FORBIDDEN FUNDS – INDONESIA'S NEW LEGISLATION FOR COUNTERING THE FINANCING OF TERRORISM

Adam Fenton[*] and David Price [**]

Abstract

In March 2013 the Indonesian Parliament passed the Prevention and Eradication of Terrorism Financing Act (Law No.9 2013). Enactment of the legislation ostensibly brought Indonesia into line with its commitments under international law as a signatory to the International Convention for the Suppression of Financing of Terrorism (1999) which Indonesia signed in September 2001 and ratified in 2006. While Indonesia's existing, hastily-drafted anti-terrorism legislation (Law No.15 2003) contained a brief provision criminalising the funding of terrorism, this latest and much more significant statute is intended to shore up any gaps within the legislative regime already in place. It also provides for a central governmental agency, namely the Centre for Financial Transactions and Reporting (PPATK – Pusat Pelaporan Analisis Transaksi Keuangan), to have both authority and responsibility for the monitoring of suspicious financial transactions. While the legislation establishes the legal basis for PPATK's role in countering the financing of terrorism, it also places significant obligations on financial services providers to monitor and report any suspicious transactions to PPATK – as well as obligations to "know your customer" – with significant penalty provisions for failure to do so. However, despite the enactment of this latest legislation to counter the funding of terrorism, the Financial Action Task Force (FATF), an inter-governmental standard-setting agency under the auspices of the Organization for Economic Co-operation and Development (OECD), has kept Indonesia on its list of 'high risk and non-cooperative jurisdictions'. This paper examines the international law background to the new counter-terrorism financing legislation, the substantive sections of the Act, and the obligations it places on commercial financial services providers. It also examines the legislative regime's deficiencies and criticisms.

***Keywords**: Transnational Organized Crime,Terrorism,Prevention and Eradication of Terrorism Financing Act*

I. INTRODUCTION

On 13 March 2013, Indonesian President Susilo Bambang Yudhoyono, and Minister for Law and Human Rights Amir Syamsudin signed into existence the *Prevention and Eradication of Terrorism Financing Act* (Law Number 9 of 2013) (*Undang-undang Pencegahan dan Pemberantasan Tindak Pidana Pendanaan Terorisme* 2013)

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[*] Doctoral candidate, School of Law, Charles Darwin University, Australia. This paper is based on a presentation at the 4th CILS International Law Conference on Transnational Organized Crime, Banda Aceh, Indonesia, October 2013.

[**] Associate Professor, School of Law, Charles Darwin University.

(hereinafter the "Act"). At 49 pages, including explanatory notes, the Act is a substantial yet economically-worded piece of legislative drafting. The Act represents Indonesia's visible, legislative commitment to the principles of the *International Convention for the Suppression of Financing of Terrorism 1999* (hereinafter the "Convention"), and the complementary special recommendations of the OECD's Financial Action Task Force (FATF). Despite the enactment of this 'comprehensive' legislation for countering the financing of terrorism[1] (otherwise generally known as "CFT" legislation), FATF in June 2013 publicly acknowledged that Indonesia had made some progress to give effect to its obligations under the Convention, but continued to include Indonesia on its list of 'high risk and non-cooperative jurisdictions' (FATF 2012, pp. 31-2; 2013a). It noted that Indonesia had "not made sufficient progress in implementing its action plan within the agreed timelines" and that "certain strategic AML/CFT[2] deficiencies remain regarding the establishment and implementation of an adequate legal framework and procedures for identifying and freezing of terrorist assets" (FATF 2013a, p. 3).

This paper examines Indonesia's enactment in 2013 of its new law for the countering of the financing of terrorism, taking account of the various international conventions and United Nations resolutions which gave impetus to the Act's emergence. It locates the Act within Indonesia's counter terrorism legislative framework and considers whether the salient features of the new law appropriately meet the Act's objectives, particularly in view of the FATF's ongoing criticism of Indonesia's performance in this regard. The paper argues that the Act is a commendable and timely attempt to monitor and eradicate funding of terrorism activities, its implementation falls somewhat short of those established international standards and conventions, as well as Indonesian domestic imperatives.

While CFT has not been a central element in Indonesia's counter terrorism operations to date, globally, CFT has been of key importance in the war on terror and the prevention of terrorist attacks. As Barrett

[1] In this paper FATF usage of the acronym 'CFT' is followed, namely, 'countering the financing of terrorism'.The acronym CTF "counter-terrorism financing" is also commonly seen in discussions of this topic.

[2] "AML/CFT" – Anti-money laundering/countering financing of terrorism

notes, the last major bomb attack on a western country were the London bombings of 2005[3]. He points out that:

> *Ten years after 9/11 it is inconceivable that any terrorist group, let alone one connected to al-Qaeda, could raise enough money to launch an attack on a similar scale through donations. Given the scrutiny of and visibility of transactions in the formal banking system any financier of terrorism would take a huge risk were he to transfer money to a known terrorist entity. (Barrett 2012, p. 719)*

Countering the financing of terrorism s therefore of key importance in combating terrorism *per se*. CFT laws are potentially an extremely powerful weapon in the hands of law enforcement agencies to disable terrorist groups and individuals. They can prevent terrorist attacks by cutting off the flow of funds to terrorist groups – depriving them of resources needed to purchase weapons, for example. But CFT laws also function by criminalising the act of funding terrorism, so that persons or organisations knowingly providing any kind of funds for a terrorist act, individual or group, are committing a crime - even when they had no intention of taking part in an actual terrorist attack themselves. CFT laws also expose "money trails" which may generate previously unknown leads, and which can force terrorists to use more costly and high risk means of funding their activities – making them more susceptible to detection. (FATF 2013b)

Terrorism, and by necessity the funding of terrorism, are still live and serious issues in Indonesia. While there have been no major bomb attacks on foreign targets since 2009, low level violence primarily between terrorist groups and the police continues – four police officers were killed by suspected terrorists in the month of August 2013 alone (Meida 2013). During the writing of this paper another police officer was fatally shot in Central Jakarta (Marhaenjati 2013). And the threat of a major bomb attack remains –in August, a bomb exploded in a Jakarta Buddhist temple injuring three people; the attack was allegedly in response to violence against Rohingya Muslims in Myanmar (Natahadibrata 2013; Sandro Gatra 2013). Terrorist cells have shown

[3] Barrett's article was written in 2012, before the Boston marathon bombing of April 2013. With three fatalities and 264 injured it is arguably a major bombing, however it is clearly not on the same scale as the 9/11 attacks.

remarkable resilience and ingenuity, in respect of their funding efforts. Groups have resorted to many forms of crime to fund their activities, including bank robbery, motorcycle and jewellery theft, smuggling, narcotics trading, posing as mobile phone-card agents, and even operating businesses under the guise of corporate social responsibility or welfare activities (Globe 2012; ICG 2012). Most recently, internet fraud has emerged as potentially a major source of funds. In May 2012, the head of the National Counter-terrorism Agency, Ansyaad Mbai, commented that counter-terrorism officers had arrested 11 suspects who had hacked into multi-level marketing websites and stole over Rp8 billion (over US$800,000) to fund terrorist training camps, and purchase explosive materials (Globe 2012). It should be noted that Indonesian terrorist groups have not yet resorted to kidnapping for ransom as a source of funds, a common practice among African terrorist groups.

Clearly therefore, an effective CFT regime is urgently needed in Indonesia. However, to function effectively as a method of law enforcement a CFT regime requires the knowledge and cooperation of government departments, law enforcement agencies and private financial institutions. It is therefore essential for all parties to be aware of, and implement these CFT laws – not only for the common good of fighting and preventing terrorist violence. All financial services providers operating in Indonesia, both formal and informal, are subject to this legislation – and it contains substantial penalties for non-compliance. For example, Article 13 of the Act provides that a financial service provider which fails to report a 'suspicious transaction' to PPATK within three days of becoming aware of it, faces a penalty of up to Rp1 billion (approximately US$100,000). It is therefore essential for any provider operating within Indonesia to be fully aware of their obligations under the Act.

II. THE INTERNATIONAL LAW BACKGROUND

In her analysis of CFT, McGarritty argues that the international counter-terrorism financing regime "can best be described as a 'patchwork' of international instruments. Whilst each of these instruments requires states to criminalise the financing of terrorism, there are important points of distinction in the detail" (McGarrity 2013, p. 55).

The international law response to terrorism and terrorism financing goes back well before the terrorist attacks on New York's World Trade Centre of 9 September 2001 (universally recognised as the most egregious of terrorist attacks and simply known as "9/11"). For example, the United Nations (UN), an organisation founded on the highest principles of peace, justice, human rights and friendly relations between states, has, for decades, condemned acts of aggression and terrorism by both states and non-state actors. General Assembly Resolution 2625 (XXV) *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States* of October 1970 (UN 1970) and General Assembly Resolution 3034 (XXVII) *Measures to Prevent International Terrorism* of December 1972 (UN 1972) both condemn terrorist acts without prescribing clearly and unequivocally what constitutes terrorism. Resolution 3034 Article 4, for example, "condemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms".

Twenty years later, General Assembly Resolution 46/51 *Measures to Eliminate International Terrorism* of December 1991 (UN 1991) recalls no less than nine of its resolutions and declarations from the 1970s and 1980s. The Preamble again expresses the UN's deep disturbance at "the world-wide persistence of acts of terrorism in all its forms … including those in which States are directly or indirectly involved".

General Assembly Resolution 49/60 *Measures to Eliminate International Terrorism* of December 1994 (UN 1994) contains the first specific reference to the act of financing of terrorism. Reminiscent of the wording of Resolutions 2625 (XXV) of October 1970 and 46/51 of December 1991, Resolution 49/60 once again recalls the growing list of resolutions, declarations, treaties and conventions[4] on terrorism, and

[4] Resolution 49/60 Preamble recalls that "the existing international treaties relating to various aspects of the problem of international terrorism [include], inter alia, the Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, the International

condemns all acts of international terrorism. An important difference, however, is the inclusion of the crucial term "financing" in its language. Article 5(a) of the Resolution calls on states to "refrain from organizing, instigating, facilitating, *financing*, encouraging or tolerating terrorist activities" within their respective territories (emphasis added).

But, as McGarritty points out, "a substantial portion of the funds used for terrorist activities is now provided by private individuals and organisations rather than states" (McGarrity 2013, p. 57). General Assembly Resolution 51/210 *Measures to Eliminate International Terrorism* of December 1996 (UN 1996), recognises this weakness and, stressing the need for international and regional cooperation, specifically calls upon States, at paragraph 3(f):

To take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities

Paragraph 3(f) continues:

and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding the freedom of legitimate capital movements. (UN 1996, p. 3(f))

Importantly, paragraph 9 establishes an *ad hoc* committee to develop a "comprehensive legal framework of conventions dealing with international terrorism." (UN 1996, p. 5 Para 9) While work on this comprehensive framework is ongoing, importantly for this discussion, the *ad hoc* committee's deliberations led to the creation and adoption

Convention against the Taking of Hostages 1979, the Convention on the Physical Protection of Nuclear Material 1980, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf 1988, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991."

by the General Assembly, by Resolution 54/109 of 9 December 1999 (UN 1999a), of the *International Convention for the Suppression of the Financing of Terrorism* (the "Convention"). As later discussed, the Convention (along with FATF recommendations) provides the legal framework and principles upon which Indonesia's domestic legislation is based. Indeed, several of the provisions in the domestic legislation mirror key articles of the Convention.

Firstly, Convention article 1(1) provides a very broad definition of "funds" which includes "assets of every kind whether tangible or intangible, moveable or immoveable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit."

Secondly, it sets out a definition of a 'terrorist act' and criminalises financial support for that act. Given that defining terrorism has been described as "a futile polemical exercise" and "the Bermuda Triangle of terrorism" (Schmid 2011, p. 42), this is a significant achievement – even if the definition is only for the limited purposes of the CFT regime in the Convention. Article 2(1) creates an offence for any person who, directly or indirectly, unlawfully and wilfully provides or collects funds with the intention that they should be used in full or in part in order to carry out:

(a) An act defined in one of the treaties listed in the Annex[5], or:
(b) Any other act intended to cause death or serious bodily injury to

[5] The nine conventions listed in the Convention Annex include the following: Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; International Convention against the Taking of Hostages, 1979; Convention on the Physical Protection of Nuclear Material, 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 1988; International Convention for the Suppression of Terrorist Bombings, 1997.

a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Article 2(1)(a) above may be problematic as it depends on which of the twelve terrorism conventions a state has ratified. Article 2(1)(b) rectifies this to some extent by effectively providing a working definition of a terrorist act – in a nutshell, any act intended to cause death or serious injury to civilians with the purpose of creating fear or coercing a government. Article 2(3) establishes that it is not necessary for the funds to *actually* have been used to carry out a terrorist act. Articles 2(4) and 2(5) create additional offences for those who attempt, participate as an accomplice, organize or direct others, or contribute to the commission of an offence under Article 2(1) – that is, inchoate offences.

The Convention further requires, pursuant to Article 4, that State Parties create criminal offences (with corresponding penalties that reflect the seriousness of the offences) in their domestic law based on the offences set forth in Article 2. Further, the offences must also apply to "legal entities" which commit the offences, and extra-territoriality provisions must be applied as well. For example, where an offence is committed on board a ship flying the flag of the state, or where a national of that state commits a terrorist act in another country, that state may establish jurisdiction to prosecute the offence.

State Parties are also required to take measures to provide for the freezing, seizure and forfeiture of funds allocated for terrorist acts (article 8), and to prosecute or extradite, where they become aware that an offender is within their jurisdiction (articles 9 and 10). The offences set out in Article 2 are expressly extraditable offences, and the Convention stresses the need for international cooperation in the investigation and prosecution of offenders.

Convention article 18 stipulates the obligations and regulations to be applied to financial institutions such as identification of customers and the reporting of suspicious transactions. As discussed later, these principles are enunciated in more detail in FATF's Special Recommendations.

It is interesting to note that the Convention opened for signature from

10 January 2000 until 31 December 2001 (Article 25.1), and required 22 ratifications to enter into force (Article 26). But by early September 2001, it had been ratified by only four states. However, following the 9/11 terrorist attacks and UN Resolution 1373, the Convention was rapidly ratified by many states and came into force on 10 April 2002. Indonesia signed the Convention on 24 September 2001 (Husein 2012, p. 15) and ratified it by Act of Parliament in 2006 (*Undang-undang Nomor 6 Tahun 2006 Tentang Pengesahan International Treaty for the Suppression of the Financing of Terrorism 1999* 2006).

In considering the UN response to CFT, two Security Council resolutions are of particular significance, namely Resolution 1267 of 1999 (UN 1999b) and Resolution 1373 of 2001 (UN 2001). Resolution 1267 was aimed specifically at disabling the Taliban, and Al Qaida, and required states to freeze any funds connected to the Taliban. It also established the "1267 Committee", tasked with creating a list of individuals and organisations associated with Al Qaida, for whom states are required to freeze their assets "without delay". The list contains several Indonesian nationals and organisations including Abu Bakar Bashir, Umar Patek and the Jemaah Anshorut Tauhid (JAT) amongst others (UN 2013). As discussed later, the implementation of this list and the significance of freezing of assets "without delay" is one of the main stumbling blocks faced by Indonesia.

Resolution 1373 was issued on 28 September 2001, just over two weeks after 9/11, and is broader in its application than Resolution 1267. Amongst other provisions, it "decided" that all states shall "prevent and suppress the financing of terrorist acts" by criminalising the provision or collection of funds for terrorism and by freezing funds of persons who commit terrorist acts. Broadly speaking, the obligations of Resolution 1373 are similar to those under the Convention with one major exception – the Convention defines a terrorist act. This may be one reason why under Article 3(d) States are called upon to "become parties as soon as possible to the relevant international conventions...including the Convention for the Suppression of the Financing of Terrorism of 1999" (UN 2001, p. 3 Para d).

While there are considerable overlaps between the Convention and Resolution 1373, together they form a much stronger and more

comprehensive CFT regime. For example, the Convention contains provision for preventative mechanisms - such as customer identification and reporting of suspicious transactions - that are not mentioned in Resolution 1373. On the other hand, Resolution 1373 creates the Counter-Terrorism Committee which is specifically tasked with pursuing implementation by various State Parties of the Resolution and Convention provisions. Resolution 1373 also provides that in respect of terrorist groups not linked to Al Qaida or the Taliban, states will be responsible for compiling their own domestic lists of terrorist individuals or organisations – and consequently freezing their assets. The compilation of this domestic list has also been flagged by the FATF as an issue in Indonesia's non-compliance with its international obligations.

Outside the UN arena, FATF has had a significant impact on the introduction of CFT laws. Established in 1989 under the auspices of the OECD, FATF's original mandate was to examine issues of combating international money laundering. However, following 9/11 it expanded its role to include CFT; since then it has issued IX Special Recommendations on Terrorist Financing (FATF 2008). As Realuyo notes, while FATF's recommendations are non-binding, inclusion on its list of non-compliant countries may have serious consequences for a country's ability "to do business in the international financial system and discourage investors from engaging in a country" (Realuyo 2013, p. 15). This 'name and shame' process has been extremely effective in bringing countries into line with international standards on both AML and CFT. Indeed, a prominent Indonesian lawmaker and politician, Eva Kusuma Sundari, criticized the Act, arguing that its introduction "was mainly triggered by the critical report of the Financial Action Task Force (FATF) on Indonesia" (Tas 2012).

FATF's IX Special Recommendations mirror the Convention, in that they direct states to ratify the Convention, criminalise acts of terrorist financing, freeze assets, report suspicious transactions and cooperate internationally. But Recommendations VI, VII, VIII and IX add detail relating to issues of alternative remittances, wire transfers, non-profit organisations and cash couriers – all areas on which the Convention remains silent.

III. THE INDONESIAN CFT LEGISLATIVE FRAMEWORK

While there has been much international academic literature devoted to global terrorism issues, very little has focused on Indonesia's domestic anti-terrorism legislation, and even less on its CFT laws. This is no doubt due to the fact that the comprehensive counter terrorism financing legislation was only recently enacted in March, 2013. However, this is only part of the story. While it can now be said that Indonesia's domestic legislation is largely, if not completely, compliant with the provisions of the Convention and the FATF IX Special Recommendations, that was not the case beforehand.

Following is a timeline of Indonesia's evolving CFT legislative regime:

1. 9 December 1999 – The UN issues the *International Convention for the Suppression of Terrorist Financing* (the Convention) by Resolution 54/109.
2. 24 September 2001 – following 9/11 , Indonesia signs the Convention.
3. 28 September 2001 – UN Security Council Resolution 1373 is issued requiring all states to criminalise the financing of terrorism, and calling on them to ratify the Convention "as soon as possible".
4. 18 October 2002 – following the Bali bombing of 12 October, Indonesia issues Interim Law Number 1 of 2002(*PERPU Nomor 1 2002 Tentang Pemberantasan Tindak Pidana Terorisme* 2002), criminalising the financing of terrorism. This interim law was ratified by Act of Parliament in March 2003 by Law No. 15 2003. (*Undang-Undang Nomor 15 Tahun 2003 Tentang Penetapan PERPU Nomor 1 2002 Tentang Pemberantasan Terorisme, Menjadi Undung-Undang* 2003)
5. 5 April 2006 – Indonesia ratifies the Convention with Law Number 6 of 2006 (*Undang-undang Nomor 6 Tahun 2006 Tentang Pengesahan International Treaty for the Suppression of the Financing of Terrorism 1999* 2006). It states that, with one reservation, the Convention forms an inseparable part of the law itself.
6. 22 October 2010 – Indonesia enacts its Anti-Money Laundering law (*Undang-undang Nomor 8 Tahun 2010 Tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang* 2010), creating

PPATK and including terrorism as a predicate offence.
7. June 2012 – Indonesia is included on FATF's "High Risk and non-Cooperative Jurisdictions" list (FATF 2012, p. 30)
8. 13 March 2013 – Indonesia enacts the *Prevention and Eradication of Terrorism Financing Act* (Law Number 9 of 2013 (the Act).

Following the Bali bombing of October 2002, Indonesia hastily enacted the Eradication of Terrorism Act, contained in Interim Law No.1 of 2002. (*Undang-Undang Nomor 15 Tahun 2003 Tentang Penetapan PERPU Nomor 1 2002 Tentang Pemberantasan Terorisme, Menjadi Undung-Undang* 2003). A detailed discussion of this law, Indonesia's *general* anti-terrorism legislation –first enacted using the President's emergency powers and subsequently ratified by Parliament – is beyond the scope of this paper. However it is worth noting that the 2003 law contains one section specifically devoted to *criminalising* the financing of terrorism. Article 11 states:

Any person who wilfully provides or collects funds with the intention that they be used, or ought reasonably suspect that they will be used in whole or in part for the commission of a terrorist act as set out in Articles 6, 7, 8, 9 and 10 is subject to a punishment of between 3 and 15 years imprisonment. (*PERPU Nomor 1 2002 Tentang Pemberantasan Tindak Pidana Terorisme* 2002, p. 4 Article 11)

Article 29 also empowers investigators, prosecutors and judges to order banks and other financial institutions to immediately freeze the assets/property (harta kekayaan) of any person, where it is known or suspected that they are the result (hasil) of a terrorist act and/or a crime connected with terrorism. The assets/property are ordered to remain in the bank. A penalty for non-compliance is to be provided under separate regulations.

Questions about the specific detail of these sections arise, for example, why Article 11 refers to funds (dana), whereas Article 29 refers to assets/property (harta kekayaan). It is noteworthy that Article 29 does not provide for any judicial review of this power, which may be equally used by police investigators, prosecutors and judges alike. Neither the duration of the asset freezing nor an appeals process by the asset owner is stipulated. No evidence appears to exist as to whether the

asset freezing act has been judicially examined, or indeed whether the power was ever even used by authorities.

In any event, by October 2002, Indonesia had complied with its international CFT obligations to the extent that it had criminalised the act of financing terrorism, and provided a mechanism by which the assets/property known or suspected to be the result of a terrorist act or a crime connected with terrorism could be blocked or 'frozen'. (In Indonesian the term "pemblokiran" literally "blocking" is used to mean freezing. Both terms are used here interchangeably.)

These two relatively brief sections, part of a hastily drafted response to a catastrophic terrorist attack, essentially formed the extent of Indonesia's CFT regime for almost a decade. According to a PPATK representative, since 2003 there have been 15 prosecutions of terrorism funding using Article 11 (Ramadhan 2013). Among the most notable cases was the 2011 trial of radical cleric Abu Bakar Bashir who was convicted of financing a terrorist training camp in Aceh and sentenced to 15 years imprisonment (AAP 2011). Another exception is the case of Abdul Haris, who in 2011 was convicted of collecting funds for the Aceh training camp and sentenced to nine years imprisonment (Panggabean 2011). Most recently three people were convicted of committing internet fraud and using the funds to finance a terrorist training camp in Poso, Central Sulawesi (Ramadhan 2013).

After the enactment of the 2002 anti-terrorism law, no further developments occurred in relation to CFT until 2006, when Indonesia officially ratified the Convention by Act of Parliament. However, this Act alone is not sufficient to place the Convention on an equal footing with other national legislation. A further Act was required, which did not occur until 2013. The only other CFT-related development came in 2010 with the enactment of the Anti-Money Laundering Law (Law Number 8 of 2010) (*Undang-undang Nomor 8 Tahun 2010 Tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang* 2010). While there are some areas of overlap between the anti-money laundering law and CFT, the two are distinctly different phenomena. Money laundering concerns the act of concealing the illicit origin of funds of crime. CFT is concerned with preventing funds of any kind, licit or illicit, from making its way into the hands of terrorists.

Indonesia's counter-terrorism efforts to date have focussed on enforcement – that is, capturing and prosecuting terrorist suspects. Indonesia's special counter-terrorism police detachment, Densus 88, has garnered international praise for their bravery and success in their CT operations; having, at last count, apprehended over 700 suspects over the past decade(Post 2013). In fact, while the Indonesian police have been praised for their "extraordinary success" (Fealy 2013, p. 1) in combating terrorism – police and the government have both been criticised for having done, and achieved, much less in the area of prevention – Vice President Boediono has been quoted as saying that "there has been too much emphasis on repressive actions and not enough on preventative" (Sihaloho 2012). If that is the case for the *general* prevention of terrorism, then it is doubly true for the prevention of the financing of terrorism.

In considering the relatively little commentary on CFT regimes, McCulloch suggests that it may be due to a perception that CFT laws 'are relatively benign, compared to, for example, interrogation/detention regimes...It is possible that the sheer volume of national and international security measures and legislation passed post-9/11 has meant that the suppression of financing of terrorism measures have passed relatively undetected in the camouflage of the many other measures that add to the arsenal of the state's coercive powers.' (McCulloch 2006, p. 397)

In Indonesia's post-dictatorship era much more critical attention has been given to sections of the anti-terrorism laws which provide police with greater powers of arrest and detention, than to CFT issues. Apart from some media reporting when the Act was passed in March, 2013 there has been very little public forum discussion of CFT issues. Indeed it would appear that it has been a deliberate policy of PPATK to not draw public attention to the CFT laws, for fear of challenge in the Constitutional Court (Ramadhan 2013).

One exception is a governmental report entitled "The Final Report of the Academic Team on the Draft Law for the Prevention and Eradication of Terrorism Financing" (BPHN 2012), issued in 2012 in advance of the enactment of the Act. Prepared by the Ministry of Law and Human Rights' Centre for Planning and Legal Development in conjunction with representatives from various government agencies

including the National Police, the Indonesian Central Bank (BI) and PPATK, the 96-page Report was intended as a background paper and resource for lawmakers when considering the draft version of the Act. The Report echoes the sentiment that while much has been done by government agencies in the area of investigating and capturing terrorist suspects, less has been done in the area of prevention:

The government's efforts so far to eradicate terrorism have been satisfactory. Although, it has been limited to capturing suspects and has given less attention to elements of funding, which are a crucial element of any terrorist act...Efforts to eradicate terrorism through conventional methods ("follow the suspect") that is, by capturing and punishing terrorists, is not sufficient for preventing and eradicating terrorism. Other efforts are required...by applying a "follow the money" approach which involves the PPATK, Financial Services Providers and law enforcement agencies to detect the flow of funds which are used or suspected of being used to fund terrorism (Husein 2012, p. 2).

It goes on to explain however, in repeated references to both the Convention and FATF IX Special Recommendations that:

> *Having ratified the International Convention for the Suppression of the Financing of Terrorism by virtue of Law Number 6 of 2006, Indonesia is therefore obliged to create or harmonise its legislation relating to terrorism financing so that it is in line with the provisions in the Convention...The existing legislation relating to terrorism financing has not yet dealt with the prevention or eradication of the crime of terrorism financing in a satisfactory or comprehensive way... ratifying a convention is not sufficient for it to become operational, this requires a further action. The Prevention and Eradication of Terrorism Financing Bill represents the effort to follow up on the ratification of the Convention...with its enactment it will form a part of Indonesia's positive law equal to other national legislation... The need for counter terrorism financing to be dealt with in its own legislation is also triggered by the IX Special Recommendations of the FATF. These recommendations form the international standard for blocking access by terrorist groups and their supporters to the financial system (Husein 2012, p. 3).*

Given that the Report is firmly based on Convention and IX Special

Recommendations principles, it is no surprise that the Act itself is very much in line with those provisions, and in many cases mirrors the provisions themselves.

The Report in some ways attempts to justify Indonesia's failure to fully implement the Convention's provisions by arguing that the existing, minimal provisions in the then existing CFT legislation are effectively sufficient to cover its obligations. It also points out that since 2008 PPATK and the Central Bank have been publishing and implementing the UN's consolidated list of terrorist individuals and groups to assist financial services providers in detecting and reporting suspicious transactions. It adds that from 2008 to 2010 PPATK found 128 transactions suspected of being connected to terrorism. Further, 35 suspicious financial transactions were reported to law enforcement agencies (Husein 2012, p. 20).

TheReportarguesthat"*havingalreadyaccommodatedtheobligations on State Parties as set out in the SFT Convention, the ratification or enactment of the Convention by the Indonesian government tends more towards strengthening or confirming that commitment...Nonetheless, ratifying or enacting the convention is very important in strengthening Indonesia's anti-money laundering regime*"(Husein 2012, p. 20).

Whether or not this is really the case, it can now be said that Indonesia's domestic legislation is largely, albeit not yet completely, in line with international best practices and its obligations under the Convention. Whether this legislative conformity will translate into greater detection and prevention in practice is an issue outside the scope of this paper. In light of the critical importance of the Act to Indonesia's CFT regime, the Act's salient features warrant attention here.

Preamble

The Preamble of the Act defers to the 1945 Constitution (*Undang Undang Dasar Negara Republik Indonesia* 1945) as the basis of the state's duty to ensure the security and prosperity of the people. It states that in implementing and participating in a world order based on independence, peace and social justice' the state must take firm action against any threats which disrupt the security of the people or the sovereignty of the state, including terrorism and any activities which

support terrorism. Paragraph (b) states that financing is an essential element of terrorist acts and therefore any efforts to combat it must include the prevention of the financing of terrorism.

Paragraph (c) refers to Indonesia's ratification of the Convention, and that Indonesia is therefore obliged to harmonise its domestic legislation with the provisions as set out in the Convention. The fact that Indonesia has ratified the Convention and here, expressly acknowledges the requirement to enact the provisions in its national legislation effectively deals with the first FATF recommendation that "each country take immediate steps to ratify and implement fully the 1999 UN Convention for the Suppression of Terrorist Financing" as well as the UN resolutions, particularly Resolution 1373.

Paragraph (d) acknowledges that the legislation dealing with CFT has not yet dealt with the prevention and eradication of terrorism financing satisfactorily and comprehensively.

Chapter I – Definitions

Terrorism financing is defined in Article (1)(1) in terms similar to the Convention as "any act of providing, collecting, giving or loaning funds, whether directly or indirectly, with the intention that they be used, or in the knowledge that they will be used, for a terrorist act, a terrorist organisation or a terrorist individual." Convention Article 2(1) makes no reference to "loaning" of funds, hence this definition is wider and would catch that circumstance if it were ever to be raised as a defence. The Indonesian definition has dropped the phrasing "in full or in part". It is not made clear why this was done, and effectively leaves the door open to a defence along the lines of "only a small percentage of the funds we collected were used for terrorism." For the sake of completeness it would be preferable for "loaning" to be inserted.

It should also be noted here that as discussed above, pursuant to Resolution 1373, each country has been tasked with compiling its own list of terrorist individuals and organisations, and the Act contains provisions to that effect.

Paragraph (2) of the Act defines a "terrorist act" by reference to the general anti-terrorism legislation. Law No.15 2003 Article 6 creates the crime of terrorism and effectively defines a terrorist act as being when:

"any person intentionally uses violence or the threat of violence to create a widespread atmosphere of terror or fear or which causes mass casualties by taking the liberty or lives and property of any person, or which causes damage or destruction to vital strategic objects or the environment or public facilities or international facilities."

By comparison, as discussed above, the Convention's definition of a terrorist act is two-part, and refers to (a) any acts contained in the 12 terrorism conventions and (b) any act intended to cause death or serious injury to a civilian where the purpose is to intimidate a population or to compel a government or other organisation to do or abstain from doing any act.

While the wording of the Indonesian definition is unusual by its reference to the creation of mass casualties through the taking of liberty, lives and property, its references to damage and destruction of property, strategic vital facilities, and the environment arguably make it *far* wider than that in the Convention. Whereas the Convention requires an act intended to cause death or serious injury, the Act requires, taken at its most minimal interpretation, merely an act which causes a widespread atmosphere of fear by intending or threatening to cause damage to the environment or some public facility. As Butt argues:

> *Critical terms such as 'widespread atmosphere of terror or fear', 'mass casualties' and 'very high' are not defined. This leaves them open to subjective interpretation and raises many questions about how these provisions could be applied...Would terror or fear instilled in most inhabitants of one village suffice, or must the terror spread through a sub-district, province or, indeed, the whole of Indonesia? How is the terror/fear to be proven? Must a poll be taken or witnesses called; or would judges accept that fear had in fact occurred based on their own perceptions? (Butt 2008, p. 4)*

The author is not aware of any cases where this has been raised as an issue of contention; a definitive answer would require a detailed examination of the available judgments in terrorism cases. The question however is a real one, and could arguably be raised as a defence. As noted by Jones in relation to many recent cases of shootings of police officers "It used to be that jihadis saw the creation of fear as a very specific objective...The aim now is much more instrumental. It's about

getting weapons, taking revenge, and giving militants something to do... The main aim of killing police is certainly not to create fear." (Jones 2013, p. 1) Yet these shootings of police officers (five in August and September 2013) continue to be labelled terrorist acts, due to alleged connections to terrorist groups (Gatra 2013).

Paragraph (3) expressly defines "persons" to include corporations and (4) defines corporations as including "a collection of people and/ or assets whether legal entities or non-legal entities". This definition of a terrorist group or organisation is an improvement on the definition in Interim Law No.1 of 2002 – which doesn't refer to "groups of people" only legal or non-legal bodies. Arguably this wider definition of a "corporation" is wide enough to capture clandestine terrorist groups and networks. However, in terms of listing Indonesian terrorist groups, while there are a great number of different groups with different names, there is also a high level of permeability between the groups, in respect of assisting or harbouring other group members, exchanging information, strategies, funds and skills. This 'blurring of the lines' between terrorist groups potentially creates a hurdle for police who are responsible for maintaining the list of terrorist organisations.

Paragraph (6) defines a "suspicious transaction related to terrorism financing" in two parts, namely, (a) a financial transaction where there is an intention to be used and/or where it is known that it will be used for terrorist acts; or (b) transactions involving any person on the list of suspected terrorists or terrorist organisations. The definition of "suspicious transaction" will be of essential importance to those in the financial services industry, for it is such transactions that employees are required to report within three days of becoming aware of them. In the absence of an admission or incriminating statement from a customer, it is difficult to imagine how a bank employee could establish that a transaction was intended or known to be used for terrorism. In the absence of such an admission therefore it would arguably be very difficult to prove that a financial services provider[6] had failed to report

[6] The explanatory notes to the Act list a number of examples of Financial Services Providers (FSPs) including, among others: banks, financial institutions, insurance companies and insurance brokers, pension funds, securities companies, investment managers, custodians, trustees, postal service providers, foreign exchange traders, credit card companies, e-money or e-wallet providers, savings and loans societies or

a suspicious transaction on this basis. A more likely situation is failure by the provider employee to check a current list for a listed individual or organisation, and the transaction has proceeded. Considering the enormous volume of daily transactions, it is conceivable, indeed probably inevitable that an inestimably large number of transactions will proceed without being checked in this manner. It is here that criticisms of CFT as being akin to trying to "find a needle in a haystack" come to the fore. Barrett for example speaks of the "the near impossibility of achieving full compliance with all nine Special Recommendations, let alone of assuring effective implementation." (Barrett 2012) He also warns that where a perception of disproportionality seeps in between the burden of implementing the laws and the benefits of doing so, those implementing them will become less rigorous and those complying less caring. This will undoubtedly be an issue faced by both financial service providers obligated to implement the CFT checks and PPATK tasked with enforcing them.

Paragraph (9) defines the Financial Transactions Analysis and Reporting Centre (PPATK) as that referred to and created by the Anti-money Laundering Act.

Under Paragraph (10) a Financial Services Provider (FSP) is any person providing services in the field of finance or related services whether formal or informal. According to Ramadhan this definition would include designated non-financial businesses and professions (DNFBPs), such as lawyers, which offer any kind of financial service. A lawyer who offers only advocacy services, on the other hand, would not be included. (Ramadhan 2013)

A Supervisory and Regulatory Agency (LPP) is one responsible for supervision, regulation and sanction of Financial Services Providers. The relationship between LPPs and the PPATK is expanded on further in the Act. In practice, there are two LPPs – for banks, the relevant LPP is Bank Indonesia; Indonesia's central bank. For non-banks, the

cooperatives, any companies operating in commodities trading, or money transfer services. The Act makes no mention of non-financial businesses and professions such as lawyers. According to Syahril Ramadhan this definition is wide enough to cover any professions, including lawyers, which offer any kind of financial services (Ramadhan 2013).

relevant LPP is the Financial Services Authority (OJK). Whereas the PPATK can recommend sanctions against FSPs, it is the relevant LPP which will actually make a final determination on the execution of sanctions against FSPs (Ramadhan 2013).

Chapter II – Scope

Chapter II details the extraterritoriality provisions in the Convention, that is, that the Act may apply within the territory of the Indonesia or outside Indonesia in certain cases where there is a nexus with Indonesia. External acts listed include those committed outside Indonesia by an Indonesian national, or acts committed against the Indonesian government or Indonesian flagged vessels or aircraft.

Chapter III – the crime of terrorism financing

Article 4 criminalises terrorism financing, providing for a maximum penalty of 15 years imprisonment and a maximum fine of Rp1 billion. Article 5 criminalises attempts, conspiracies, or aiding terrorism financing with the same penalties as Article 4.

Article 6 states "any person who wilfully plans, organises or incites/ encourages (menggerakkan) others to commit the offence set out in Article 4 commits the offence of terrorism financing with a penalty of life imprisonment or a maximum penalty of 20 years imprisonment. This section is interesting - firstly it provides two seemingly contradictory penalties, i.e. life imprisonment or a maximum of 20 years. Secondly the penalty here for planning, organising or inciting is harsher than the penalty in Article 4, and arguably far wider in scope. It is conceivable that the section applies to fiery speeches by Islamist clerics (*taklim)* which include a call to make donations to jihadist groups. Clearly where the group was listed this would constitute a crime. Where it is known or ought to be known that the funds would be used for a terrorist act, this would also constitute a crime under Article 6 and expose the speaker to a maximum penalty of life imprisonment. The penalty's harshness presumably reflects the gravity of the offence for those in positions of authority, such as clerics or teachers, to abuse their position by encour-

aging others to commit the crime of funding terrorism.

Chapter IV – Other crimes related to terrorist financing

Chapter IV stipulates the potential criminal liabilities of those working within the terrorism financing regime and financial services providers. Article 9 (the 'anti-tipping off' article) provides that any officer or employee of PPATK, investigating or prosecuting agencies, judges, or any person receiving documents or information relating to a suspicious transaction in the course of their duty is obligated to treat that information as secret. Leaking of any such document or information attracts a maximum penalty of four years imprisonment. Given the level of corruption within Indonesia's criminal justice system, the maximum penalty of four years imprisonment would seem a reasonable deterrent to the leaking of such sensitive information.

Article 10 forbids directors, commissioners, managers or staff of a financial services provider or the regulatory agencies from providing information regarding a suspicious transaction to any customer and provides a maximum penalty of 5 years imprisonment and Rp1 billion fine. The penalty here is higher as it specifies the giving of information to the customer (or any other person). Given the seriousness of the potential consequences of leaking such information to a terrorist organisation it may be asked whether the penalty should not be even higher.

Chapter V – Prevention

Chapter V sets out provisions relating to prevention of CFT, with Article 11 setting out four mechanisms by which prevention may be achieved. They are: (a) application of the principle of 'know your customer' (b) adherence to monitoring and reporting by FSPs (c) monitoring of money transfer systems and (d) monitoring the movement of cash in and out of Indonesia.

Article 13 on "Reporting" is one which would perhaps cause most concern for those working in the financial services industry and requires any provider to report any financial transaction suspected of being connected to the financing of terrorism within three days of becom-

ing aware of the transaction. Subsection (2) however softens the impact of the preceding section by stating that where a provider "intentionally" contravenes the section it may incur an administrative fine of up to Rp1 billion rupiah. This fine is to be administered by the LPP.

Articles 14-17 outline the legal framework for the monitoring and compliance with the reporting requirements. Monitoring and compliance is to be carried out by LPPs in cooperation with PPATK. Where an LPP discovers a suspicious transaction that has not been reported to PPATK, the LPP must immediately report this discovery to PPATK.

Reports of suspicious transactions to PPATK are specifically exempted from confidentiality provisions which providers are usually bound by. And except in cases of abuses of process provider staff will not be liable for any criminal or civil action in carrying out their duties in accordance with Act.

Articles 18, 19 and 20 set out the conditions for money transfers, including requirements for full details to be obtained with regard to both the sender and receiver of funds. Without those the transfer must be rejected. providers are also required to store details from all money transfers for at least five years from the date of the transfer. In the event of non-compliance providers will be liable to a sanction to be set out in further regulations, which are yet to be issued.

Chapter VI – Blocking (Freezing)

Chapter VI stipulates the regime by which PPATK, investigators, prosecutors or judges may request or order a provider to block or freeze assets where it is known, or ought to be known that the funds will be used for terrorism. It should be noted that the regime provided in Chapter VI is significantly different from that set out in article 29 of interim law No. 1 of 2002. The main difference is that this new regime provides for judicial oversight of the power to block or freeze assets or funds. The regime set out here expressly supersedes and repeals the provisions of article 29 of the ATL.

Article 22 sets out that a freeze may be executed where it is known or

suspected[7] that funds will be used for terrorism. Articles 23 through 26 then go on to set out the procedure by which a freeze may be requested, executed and objected to. Under article 23(1) a request for a freeze on funds may originate from the PPATK, an investigator, a prosecutor, or a judge – and must be set out in writing in a letter of request to the FSP. This is expressly "an administrative request" and it must set out the name and position of the person requesting the freeze, the identity of the corporation or person whose funds are being blocked, the reasons for the request and the location of the funds.

Article 23(2) sets out a parallel mechanism by which a court order may be sought from the Central Jakarta District Court – but does not provide further details.[8] In either case, article 23(5) requires FSPs to execute a block immediately after receiving a letter of request or an order – the block then remains in force for 30 days – and the FSP must provide a notice of compliance with the block to the requesting agency, and the party whose funds have been blocked, within one day. The blocked funds must remain with the FSP. After 30 days the FSP is then required to terminate the block on the funds. This would appear to contradict FATF Best Practices which require a block of "indeterminate duration" (FATF 2013b, p. 6).

Articles 24 to 26 set out a procedure for objecting against a block by the holder of the funds. This may be done by lodging a notice of objection within 14 days with PPATK, investigator, prosecutor or judge, i.e. the party which requested the block. The notice must include the reasons for the objection and be accompanied by any relevant documentary evidence which may explain the legitimate origin of the funds. In the event of a notice of objection the requesting agency must either revoke the block or reject the notice of objection. Where it is rejected, article 25(6) advises that the blocked party may bring a civil action in court. It appears unclear how the two mechanisms of an administrative request and a court order work together. In what circumstances should a requesting agency seek a court order and when

[7] The explanatory note to this section sets out that the standard of proof in this instance is that of *bukti permulaan yang cukup*, sufficient preliminary or 'prima facie evidence'.

[8] This "dual" mechanism of administrative and judicial proceedings accord with the process outlined in the FATF best practices document (FATF 2013b, p. 5)

would it use an administrative request? Secondly, it seems potentially inequitable that an objection to a block on funds should be made to the same agency which sought the block.

Chapter VII – List of suspected terrorists and terrorist organisations issued by government

Chapter VII, articles 27 to 35, outlines the procedure for issuing a list of terrorist organisations, the blocking of funds of listed persons or organisations, and a procedure for objecting. In brief, the Chief of the Indonesian Police shall submit an application to the Central Jakarta District Court of suspected terrorist individuals and organisations. Identities and reasons must be included as well as any documentary evidence or recommendations from relevant government departments or ministries[9]. The Court must then make a determination on the application within 30 days. Where the court grants the request, the name of the person or organisation is included on the list, and the person or organisation must be notified within 10 days. The list is maintained by the Chief of Police. As at September 2013, such a list had yet to be issued – forming one of FATF's main concerns about Indonesia's non-compliance.

The list is then forwarded, via the LPPs' to all financial services providers who are required to block all funds belonging to those persons or groups. The blocked parties may object providing reasons and documents to the Chief of Police. The Chief of Police must then determine whether to remove the person from the list, or reject the application; in which case the party may bring an action in the Central Jakarta District Court.

Remaining Chapters

Chapter VIII sets out a procedure for law enforcement agencies to request information relating to funds from FSPs. Chapter IX relates

[9] The explanatory note for article 27 mentions agencies such as the National Counter Terrorism Agency, Ministry of Foreign Affairs, and the National Intelligence Agency.

to international cooperation including requests from foreign agencies for freezing of funds of terrorist organisations within Indonesia. Under Chapter IX a request for the freezing of assets of a person originates from an overseas jurisdiction and is forwarded to the Foreign Affairs Ministry. This request is then forwarded to the Chief of Police, and on to the Central Jakarta District Court in a process similar to that contained in Chapter VI. Chapters X and XI are administrative covering transitional arrangements and repealing previous legislation.

IV. CRITICISMS OF INDONESIA'S CFT REGIME

In evaluating Indonesia's CFT legislative regime, it can be argued that Indonesia has fulfilled its obligations under the Convention. All of the major requirements of the Convention are met, namely funding of terrorism is criminalised with serious penalties; a regime exists for the designation of terrorist groups and the freezing of their assets; laws exist requiring FSPs to apply "know your customer" principles and to report suspicious transactions; procedures exist for extradition and international cooperation in CFT – and so on.

However, according to FATF, Indonesia has not gone far enough (Posthouwer 2008, p. 161). And while these recommendations are not binding on countries, being on the FATF's list of high-risk and non-compliant jurisdictions can provide a powerful incentive to act.

In a statement posted on 21 June 2013, FATF stated:

> *Indonesia has taken steps towards improving its AML/CFT regime, including by adequately criminalising terrorist financing through the CFT law enacted in February 2013. However, despite Indonesia's high-level political commitment to work with the FATF and APG to address its strategic AML/CFT deficiencies, Indonesia has not made sufficient progress in implementing its action plan within the agreed timelines, and certain strategic AML/CFT deficiencies remain regarding the establishment and implementation of an adequate legal framework and procedures for identifying and freezing of terrorist assets. The FATF encourages Indonesia to address these remaining issues, in compliance with international standards.*

It is clear that significant progress has been made by Indonesia, driven by high-level political commitment; however more work needs to be done in the area of implementation.

PPATK representative Syahril Ramadhan confirmed these comments saying that the FATF's concerns could be divided into three areas: Indonesia's failure to create a domestic list of terrorism financers; freezing assets of individuals on the Resolution 1267 list "without delay"; and the *evidentiary standards* applied by Indonesian courts when determining whether to include a person on the domestic list (Ramadhan 2013).

Whereas the legal framework for the creation of a list of suspected terrorist financers now exists, pursuant to Chapter VI of the Act, in practice, this list has not yet been compiled or issued by the Indonesian Chief of Police. However this is merely a question of time and implementation. The PPATK is currently in discussions with the police's special counter terrorism unit, Densus 88, and it appears that a domestic list will be issued within a matter of months (Ramadhan 2013). In the opinion of Mr Ramadhan, the issuance of that list, which will merge both a domestic list and the Resolution 1267 list, will be sufficient for Indonesia to be removed from the FATF's list of high risk and non-cooperative jurisdictions.

Notwithstanding the creation of such a list, FATF has flagged two further issues related to Indonesia's judicial oversight menchanism. First, that the freezing of assets of individuals on the 1267 list must be conducted "without delay" and the judicial oversight mechanism provides a lag time of up to 30 days during which a court considers whether to list the person or not. Second, FATF has requested further information regarding the evidentiary standards used by Indonesian courts in making such a determination (Ramadhan 2013). In relation to the second issue, FATF's *International Best Practices* document, explains that in making determinations of whether individuals should be listed "the competent authority of each jurisdiction will apply the legal standards of its own legal system regarding the kind and quantum of evidence...to enhance and expedite cooperation...all countries are encouraged to share information on how the legal standard is applied... with examples." (FATF 2013b, p. 6) Given the relative newness of In-

donesia's CFT legislation there are currently no decided cases for Indonesian authorities to share with other jurisidictions. However, as at the time of writing, the first case to seek a designation using the new legislation is before the courts and will be decided within a matter of weeks. (Ramadhan 2013) Indonesian CFT authorities would be advised therefore to take note of the court's decision and the evidence presented, and share this information, with their international counterparts; in line with FATF's guidance.

Regarding the delays inherent in Indonesia's judicial oversight mechanism it would appear that there are two competing policy objectives at stake – on one hand is the expedient freezing of assets of suspected terrorist financers before they are able to be withdrawn or moved – on the other are notions of due process and fairness. [10]

Indeed, FATF's *International Best Practices* document which is intended to "assist countries in developing and implementing" financial sanctions regimes refers to both of these competing policy objectives. It stresses that "efforts to combat terrorist financing are greatly undermined if countries do not freeze the funds or other assets of designated persons and entities quickly and effectively". (FATF 2013b, p. 4) However, it also emphasises the importance of following established legal guidelines, the rule of law and due process.

Yunus Husein, Chairman of the committee which authored the draft CFT Bill Report, and former head of PPATK, criticised the Act for that reason. In discussing the mechanism contained in Articles 27 and 28 he pointed out that it would be possible for funds to be moved while this process proceeds. (Hukumonline 2013) One alternative, as adopted in Malaysia for example, is that the funds of anyone on the 1267 list, are automatically frozen (Ramadhan 2013). However, this would require an amendment to the Act, and that is unlikely to happen within the life of the current parliament, given Indonesia has an election in early 2014. While it might seem easy to dismiss concerns related to the 1267 list, due to the decreasing relevance of Al Qaida in the years since 9/11, Ramadhan has pointed out that in the last month alone, the United States

[10] Further details on the application of Special recommendation 6 can be found in the FATF Special Report on International Best Practices Targeted Financial Sanctions Related to Terrorism and Terrorist Financing (Recommendation 6) (FATF 2013b)

has added two Indonesian nationals to the list. Therefore, the list and concerns relating to its implementation continue to be regarded as being of high importance to FATF, the UN and the United States in particular.

Another criticism of Indonesia's ability to implement an effective CFT regime focuses on the high numbers and ease of obtaining false identification documents (KTPs or Kartu Tanda Penduduk) which allow terrorists (and other criminals) to travel, seek accommodation, open bank accounts etc using a false identity. As outlined in FATF's Best Practices document "for the effective implementation of an asset freeze, robust identifying information is essential" (FATF 2013b, p. 6) This factor, combined with the common practice of individuals to use only one name, could potentially lead to significant issues in providing a positive identity match for a suspected terrorism financer (Nugrahanto 2010). However this is obviously an issue outside the control of PPATK.

A reading of Posthouwer's analysis of the Australian legislative regime (Posthouwer 2008) indicates a level of nuanced detail in the various regulations and procedures which is not yet present within the Indonesian system. For example, AUSTRAC, Australia's equivalent of PPATK, has issued detailed supplementary rules and regulations governing the fine details of implementation of "know your customer" procedures. However, further regulations will no doubt be forthcoming from PPATK to govern the kind of procedural details which are present in other jurisdictions.

PPATK needs to work closely with FATF to further develop the detailed regulations and rules required to bring Indonesia into line with FATF's requirements and to be removed from the list of non-compliant countries. These regulations would then require a concerted whole-of-government approach in their application with the full commitment of the private financial services sector to implement the principles of KYC and suspicious transaction reporting. Only then will Indonesia have any chance of being removed from FATF's list of high-risk countries.

V. CONCLUSION

With the enactment, in March 2013, of its *Eradication and Prevention of Terrorism Financing Act*, Indonesia has finally brought its domestic legislation into line with its commitments under the *International Convention for the Suppression of Terrorist Financing* – 12 years after signing the Convention.

However, having been criticised by FATF for failing to implement the new laws in line with the agreed timeline, Indonesia remains on FATF's list of high-risk and non-cooperative jurisdictions. It may be argued that the 2003 law and this latest initiative merely pay lip-service to Indonesia's international commitments in respect of combating the financing of terrorism, and that the latest initiative was enacted only in response to Indonesia's inclusion on FATF's 'name and shame' list. On the other hand, it may be said that Indonesia has achieved more than most in the area of general counter terrorism operations, and while the enactment and implementation of its CFT legislation may have lagged somewhat, the political will exists, and it is simply a matter of time and regulatory detail before the legislation is fully implemented by both public and private institutions.

A truly effective application of the CFT statutory regime will require accompanying implementing regulations, which have yet to be issued. The regulations will require much greater detail in respect of the implementation and infrastructural regime, particularly concerning the monitoring and application of compliance and sanctions by PPATK and the sustained and coordinated efforts of both government agencies and the financial services sector. These are all outcome objectives which are achievable given the continuing goodwill and cooperation of the financial services sector. While it may appear unlikely to be realised in the near future, with the enactment of its CFT legislation, a functioning counter-terrorist financing regime, capable of satisfying FATF, is now within Indonesia's grasp.

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