Prevention of Money Laundering Act, 2002, or 'PMLA') as medium term goals, in lieu of this conditional membership.[81]

When the executive proposed these FATF-directed amendments to the Parliamentary Standing Committee on Home Affairs, the Committee responded that the amendments, especially to the UAPA, and beyond the amendments already made in 2004 and 2008, could have 'far reaching implications'. The executive however responded that its hands were tied, considering how India's membership rested on these changes, and how non-implementation would effectively reduce its position, placing it on an enhanced follow-up list, and worse, attract sanctions.[82]

Both the 2004 and 2008 amendments were also necessitated by international commitments – the 2004 Amendment extended the scope of the legislation to criminalize raising of funds for terrorist acts, or raising funds for a terrorist organization, or holding proceeds of terrorism, or membership of and providing support to such organization or individual terrorist. The 2008 Amendment increased the scope of 'funds' for broader coverage of terror financing offences and amended the definition of 'property' in line with the International Convention for the Suppression of Financing of Terrorism.[83] Hereinafter, the 'proceeds of terrorism' would include property 'intended' to be used for terrorism. Likewise, 'legitimate sources' (organizations, associations, or lone individuals) would also be scrutinized for possibly 'raising funds' for terrorist acts. Finally, it also added another section giving effect to the UN SC list on freezing-attaching and seizing funds.[84]

Eventually, the result of the constant engagement with the FATF has meant the adoption of a 'risk' rather than evidence-based administration of the criminal justice system along with centralization of investigative and enforcement powers, waiver of procedural checks and arbitrary use of criminal provisions.

During the past few years, the FATF's carefully calibrated standards have provided multiple opportunities for a government bent on targeting its critics and minorities. For instance, following the anti-Citizenship Amendment Act protests that began in 2019, over 1500 individuals, primarily Muslims, and student leaders protesting systemic police violence, were arrested, and charged under counter-terror legislations on allegations of instigating violence in areas temporally and spatially close to the period and

[79]Ibid, 7–8.
[80]The MER identified deficiencies such as 'technical issues' over 'coverage' and was also adopted by the FATF Plenary on 25 June 2010.
[81]Parliamentary Standing Committee on Home Affairs (n 77) para 1.19.
[82]Ibid, iii, para 1.1.8. Under the enhanced follow-up procedure list of countries, India would not escape FATF scrutiny – instead, it would have to produce a progress report every four months; Standing Committee Finance (n 78) 7–8.
[83]See, Parliamentary Standing Committee on Home Affairs (n 77) paras 1.2.1, 1.2.2. clearly distinguishing between measures suggested by the FATF, and those that the executive sought to bring on its own initiative. The latter includes provisions criminalizing threats to 'economic security' for instance, as a terrorist act, or increasing the periods of proscription of 'unlawful associations'.
[84]Ibid, paras 1.12 and 1.13.

centre of protest, despite the overwhelming public incidence of hate speech and instigations by political leaders that directly incited people to take to violence. The violence (widely categorized as a pogrom in neighbourhoods largely dominated by religious minorities) saw the death of over 50 people, hundreds of other casualties, and large-scale destruction of property – all fitting into the description of an 'attack' likely to 'strike terror' in the people.[85] The government initially denounced the protests as riotous, and a terrorist plot. Once the individuals, or associations participating in the protests were charged (not convicted) with terrorism, the investigative authorities attempted to link the two events (the protest and the violence). Prominent community members from the region where the violence took place, including a Muslim legislative assembly member, were charged with 'terror financing'. To give context, violent and riotous situations in India usually results in situations where individuals, including state actors, act on the side of their co-religionists. The Enforcement Directorate (ED) that is responsible for investigating AML crimes, found that there were high-value transactions within corporate entities being managed by these community leaders, who as opposed to the protestors were financially proficient, and termed the monetary transactions as raising suspicions of 'illegal proceeds of crime'.[86] Although high-value transactions or complex patterns of money movement, could be some of the indicators, the FATF guidelines allow financial institutional actors to use their discretion on whether the transactions appear to be AML-CFT offences.[87] Using the large amounts as a pretext, citing evidence of personal acquaintance and one or two prior informal exchanges between the protest organizers (now categorized as 'terrorists') and the community leaders, the investigation authorities claimed they had found 'evidence' of 'terror' financing – that is the illegal proceeds of a 'crime' were being supposedly used for terrorism.[88]

Previously in its address to concerns raised by the Standing Committee over the FATF proposed amendments, the executive had clarified that both AML and CFT incidences could be captured in a single incident, under the FATF's proposed amendments. Since terrorism is also an offence that can generate 'proceeds', it can become the 'predicate crime'.[89]

In 2020 likewise, the government accused a farmer's protest of pursuing 'anti-national activities' at the behest of 'foreign ideologies',[90] while at the same time continuing to engage in negotiations with them. The National Investigation Agency subsequently registered offences under counter-terror legislations, against individual protestors and volunteers associated with prominent organizations, who were involved in providing

[85]UAPA, s 15 describes a terror attack as an act done with the intent to threaten or likely threaten the unity … with intent to strike or likely to strike terror in the people. Meanwhile, the acts assuming such gravity to qualify as an attack, involve death or injuries to persons, loss, damage or destruction of property, disruption of supplies or services, and so on. The use of weapons is irrelevant for this purpose – ' … or by any other means of whatever nature … '.

[86]'ED raids suspended AAP councillor Tahir Hussain's premises in connection with Delhi riots' *The Print* (23 June 2020) <https://theprint.in/india/ed-raids-suspended-aap-councillor-tahir-hussains-premises-in-connection-to-delhi-riots/447197/> accessed on 10 February 2022.

[87]Nance (n 37) 119 (referring to Anthony Amicelle's work where he observes how compliance officers and financial authorities form the core of this regime).

[88]'Tahir Husain, Umar Khalid Met in Shaheen Bagh to Plan Northeast Delhi Violence, Says Chargesheet' *ANI News* (7 January 2021) <www.aninews.in/news/national/general-news/tahir-husain-umar-khalid-met-in-shaheen-bagh-to-plan-northeast-delhi-violence-says-chargesheet20210107152155/> accessed 10 February 2022.

[89]Parliamentary Standing Committee on Home Affairs (n 77) para 1.5.6.

[90]'India Must Save Itself from "Foreign Destructive Ideology": PM Modi in Rajya Sabha' *Indian Express* (8 February 2021) <https://indianexpress.com/article/india/india-must-save-itself-from-foreign-destructive-ideology-pm-modi-in-rajya-sabha-7179445/> accessed on 10 February 2022.

humanitarian relief.[91] The principal evidence to sustain charges was the 'suspicion' of 'terror financing'. The investigative agency claimed that the FIU had compiled a suspicious transactions report over 'abnormal transactions' from ethnic minority groups resident abroad, raising concerns that previously banned secessionist groups could be funding protests. The only evidence to support such a claim was that members of this domestically proscribed secessionist group (who had previously advocated for secession) had organized protests in solidarity with the farmers who shared same ethnic ties before Indian missions abroad (the protesting farmers were overwhelmingly Sikhs, because of the ethno-religious demographics in the regions where agriculture constitutes the primary occupation).[92]

In this way, the government has also managed to charge minority institutions involved in charitable activities and humanitarian assistance – provision of education, health, and other civic works in the conflict regions like Kashmir, and CSOs involved in documenting state crimes, with 'separatist and terrorist activities' based on 'credible information'.[93] Some of these raided organizations like the Jammu Kashmir Coalition of Civil Society (JKCCS) and Association of Parents of Disappeared Persons (APDP) enjoy long-standing relations with prominent UN human rights observatories.[94] While no evidence has been offered since, the delegitimization has crippled their functioning. Here too, the state was technically sticking to the FATF's requirements – cash transactions need not be above a sufficient threshold to attract the state authorities' attention – instead Suspicious Transactions Reports (or 'STRs') are supposed to be compiled when there are financial flows to or between perceived high-risk categories and geographies.[95]

In the same Standing Committee address mentioned above, the executive pointed out that legitimacy of associations is not the question here, but 'misuse'. Hence, leave alone intention, even knowledge is not a requisite for making a case for 'financing terrorism' – 'so the entities may not know, and they are exploited' – since funds can be hidden like donations. The question is essentially one of being able to 'hold funds'[96] As for the state's case against humanitarian assistance, the executive had specifically summed up its understanding as criminalizing an 'ongoing trend of "providing social security" type support to the families' of the terrorists killed/arrested or still alive'. Thus the purpose of humanitarian assistance is not important.[97]

[91]'As Farm Law Protests Continue, NIA Sees "Anti-National" Plot, Summons Activists' *Wire* (16 January 2021) <https://thewire.in/rights/nia-summons-activists-linked-to-farm-law-protests-suspects-conspiracy-against-india> accessed 10 February 2022.

[92]'Pro-Khalistan Outfit Threatens to 'Shut Down' Indian Mission' *Times of India* (8 December 2020) <https://timesofindia.indiatimes.com/india/pro-khalistan-outfit-threatens-to-shut-down-indian-missions-on-december-10/articleshow/79613058.cms> accessed 10 February 2022.

[93]'"Fund Diversion": NIA Raids Activists, Journalists in J&K, Triggers Outrage' *Indian Express* (29 October 2020) <https://indianexpress.com/article/india/nia-raids-jk-journalists-activists-fund-diversion-6907904/> accessed 10 February 2022.

[94]In 2017, Parveena Ahangar and Parez Imroz, representing the APDP and the JKCCS, were awarded the Rafto prize. See, Laureate 2017 <https://www.rafto.no/en/news/kashmir> accessed 10 February 2022.

[95]The FATF contemplates two kinds of reports – Suspicious Transaction Reports (STRs) and Cash Transaction Reports (CTRs). The former does not depend on monetary value of the transactions, whereas the latter is compiled where transactions are above a certain limit, usually 10,000 USD. Prior to the FATF's push for reducing this threshold, the Indian monetary value threshold stood at 10 lakhs (or 1 million). See, Standing Committee on Finance (n 78) 10–11.

[96]Parliamentary Standing Committee on Home Affairs (n 77) para 1.5.7. '*It is not about a legitimate Hindu Undivided Family or Trade Unions; it is a game of misusing the Trust. So, the entities may not know and they are exploited. So, what the FATF said is, "Aim to put in place such legal provisions that would prevent misuse of legal structures so that they are not exploited for channelising funds for terrorism or money laundering*'.

[97]Ibid, para 1.5.36.

From the cases mentioned above, it appears that India has followed Dixon's theory on 'rhetorical adaptation' in the form of a combination of norm avoidance and norm interpretation (or norm evasion). India theoretically stuck to the FATF standards in amending its legislations in response, criminalizing terror financing and laundering offences, categorizing individuals as terrorists, or establishing centralized authorities for information dissemination and coordination (FIUs), mandating CDDs, etc. This is observable from their responses before the Parliamentary Committee and the time of introduction of such amendments (as per their Action Plan in lieu of membership). While the threat of breach of rights was an important consideration, so was the fact that India sought to establish itself as a major financial power in South Asia.[98]

At the same time, India has a history of using terror legislations (such history however does not automatically imply it has a history of 'terrorism') since the 1980s when it first introduced the Terrorist and Disruptive Activities Act (TADA), in the early 2000s, when it introduced the Prevention of Terrorism Act (POTA) and finally, in late 2000s, when it amended the UAPA. In all three instances, the legislations have been used to target minorities, political dissenters and separatists in Kashmir. All three legislations have produced minimal convictions and maximum under-trial periods ending in acquittals. For instance, the POTA-produced backlash (including from senior advocates and the human rights commission) forced the government to repeal the legislation. However, the government reintroduced the POTA provisions, with a different nomenclature and this time without a sunset clause – that is post admittance into the FATF, the UAPA came to stay.[99]

With the FATF standards, the government found an additional pretext to justify such extraordinary legislations. It could now claim, that certain events fell within the rhetorical understanding of 'terrorism' and 'terror financing'. While the constitutional court had refuted certain provisions such as criminality by association, or designation of an individual as a terrorist without specific acts,[100] the FATF considered these to be minimum requirements that had to be fulfilled – irrespective of a proven risk basis (as will be seen in the next section, similar issues arose in the context of NPO sector in India). Since these events constituted such acts of 'terrorism', exceptional responses became justified – hence, human rights norms, to which the state is also a party, became secondary considerations.[101]

While UN rights bodies continued to criticize these excessive measures,[102] the executive had in fact used the ambit provided by the FATF's CFT regime, based on suspected 'intentions', to draw links between a banned separatist group, previously involved in violence, and peaceful legitimate protests, to delegitimize and criminalize them. This is because in the FATF's imagination, irrespective of the existence of specific acts, any 'funds' – with the broadest comport – made to or by an individual or organization that

[98]See, Press Information Bureau, Department of Economic Affairs, Ministry of Finance, DEA ID Note No. 1/10/em/2009 pt II (29 June 2010) <https://dea.gov.in/pressrelease/indias-membership-financial-action-task-force> accessed 20 July 2022.

[99]For an excellent discussion on the implications of the three legislations and how they each drew upon their predecessors, see, Ujjwal Kumar Singh, 'Mapping Anti-Terror Legal Regimes in India' in Victor V Ramraj and others (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, CUP, 2012).

[100]See, the recent judgment in *Thwaha Fasal v Union of India*, Criminal Appeal No. 1302 of 2021, decided on 28.10.2021 [13].

[101]See, Dixons' reference to the case of Syria, where protestors were denounced as terrorists. Dixon (n 14) 84.

[102]See, OHCHR, 'India: Terrorism Charges are Pretext to Silence Human Rights Defenders' (2018) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23686&LangID> accessed 15 February 2022 ('overly broad national security legislation').

fell within proscribed lists (whether domestic or international) must constitute 'terrorist funding'.[103]

Thus, India's case seen from the perspective of 'rhetorical adaptation' gives another reason as to why states may be nominally compliant with international commitments, apart from financial and reputational implications. This is because states can continue to act as they did before, by appropriating regimes.

The following section raises an alternate concern – while the Indian government did intentionally misapply the FATF standards; in the context of the NPO sector, the Indian government submitted during the mutual evaluations, that the legislations existing then were sufficient as per their RBA. But the FATF continued to push it nevertheless to bring in legislations and institutional framework specifically proscribing or limiting certain operations. While the conclusion to be drawn from there is not to say that the FATF must rely solely on the states' RBA, it is also to be noted that the FATF's persistence in this context made way for the governments (then and subsequent) to appropriate or continue to appropriate them to their benefits. The argument is that, despite such concerns brought to their notice or cognisance, the FATF continued to push the governments to keep implementing such constrictive legislations, or ranked them highly, indirectly legitimizing the way they have been used. The section further seeks to answer how the FATF has managed to evade direct criticism (instead attributing the blame to the incorrect application of its standards), and why it has continued to act the same, despite criticism.

V. International hypocrisy: FATF's methodology and inconsistencies

Humanitarian agencies and international organizations associated with the UN have previously notified the FATF of the inconsistencies between humanitarian assistance and its own proposed counter-terrorism standards. For instance, the UN Office for Coordination of Humanitarian Affairs and the Norwegian Refugee Council described the counter-terror framework as having 'structural, operational and internal' impacts for NPOs and individual organizations, with these legislations distorting 'core humanitarian principles'.[104] Likewise, the Australian Independent National Security Legislation Monitor pointed out that humanitarian exceptions were contradictory to the UN CT resolutions, and accordingly proposed exceptions to them on a 'compromise basis' for at least highly reputable organizations, such as the Red Cross.[105]

But apart from the ambiguity underlying the FATF's provisions and procedures, much less attention has been paid to the process of its evaluation of threats and vulnerabilities, and the coercive tactics it uses in the enforcement of its norms.

In its Typologies report, the FATF denies its standards as problematic, arguing that each state as a sovereign entity possesses the final word on implementation, and the FATF is not responsible for implementation issues existing within individual

[103]See, discussion below in part IV.

[104]See, Kate Mackintosh and Patrick Duplat, 'Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action' (July 2013) OCHA and Norwegian Refugee Council 102–14. <www.nrc.no/globalassets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf> accessed 10 February 2022.

[105]See, Australian Government, Independent National Security Legislation Monitor, Annual Report (7 November 2013) 77–85 <www.inslm.gov.au/sites/default/files/inslm-annual-report-2013.pdf> accessed 5 February 2022.

states.[106] While the FATF officials might have subsequently acknowledged their contribution to the issue,[107] they still resist any responsibility, arguing that the manner of implementation is out of their hands.[108] This is despite the coercive nature of their standards and recommendations that I have outlined in the first section.[109]

The FATF espouses, at least in theory, that member states are best disposed to conduct RBAs. But this is untrue.[110] In fact, in its earliest response to the MER over an issue concerning a perceived lack of control over NPOs, India had responded that its own assessment conducted in 2011, negated a major risk of terrorism in its NPO sector – dissatisfied with which, the FATF classed India's standard as only partially compliant.[111] Foreign funding to the social sector in India constitutes less than five per cent of the incoming foreign investment.[112]

Further, Indian authorities contended that the receipt of foreign funds was already subject to rigorous scrutiny by security and intelligence agencies under the Foreign Contributions Regulation Act (FCRA) 2010 and its accompanying rules, FCRR 2011. Under it, financial institutions and regulators were obligated to disclose all receipts of foreign contributions and transfers to the Centre, which would ideally have been sufficient if the FATF limited itself to a member-state's RBA. Instead, it reiterated that the Indian framework would only cover high-risk NPOs.[113] Likewise, the Indian Home Secretary in response to the Standing Committee overlooking the necessity of incorporation of FATF-suggested amendments into domestic law, also responded that the FATF pushed for an explicit mentioning of NGOs, which anyway would have been covered under the UAPA's then definition of 'persons' – including all natural and legal persons;[114]

> then they also wanted to bring in various bodies which can be used to funnel terrorist funds, also to brought in, we said that that is already included in the juridical definition of person, but they wanted explicit mentioning of those bodies, NGOs, etc.

[106]FATF Report, 'Risk of Terrorist Abuse in Non-Profit Organisations' ('Typologies Report') (2014) 87 <www.fatf-gafi.org/media/fatf/documents/reports/Risk-of-terrorist-abuse-in-non-profit-organisations.pdf> accessed on 9 February 2022.

[107]In 2021, the FATF reportedly started reviewing the 'unintended consequences' of their standards and promised to engage with the non-profit sector over strategies to mitigate them. See, OECD Observatory of Civic Space, 'The Impact of National and Global Security Measures on Civic Space', Summary Report 8 <www.oecd.org/gov/open-government/impact-national-and-global-security-measures-on-civic-space-summary-report.pdf> accessed 10 February 2022.

[108]Ibid, statement of David Lewis, former Executive Secretary, FATF, 'Many countries are not taking the risk-based approach advocated by the FATF and are not effectively consulting and engaging civil society as they go about developing and implementing measures to tackle terrorist financing'.

[109]See, discussion under Part I.

[110]As per OMCT's assessment, Tunisia appears to be the only exception where the MENA FATF found the Tunisian legal framework as compliant, but the state's own assessment found shortcomings in the NPO sector, without consultation with the stakeholders themselves and following which, the MENAFATF changed its stance, qualifying it as a 'sector at risk'. See, submission of the OMCT Working Group Torture & Terrorism (10 July 2019) 9–10 <www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/Submissions/OMCT_GA74CT.pdf> accessed 10 January 2022.

[111]'Mutual Evaluation of India: 8th Follow-up report & Progress Report on Action Plan' (2010) 39 <www.fatf-gafi.org/fr/publications/evaluationsmutuelles/documents/india-fur-2013.html?hf=10&b=0&s=desc(fatf_releasedate)> accessed 15 February 2022.

[112]Ingrid Srinath, 'FCRA Amendments Hurt India's Development and Democracy' *BloombergQuint* (22 September 2020) <www.bloombergquint.com/law-and-policy/fcra-amendments-hurt-indias-development-and-democracy> accessed on 10 February 2022.

[113]8th Follow-up Report (n 111) 40–41. See, France (n 8) 13 (the Transparency International Report quotes the findings of a study conducted by the UN Counter Terrorism Implementation Task Force Working Group on Tackling the Financing of Terrorism, over how the actual percentage of fund flows to and from NPOs, abused for financing purposes is small. These findings were further corroborated by a state review (UK) of the charitable sector in 2007).

[114]See, Parliamentary Standing Committee on Home Affairs (n 77) response of the Home Secretary at para 1.3.4.

From Takeuchi and Goldbarsht's discussions, it would appear that this was not one isolated incident: Takeuchi notes how Japan was coerced into broadening its definition of the term 'funds' and 'prohibited assets' as well as prohibited conduct, despite its understanding that it had complied with its treaty obligations, for fear of being listed as 'non-compliant'.[115] Likewise, Goldbarsht notes how the FATF pushed Australia in one example, to specifically criminalize funding of an individual terrorist (even though this was understood under then existing legislations), or suffer being ranked as partially compliant. The Australian government did so after appending a footnote that this amendment was to strengthen the existing CFT offences, even though the Security Legislation Review Committee questioned its usefulness and noted that the provision instead caused further confusion.[116] The OMCT Working Group on Torture & Terrorism documents how the FATF had coerced Argentina, Bangladesh, Indonesia, and Pakistan, to amend their laws despite states' arguing there was no evidentiary basis for the same, or in some cases, implicitly refusing to address human rights questions when confronted with the argument that the laws were strong enough, but only required correct interpretation.[117]

But the issues do not rest with these divergent interpretations of standards at the domestic level, and the FATF's attempts to prevail over individual states. Rather, FATF documents that are supposed to provide general guidance to states, exhibit equal methodological flaws.

For one, the FATF identifies NPOs operating in conflict areas as a problem, citing proximity to active threats. It goes beyond, however, asking states to perform increased monitoring of those based in conflict territories or working to assist such populations, and 'population that is actively targeted by a terrorist movement for support and cover'.[118] Although the typologies report uses these words, more often than not, these populations are equated with those who the state assumes would be sympathetic towards terrorist organizations – implicitly making way for state monitoring based on ethnic identities. This has been illustrated before in the example of the Kashmiri NGOs or those operating to provide social and charitable services to minorities, such as Wakfs. Goldbarsht also explains why this could be the case – because terrorist organizations he tells, operate both a military and a civil wing, where the latter could provide services to people, or indulge in indoctrinating them to support their own cause.[119] Further, he notes, courts in the US or Israel, have refused to draw distinctions between the two, citing inconvenience in terms of tracing financial flows.[120] Likewise, the mere travelling of NPO representatives into an area hit by conflict, is under the FATF's understanding an indicator of terrorist financing. Along the same lines, it also considers frequent visits of individuals 'believed to support terror', as an indicator.[121]

[115]Takeuchi (n 38) 225.
[116]Doron Goldbarsht, 'Who's the Legislator Anyway? How the FATF's Global Norms Reshape Australian Counter-Terrorist Financing Laws' (2017) 45(1) Federal Law Review 127, 140–41.
[117]OMCT (n 110) 4–9.
[118]See, Typologies Report (n 106) Key Finding No 2, para 14 ('The NPOs most at risk appear to be those engaged in 'service' activities, and that operate in a close proximity to an active terrorist threat. This may refer to an NPO operating in an area of conflict where there is an active terrorist threat. However, this may also refer to an NPO that operates domestically, *but within a population that is actively targeted by a terrorist movement for support and cover*').
[119]Goldbarsht (n 5) 23–36. More specifically, 'as long as anyone sympathises with a particular cause, a legal or criminal means of raising funds and transferring them secretly will always be available'.
[120]Ibid, 29–30.
[121]Typologies Report (n 106) 69 (Considers that 'NPO facilities are frequented by individuals believed to support terrorist activities', as a risk indicator).

The word 'support' oft reiterated across the organization's documents is itself of broad import, and the FATF does not seem to undertake any efforts at clarifying what qualifies as 'support'. Previously, material support has been understood even, as offering legal assistance, or attempting to peacefully resolve conflicts between two warring parties, or offering disaster relief, as in the case of Sri Lanka, where the NPO had to inevitably collaborate with the LTTE. In another case, Zakat committees in the US were targeted for providing support, in the form of money, medical aid and school supplies, food, and clothing, to those who were in the opinion of US officials, 'supportive of Hamas', without further evidence.[122]

Further, the FATF does not require an individual's knowledge of an act of terror financing as a prerequisite to such classification – the NPO or its directing officials need to be only acquainted or have been acquainted in the past with these 'terrorist entities', for what it considers as a slight inconvenience against larger harms. In fact, the Report goes so far to even accept that external volunteers completely unrelated to an organization, who are 'suspected' of terrorism, can indicate terror financing.[123] It is difficult to understand how the representation of an individual known to be unconnected with an NPO but who seeks to deceive donors claiming such association, can pose repercussions against the NPO's own genuine activities. At the very least, the FATF contemplates asset freezes or confiscation of assets of such NPOs, in case states do not wish to resort to prosecution.[124] Ironically, this suggestion finds place around the same paragraph where the FATF asserts its awareness about how strict measures can often result in loss of legitimacy and stop donors from contributing to NPOs. But in the opinion of Paul O Neill, the FATF provisions were meant to achieve just this – since the funds were to be frozen, and not seized, state officials need not necessarily have evidence that would stand in court.[125] In March 2022, the FATF released a document on the international standards pertaining to AML-CFT and non-proliferation where it clarified that NPOs are not expected to undertake CDD measures.[126] However, it maintains its position that in both, cases of suspicion of intentionality or knowledge, and where the NPO is exploited without its knowledge or intention, the authorities must freeze the NPOs assets and investigate.[127]

Moreover, the FATF's methodological flaws extend beyond the NPO sector, where it has acknowledged such a possibility of ambiguity, although not an error in methodology. With respect to the NPO sector, in 2016, it amended the recommendation VIII that saw NPOs as 'particularly vulnerable' and instead reminded the states that the RBA required focused measures 'in a manner respecting the UN Charter and international human rights law'. Subsequently, it broadened the scope of its work to cover other human

[122]Hayes (n 7) 23.
[123]Typologies Report (n 106) para 115: case study of criminalization of an NPO based on suspected ideologies.
[124]Ibid, para 14. To quote: 'In cases where foreign organizations are abusing or may abuse domestic NPOs, prosecution may not be a viable option, making the application of targeted financial sanctions on domestic or foreign entities an alternative method of protecting domestic NPOs.'
[125]Hayes (n 7) footnote 91.
[126]FATF, 'The FATF, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation' (Updated Mar 2022) 62, footnote 30 <www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 20 July 2022. NPOs are expected to take 'reasonable measures to confirm the identity and credentials and good standing of beneficiaries and associate NPOs'. However, the standard for commencing investigations and asset freezes against them, remain the same – 'suspicion' or 'reasonable basis to suspect'.
[127]Ibid, 59.

rights and issues such as de-risking and financial exclusion, in a 2021 High Level Synopsis meeting. It also initiated a Plenary project team to analyse these concerns. Nevertheless, it concluded that the issues all arose from the 'incorrect' application of its standards (or 'unintended consequences').[128]

As mentioned before in the first section, the FATF assesses effectiveness on the basis of 11 'immediate outcomes' including number of requests made or received for cooperation and information sharing, availability of information, extent to which financial information is used to investigate and trace the proceeds.[129] There is also one outcome specific to NPOs, which seeks to look at the extent to which the recommendations have been implemented without 'disrupting NPO activities', but what weight the assessors provide to them, is unclear.[130] Ronald Pol notes that what the FATF terms as outcomes are actually 'activities'. Instead, it should have been concerned with 'impacts' – that is the reduction of profit-motivated crimes – but it does not maintain such crime reduction data.[131] It proceeds to look at effectiveness, not on the basis of the estimated revenues of which amounts have been confiscated, but on the basis of a hypothetical amount laundered.[132] In this way, FATF's model of effectiveness is actually compliance with FATF standards unquestioningly, in the name of expertise sharing.[133]

Prior to the adoption of the MER, the drafts go through three stages of comments, reviews, and clarifications. Assessors' reports after the onsite visits for instance, are also seen by reviewers to ensure consistency with standards, ascertain that the recommended actions are sensible, check for any inconsistencies between past MERs and so on. That despite the back-and-forthing, there are such glaring deficiencies is telling.[134] As Pol notes, the FATF accuses governments of following a 'tick box approach' but ends in doing the same.

Thus, at several sections of its Typologies assessment, it seems to conflate risk factors – such as a lack of compliance or problems with adhering to compliance measures, with its 'abuse' indicators, by proposing administrative solutions to both (in the latter case, administrative measures are used at the beginning of what it calls a 'continuum' of terrorist activities with prosecution reserved for graver abuses).[135] This is also apparent in its understanding that any instances of 'financing' need not be for specific activities, and it is enough if finances are directed towards individuals or terrorist organizations.[136] This is particularly problematic as the FATF is not merely hinting at individuals or terrorist entities designated so internationally, but even those under national systems – a move which

[128]High-Level Synopsis (n 41). The FATF concluded for instance that there was difficulty in identifying a direct correlation between its standards and de-risking; or there was 'misapplication' in name of correcting FATF deficiencies.
[129]Consolidated Standards (n 45) 31–33; Procedure for the FATF fourth round (n 15) 8.
[130]Consolidated Standards (n 45) 33.
[131]Ronald F Pol, 'Anti-Money Laundering: The World's Least Effective Policy Experiment? Together We Can Fix It' (2020) 3 (1) Policy Design and Practice 73, 75–77.
[132]Ibid, 82–83.
[133]Ibid, 77; Jakobi (n 35) 404 (FATF is not a negotiation forum).
[134]Procedure for the FATF fourth round (n 17) 6–17.
[135]Typologies Report (n 106) para 17, 33.
[136]Ibid, paras 25–26 ('Recommendation 5, which recommends the criminalising of terrorism financing, states that members should "criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or acts … '). The FATF International Standards (n 126) 87 (interpretive notes to recommendation 20).

oftentimes as it itself admits, is political in nature.[137] Alarmingly, the individuals to be so designated as 'terrorists' need not be associated with particular groups, or even involved in 'spectacular acts' – a standard usually used in place of the term 'terror', that forms the core of definition of terrorism itself.[138] In this sense, the term can be exploited by national governments to proscribe all political activities, individuals, and otherwise dissenters, and can retrospectively operate to criminalize those with whom they shared past personal and professional relationships (by association). The term financing is so broad that it does not distinguish between 'material support' and goods in kind, as shown above.[139] The March 2022 International Standards document has now conditioned financing with wilful provision, or collection of funds with 'unlawful intention' or with the 'knowledge' that they would be used in part or full.[140]

The FATF depends on and encourages conviction numbers. In the course of its follow-up report on India, it used the number of convictions under the CFT laws,[141] and numbers of provisional attachment orders, as a metric of effectiveness of the then-present provisions.[142] In India's case it claimed there were concerns over 'effectiveness issues' related to the 'limited number of confiscations in relation to ML/FT laws'. The report records India's position, arguing that the provisional attachment orders, although limited, are of 'high quality' where the owners are deprived of their properties, which then vests under the Enforcement Directorate (ED). The final orders, however, are passed only after confirmation from an adjudicating authority.[143]

Thus, the FATF records the lower number of final orders as an 'effectiveness' issue, rather than acknowledging the problem with the substantive provision itself, that transfers the burden of proof upon an accused, irrespective of whether there exists a prior proven predicate offense.[144] Furthermore, it leads us to wonder whether, the purpose of the FATF is exactly this – lesser convictions as an indicator of lesser laundering

[137]Typologies Report (n 106) para 44 ('While there is relative consensus on the high-level understanding of what constitutes terrorist actions, consensus breaks down in debates over whether some movements or entities warrant the label of "terrorist." *Often, these debates are driven by different perspectives and interpretations of national threat environments. These debates, while important, should not detract from the overall goal of understanding how and why terrorist entities abuse the NPO sector to further violent aims …* ').

[138]Leonard Weinberg, Ami Pedahzur, and Sivan Hirsch-Hoefler, 'The Challenges of Conceptualizing Terrorism' (2004) 16(4) Terrorism and Political Violence 777 <https://doi.org/10.1080/095465590899768> accessed 10 February 2022 (Weinberg et al. lament how this element of 'terror' is often overlooked in framing a consensus definition but is necessary to separate it from acts of political violence).

[139]Typologies Report (n 106) 63 (approving a case where provision of new computers and office equipment to a cultural forum raided by Israeli authorities in the past, was considered problematic).

[140]The FATF International Standards (n 126) 41–42.

[141]8th Follow-up Report (n 111) 17 {'In May 2013, India provided updated statistics. The number of persons accused of terrorist financing and the number of cases under investigation have continued to increase (respectively 470 and 143 in total from 2006 to 31 March 2013) *while the number of persons convicted has remained low, namely 5 in total over the same period with no new convictions since April 2011. In addition, there were no cases under trial in 2012. These figures reflect an effectiveness issue in the process that leads from accusation to conviction in India …* '}.

[142]Ibid, 20–21.

[143]See, Standing Committee on Finance (n 78) 10–11, over the powers and functions of the ED.

[144]8th Follow-up Report (n 111) 19 (explaining that in financing terrorism cases, there need not be a prior predicate offense allegation, unlike in money-laundering. In both cases, conviction is not necessary, and confiscation must happen as soon as the investigation commences. To quote:

> The amendment to section 8 also ensures that confiscation of property is no longer dependent on a conviction for a scheduled predicate offence. The confiscation of property is now dependent on a predicate offence investigation registered at the judicial level, either in India or in any other country. The technical deficiencies are addressed.

India accordingly amended the UAPA in 2012).

instances. The 2022 updated standards now qualify the provisional confiscation of property used or 'intended to be used', with 'unless inconsistent with fundamental principles of their domestic law'.[145]

But the standards continue to fail to explain what exactly is the basis for assuming that the 'instrumentalities' are 'intended to be used' for financing terrorism purposes.[146] In India's case, the FATF expressed its discontent over the then provisions of the UAPA that reserved confiscation of property until conviction – asking them to be changed.[147] Following these observations, the now amended provision of the UAPA, requires a mere allegation or doubt of financing, without a previous existing offense, to confiscate assets. This inevitably espouses a standard of racial, ethnic, and religious profiling since the individual or organization need not have a history of abuse.

In fact, the standard espoused for the STRs does not have to be based on 'reasonable' suspicion – a 'suspicion' or 'reasonable belief' is enough to report, if required, even directly to the FIU without any efforts at undertaking a customer due diligence. Similarly in the case of NPOs, a mere 'suspicion' (or 'reasonable grounds') that the NPO is inadvertently, or with its knowledge being used for terror financing, or acts as a front for such activities, can result in 'full access' to information on their activities and management for investigation.[148]

Now where do the FATF and the UN – collectively as an institution striving to ensure international peace and security, but also the promotion of protection of human rights, engage in 'organized hypocrisy'? The Paper already discussed the primary composition of the FATF; although not a multilateral institution, it is still comprised of individuals who carry the convictions and interests of their representative states. As previously mentioned, Jakobi has noted that states willingly became part of such AML-CFT regime in the name of security. This could be the reason why, she claims, the FATF standards have seen weak responses to AML crimes, but stronger ones to security-related crimes.[149] In this way, the FATF's primary area of competence, and state interests converge, lending the former legitimacy.[150]

However, in 2012, after the Hayes issued report, NPOs across came to form the Global Coalition on NPOs and raise concerns, including prominent NPOs such as Charity and Security Network, the International Centre for Not-for-Profit Law, the European Centre for Not-for-Profit Law, CIVICUS, etc. This, combined with the fact that associations such as the Wolfsberg Group also found FATF standards lacking in effectiveness (as opposed to compliance) threatened to ruin the FATF's reputation. To avert this, FATF has taken several steps since

[145]The FATF International Standards (n 126) 28.

[146]8th Follow-up Report (n 111). The FATF expressed its opinion against the then UAPA provisions that did not allow for confiscating 'instrumentalities' used or 'intended to be used' by individuals. It subsequently notes that with the UAPA's amendment, allowing individuals to be categorised and deprived of their properties as terrorists, India has addressed the deficiency. To quote:

> The amended definition of 'proceeds of terrorism' in section 2(g) of the UAPA, explicitly includes 'any property which is being used, or is intended to be used, for a terrorist act or for the purpose of an individual terrorist or a terrorist gang or a terrorist organisation'. Through this amendment to the definition of 'proceeds of terrorism', section 24(2) of the UAPA also provides for the confiscation of funds collected to be used by individual terrorists. (The deficiency is addressed)

[147]Ibid, 19.

[148]Consolidated Standards (n 45) 17–20, 24.

[149]Jakobi (n 34) 119.

[150]See arguments, Ulf Morkenstam, 'Organisational Hypocrisy? The Implementation of the International Indigenous Rights Regime in Sweden' (2019) 23(10) International Journal of Human Rights 1718, 1720.

then as the Paper mentions – the 2014 amendment to clarify that it is only a sub-set of NPOs that pose risk, the 2016 amendment to the recommendations that explicitly mentions human rights and a focused approach in consonance with a risk-based analysis, and the 2021 high level meeting, putting together a plenary group to analyse 'unintended consequences'. The synopsis of the high-level meeting also acknowledged that till date the MERs involve themselves only do an 'inconsiderate consideration' of human rights, even though it stands as one of the 11 outcomes across which effectiveness is to be measured.[151]

Despite taking cognisance of all these issues – the human rights aggression in states that claim to implement them, the lack of consideration for human rights and instead push for further adoption of constrictive legislations, which in fact allows such aggression to occur in the first place – the FATF concludes that human rights 'is not a core purpose of FATF evaluations'.[152] While conveniently amending the recommendation on NPOs (VIII), the 2017 Consolidated Standards on FATF document still manages to separate out the NPO sector for cooperation and coordination with law enforcement and other private actors over full access to all information – without identifying an NPO subset.[153] As mentioned before, the standard continues to be one of 'suspicion' (or 'reasonable grounds').[154] That for the FATF, security is of overwhelming concern at the cost of fundamental rights, is also observable where with respect to asset freezes of NPOs it claims that their interest, 'cannot excuse the need to undertake immediate and effective actions to advance the immediate interest of halting terrorist financing or other forms of terrorist support provided by NPOs'.[155] Finally, the FATF-released Methodology prior to the 4th Round of Mutual Evaluations ensures that assessors conducting the on-site visits meet primarily with state authorities and agencies, and the private sector. The team can also request meetings only with government authorities.[156]

Not surprisingly, this has manifested itself in the evaluations and rankings. In a recent example of Turkey from 2021, the UN Special Rapporteurs condemned Turkey's legislations that proscribed 'aims' rather than 'specific conduct' of offenders. Likewise, it condemned criminalization of NPOs over 'propaganda making' where the only evidence required for proceeding with these charges, are assisting proscribed organizations within 'the association's premises'. Again, it condemned the legislative provision that sought to proceed against individuals who were not members of a proscribed organization.[157] These criticisms in fact correspond to the very framework that the FATF espouses in its Typologies Report, and which stands till date.[158] In 2018, the MER for Indonesia claimed that the state's amended legislation over the NPO sector, that covered practically all NPOs as 'at risk' and made it possible for the state to dissolve them without further judicial intervention, still had 'minor deficiencies' to be resolved.[159] Likewise, the FATF

[151]High-Level Synopsis (n 41) 4–5.
[152]Ibid, 5.
[153]The FATF International Standards (n 126) 58 (interpretive notes); Consolidated Standards (n 45) 15, 24.
[154]Consolidated Standards (n 45) 17–18.
[155]FATF International Standards (n 126) 59.
[156]Procedure for the FATF Fourth Round (n 15) 10–11, Annex 2, list of authorities, 34–35.
[157]Amnesty International, 'Turkey: Weaponizing Counterterrorism: Turkey Exploits Terrorism Financing Assessment to Target Civil Society' (18 June 2021) 10–11 <www.amnesty.org/en/documents/eur44/4269/2021/en/> accessed 8 January 2022.
[158]FATF, 'Best Practices Paper on Combating the Abuse of Non-Profit Organisations (Recommendation 8)' <www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf> accessed 15 February 2022.
[159]OMCT (n 110) 7–8.

moved Pakistan to its 'grey list' and the EU list of high-risk countries in 2018 for not doing enough about its legislations, despite arguments from NPOs over how Pakistan does not require any further tightening of its norms and regulations, but only appropriate implementation.[160] Since 2014, the FATF has been pushing Argentina to amend its criminal code and criminalize financing of terrorist associations, organizations, and individuals, for any purpose whatsoever.[161]

Thus, the FATF has not 'walked the talk'.

Further, its flawed standards have also been upheld and resisted at the same time by certain UN organs, which appears as contradictory. While the UN SC, and the UNSC subcommittees pertaining to listing have in several instances reiterated the FATF standards, the UN Special Rapporteurs have brought attention to how the FATF standards' implementation have been the death knell for human rights. The UNGA also adopted the Global Counter Terror Strategy Review,[162] that condemned member states' violation of the rights of HRDs and NPOs and the suppression of humanitarian efforts and sought to discuss strategies to guide both UN and state-level counter terror efforts. CSOs have already criticized the Review as being inadequate since it hardly proposes their substantive participation within deliberations concerning what amendments states would be expected to make in their legislations, regulations, and practices.

While the two are completely different organs, and the UN Special Rapporteurs act in their individual capacities (and thus the juxtaposition must be taken with a grain of salt), one could theoretically claim that the overarching goal of the UN is both, to ensure international peace and security, and promote and protect human rights. In that sense, there lies the hypocrisy on the part of both the UN as an institution, and the FATF – both pay lip-service to human rights considering the wide acceptance of human rights' foundational principles,[163] but in the end act along the security narrative, which is to the interest of their primary stakeholders, the states.

VI. Conclusion

The FATF has moved far beyond its origin, rooted in AML and the financial security concerns of a limited number of states (G7 member states), to encompass a global and normatively broader financial-security realm. In progressing towards the latter, it has and continues to engage with other actors – at the UN, other international organizations, private associations such as financial experts (like the Egmont Group), and member states, with more recent and nominal participation from civil society.

But instead of condemnation and resistance that would sit-in comfortably with what critical legal theory scholars contemplate, this move beyond its original mandate has been almost welcomed by states. Existing theories over peer pressure and legitimacy

[160] Ibid, 9.
[161] Ibid, 4–5.
[162] See, 'UN Counter Terrorism Measures Must Uphold Human Rights' *Article 19* (1 July 2021) <www.article19.org/resources/un-counter-terrorism-measures-must-uphold-human-rights/> accessed 1 February 2022.
[163] Jessie G Rumsey, 'Does Counterterrorism Trump Human Rights? An Analysis of US Foreign Aid Hearings Pre- and Post-9/11' (2018) 24 Global Governance (Rumsey concludes that human rights discourse has survived and even outdone counter-terror discourse, including in the post 9/11 period, despite any formal enforcement mechanism. He reasons that this is the result of the wide acceptance of its foundational norms and principles, coupled with its normative breadth).

(through expertise) are insufficient to explain this phenomenon. Seeing the operationalization of these standards at the domestic level, such as in India, explains state behaviour. States realize that they can 'rhetorically adapt' these standards and recommendations to their own benefit. However, this justification too is insufficient since it contemplates the role of the FATF as that of a mere bystander issuing 'ambiguous' but agnostic standards. On the contrary, the Paper finds that the FATF has too often pushed states into acting a certain way, and its standards suffer from severe inherent limitations; the adverse human rights impact it acknowledges, are merely matters of slight inconvenience. The problem does not stop here. Since the UN mechanisms continue to support and endorse FATF standards (whose breach of human rights the FATF is all-too aware of), while at the same time criticize member states for incorporating the same, the Paper contends that both the FATF and the UN engage in doublespeak and 'international hypocrisy'. Finally, the paper seeks to reason why this is so. If one was to read Brunsson's theory of organizational hypocrisy, one would see that both the FATF and the UN operate within institutional and material limitations. States, with their own interests, are the primary members and stakeholders within both these organizations. Since the organizations cannot overtly be seen to espouse standards that breach human rights however, they cover up their limitations with promises to uphold human rights (reviewing their standards, encouraging broader participation of civil society actors).

Acknowledgements

The author wishes to thank her mentor and supervisor, Professor Nico Krisch (IHEID) for the conceptualization of this issue in academic terms following a class assignment in the Transnational Law class. The author further wishes to thank her former employer and mentor, Sharib A Ali (HRD and scholar at the University of Bern) without whose support, she would not have been able to have such a thorough understanding of the Indian situation.

ORCID


Ishita Chakrabarty http://orcid.org/0000-0002-9556-716X