

THE INTERNATIONAL ANTI- TERRORIST FINANCING SYSTEM'S NEGATIVE EFFECT ON CIVIL SOCIETY RESOURCES

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INTRODUCTION

After 9/11, global powers took emergency steps to cut off the flow of financial resources to terrorist organisations. This effort included sanctions of persons and organisations put on terrorist lists, and expanded civil and criminal penalties for providing funds or other forms of aid to them. Civil society is just one of the sectors covered by these laws, but because of the unique public benefit and often life-saving nature of its work, civil society has been among the most negatively impacted.

As part of their anti-terrorist financing strategy, the US and its allies also turned to the unofficial but powerful Financial Action Task Force (FATF), an multinational organisation that sets standards for legal measures to combat threats to the international financial system, such as money laundering. After 9/11 FATF added anti-terrorist financing to its agenda and developed special recommendations to address it, including one on civil society organisations (CSOs). FATF's recommendation on non-profits adopted the rhetoric of the George W Bush administration, finding that civil society is "particularly vulnerable" to terrorist abuse, and promoting increased government monitoring and supervision of CSOs.

What followed was a chain of events that has had a negative impact on civil society operations and access to financial resources to support CSO work. While FATF has taken positive steps since 2012 to prevent abuse or misapplication of its programme, more needs to be done to make sure anti-terrorist financing laws stop money to terrorists, not to civil society. This will require concerted effort by civil society, FATF and governments around the world.

This contribution to the 2015 CIVICUS State of Civil Society Report explains how FATF's programme works and how it has contributed to the global trend of restrictions on civil society, intentionally or not. It then describes the civil society response and advocacy campaign on FATF. There have been important successes, but on-going engagement is required if the problematic trend is to be reversed. Finally, it suggests ways in which CSOs in all parts of the world can engage in the FATF process, globally and in their own countries, to prevent enactment of new restrictions and to reverse regressive trends.

THE MOST POWERFUL AGENCY YOU NEVER HEARD OF – WHAT FATF DOES AND HOW IT IMPACTS ON CIVIL SOCIETY

Ben Hayes, a UK-based civil society analyst, calls FATF “the most powerful agency you never heard of.”¹ It has come as a surprise to civil society advocates that they must now focus time and resources on a multinational institution focused on the international financial system. But defence of civil society can lead in unexpected directions, and civil society now needs to pay close attention to this obscure but influential body.

Formed in 1989, FATF has 35 member states and eight regional associate members and official

Ten categories of restrictions on resources:

- (1) requiring prior government approval to receive international funding;
- (2) enacting ‘foreign agents’ legislation to stigmatise foreign funded CSOs;
- (3) capping the amount of international funding that a CSO is allowed to receive;
- (4) requiring that international funding be routed through government-controlled entities;
- (5) restricting activities that can be undertaken with international funding;
- (6) prohibiting CSOs from receiving international funding from specific donors;
- (7) constraining international funding through the overly broad application of counterterrorism and anti-money laundering measures;
- (8) taxing the receipt of international funding, including cross-border philanthropy;
- (9) imposing onerous reporting requirements on the receipt of international funding;
- (10) using defamation laws, treason laws, and other laws to bring criminal charges against recipients of international funding.

Aid Barriers and the Rise of Philanthropic Protectionism by Douglas Rutzen, International Journal on Not for Profit Law, March 2015

observer bodies, such as the World Bank and UN agencies. Its member states set anti-terrorist financing and anti-money laundering standards that it uses to assess the adequacy of laws in almost every country in the world. Its recommendations cover a variety of sectors, including banking, remittance businesses and

CSOs. FATF members meet in quarterly plenaries and make decisions by consensus.

FATF describes itself as a policy making body.² It is not treaty based and has no actual legal authority, and hence there is little transparency or public accountability. Its recommendations do not constitute binding international obligations. FATF's power and influence comes from its evaluation programme, which assesses 180 countries for compliance with its standards. It publishes a list of countries that it finds to be non-compliant or partially compliant. A negative rating can have serious economic consequences, affecting a nation's international credit rating and ability to attract investment. As a result, FATF wields enormous influence over how governments regulate civil society.

FATF's Recommendation 8 (R8), on non-profit organisations (as it describes CSOs), states:

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

“(a) by terrorist organisations posing as legitimate entities; (b) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.”

Two key documents outline how FATF expects governments to implement this recommendation:

The Interpretive Note (IN) lays out objectives, principles and the types of measures countries should take to be rated as compliant.

The Best Practices Paper (BPP) provides more detail on principles that should guide governments, and how FATF thinks governments should implement R8.

In 2013, after consultation with civil society groups, FATF made significant revisions that took a more constructive approach. Important principles and findings in this revision include:

- Clear language on the need to safeguard freedom of association and expression;
- Caution that R8 should not be misused to suppress CSOs;
- The stipulation that oversight by governments and measures taken by financial institutions should be “flexible, effective and proportional to the risk of abuse.”
- Recognition that civil society self-regulatory organisations can play a role in protecting the sector, and that measures to strengthen self-regulation should be encouraged.

In June 2014 FATF published a report³ meant to identify typologies of terrorist abuse of civil society. Its key findings include the following:

- The terrorism threat to civil society remains, and civil society continues to be misused and exploited;
- Non-financial abuse, such as the abuse of programmes or support for recruitment, appeared regularly;

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- The CSOs most at risk appear to be those engaged in service activities and that operate in close proximity to an active terrorist threat (e.g. in a conflict area with an active terrorist threat or domestically within a population that is actively targeted by a terrorist movement for support and cover).

In a move that will have a significant impact on how countries are assessed for compliance with its standards, in 2013 FATF adopted a new evaluation methodology that establishes “a systematic assessment of the effectiveness of national systems,”⁴ with a new emphasis on the question of ‘effectiveness’. In the future, in addition to a check-the-box technical compliance review, countries will be rated on whether their laws are at a high, substantial, moderate or low level of effectiveness. This system gives civil society a new way to point out the counterproductive aspects of unnecessary restrictions on operations and access to resources.

IMPLEMENTATION OF FATF RECOMMENDATION 8 CREATES PROBLEMS FOR CIVIL SOCIETY

Authoritarian countries have abused the FATF process to infringe on the rights of civil society, including its

autonomy and ability to receive international support. Some governments have exceeded what is necessary or reasonable in their eagerness to get a complaint rating in the FATF assessment process. Because FATF focuses on financial issues, the restrictions on civil society that flow from its process impact on civil society resources: both resources coming into countries, and those going out.

A 2012 ground-breaking report by Statewatch⁵ and the Transnational Institute examined the effects of FATF regulations in almost 160 countries and found that FATF rules are being used by governments as an “...instrument, to further cut back on the space of civil society... freedom to access and distribute financial resources for development, conflict resolution and human rights work.”

For example, when Paraguay was found non-compliant with FATF standards, its response was to pass the Anti-Terrorist Law of 2010 which “...did not clearly define what constitutes terrorism and included acts such as ‘dangerous interventions or obstacles on public roadways’, ‘noise pollution’ and other actions which ‘intimidate Paraguayan citizens.’”⁶ With sentences of up to 15 years for some offences, the law is widely seen as a mechanism to suppress protest and limit the capacity of civil society.

While some governments cite FATF directly as justification for restrictions on CSOs, others cite ‘anti-terrorist financing’ or ‘national security’ more generally. Either way, the impact on civil society is negative and fails to take the proportional, risk-based approach that is central to FATF policy.

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EXCESSIVE GOVERNMENT REGULATION AND RESTRICTIONS ON SOURCES OF FUNDING FOR CIVIL SOCIETY

After the 2014 FATF evaluation, Spain passed a new law requiring all donations over €1,000 to be reported to the national government. In Uzbekistan, CSOs must get approval for foreign grants and report each financial transaction using the funds, no matter how small, to the Ministry of Finance on the next business day.⁷

The British Virgin Islands, citing FATF, passed a law that requires CSOs with more than three employees to appoint a Money Laundering Reporting Officer. CSOs with less than three employees are required to “...perform the Money Laundering Reporting Officer functions” though they need not appoint one. Stiff fines are imposed for “...failure to maintain any records required to be maintained.”⁸

In 2013, Azerbaijan passed amendments to its CSO laws that, among other measures, increased penalties for CSOs that fail to register a grant, and introduced penalties for donors giving cash donations to CSOs and CSOs for receiving cash donations.⁹

Some countries, including Bangladesh and Egypt, require prior government approval before a CSO can receive international funding. Since 2009, CSOs in Ethiopia have been limited to 10% of their total income coming from foreign sources. In India, CSOs must report all foreign contributions to the central government within 30 days of receipt.¹⁰

These are just a few examples of the many excessive government restrictions recently imposed on CSO funding.

GROWING PROBLEMS WITH ACCESS TO FINANCIAL SERVICES

FATF Recommendations also cover financial institutions. Since 9/11, financial institutions have increasingly been expected to act as monitoring and enforcement arms of governments in order to identify, track and stop illicit money flows. Between the cost of compliance and the threat of significant sanctions for violations, banks have begun ‘derisking’ by dropping low profit customers such as CSOs. As a result, charities and grant-makers that need to conduct international financial transactions for their operations have experienced increasing difficulty getting access to financial services. Financial institutions may close accounts, refuse to make transfers between organisations, or delay them, often for months at a time. Remittance services that facilitate fund transfers

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between diaspora populations and their families are threatened by this ‘derisking’ trend.

CIVIL SOCIETY AND EXPERTS RESPOND, FATF TAKES POSITIVE STEPS

The Statewatch report put a spotlight on FATF, generating further scrutiny. In 2013, Maina Kiai, UN Special Rapporteur on the rights to freedom of peaceful assembly and association, said that FATF “... fails to provide for specific measures to protect the civil society sector from undue restrictions to their right to freedom of association...”¹¹ He noted that the right of assembly includes the right “...to seek, receive and use resources... from domestic, foreign, and international sources.” A March 2013 report by the Observatory for the Protection of Human Rights Defenders looked at 35 country case studies and found that “...in many countries the fight against terrorism and money laundering is instrumentalised by authorities to neutralize NGOs and silence critics.”¹²

Civil society has also responded. In mid 2012 the Human Security Collective, a Dutch group that works to protect the operational and political space of civil society, approached FATF to ask for a response to the Statewatch report. That October FATF issued a statement saying, “It will be important that regulations and actions in this area do not harm the legitimate activities of such organizations.”¹³ During this time the Human Security Collective and

the US-based Charity & Security Network formed the Transnational NPO Working Group on FATF, which coordinates information sharing and advocacy for over 100 CSOs globally. Many of its members participated in FATF’s first formal engagement with civil society groups in April 2013, and their input was incorporated into the June 2013 limited BPP update. Since that time, the working group has provided substantial input for the 2014 FATF typology study, and at time of writing, it was coordinating civil society input into the final update of the BPP.

This process involved a formal consultation with FATF, but problems arose when it came to sharing the draft BPP for comment. FATF only released it to invitees to its consultation, and it was only after several FATF members, including the European Union and USA, released it that it became widely available for sector comment. This indicates that more needs to be done to make FATF transparent and accountable. FATF followed through on its statements about protecting civil society in its February 2015 study on ISIS financing, noting that, “It is important that efforts and measures aiming at combating terrorist financing should not affect legitimate provision of humanitarian assistance to vulnerable populations...”¹⁴

NEXT STEPS FOR CIVIL SOCIETY

At the time of writing, as well as coordinating input to FATF on the final revision of the BPP, the Transnational NPO Working Group on FATF is helping civil society raise its voice at the national level as the new assessment methodology is implemented. The final

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BPP should guide governments on what they should do to take a risk based and proportional approach to protecting CSOs from terrorist abuse. It should not be used for one-size-fits-all regulations, or turn civil society codes and standards into law.

It will be up to civil society at the national level to engage in dialogue with their governments about how R8 and the risk based approach it calls for can be implemented constructively. In places where governments abuse the process to repress civil society, both local CSOs and the international civil society community must find ways to respond. The method will depend on the circumstances, but tools such as the UN Human Rights Commission Universal Periodic Review process can be considered.

FATF evaluations of country compliance with its standards present another opportunity for civil society to raise issues about the appropriateness and effectiveness of restrictions and regulations.

CONCLUSION

Governments that are serious about protecting human security will agree with Maina Kiai, who said “...civil society organizations play a significant role in combatting terrorism. By their direct connections with the population and their prodigious work in, inter alia, poverty reduction, peacebuilding, humanitarian assistance, human rights, and social justice, including in politically complex environments, civil society plays a crucial role against the threat of terrorism.”¹⁵ Removing unnecessary and unjustified barriers to resources will only strengthen civil society’s ability to play this important role.

For more information, and to join the Transnational NPO Working Group on FATF, see www.fatfplatform.org.

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6 Ibid.

7 International Center for Not for Profit Law, NGO Law Monitor, Uzbekistan, <http://www.icnl.org/research/monitor/usbekistan.html>.

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[Used_to_Justify_Laws_That_Harm_Civil_Society#British_Virgin_Islands_\(BVI\)](http://www.charityandsecurity.org/analysis/Restrictive_Laws_How_FATF_Used_to_Justify_Laws_That_Harm_Civil_Society#British_Virgin_Islands_(BVI)).

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10 Douglas Rutzen, ‘Aid Barriers and the Rise of Philanthropic Protectionism’, International Journal for Not for Profit Law, March 2015, Vol. 17, No. 1, <http://www.icnl.org/research/journal/vol17ss1/Rutzen.pdf>.

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15 Charity & Security Network op. cit.