

Protecting charities from terrorists ... and counterterrorists: FATF and the global effort to prevent terrorist financing through the non-profit sector

Peter Romaniuk¹ · Tom Keatinge²

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Abstract What role has FATF played in the global effort to counter terrorist financing through the non-profit sector? How have advocates for the sector responded and what do these developments tell us about FATF's operations and influence? This article reflects on the emergence and evolution of FATF Recommendation 8, initially introduced as Special Recommendation VIII after the terrorist attacks in the United States on 11 September 2001. We show how the breadth of that recommendation elicited a response in the form of a "transnational advocacy network" among those within the non-profit sector. The resulting process of dialogue and the recent change in the text of the recommendation provide important lessons for scholars and practitioners concerned about FATF's accountability and authority.

Introduction

In June 2016, at its final plenary of Plenary Year XXVII, the Financial Action Task Force ("FATF") did something it had never done before: it issued, on an ad hoc basis, a revision to the text of one of its signature rules, the "40 Recommendations."

✉ Peter Romaniuk
promaniuk@jjay.cuny.edu

Tom Keatinge
tomk@rusi.org

¹ Department of Political Science, John Jay College of Criminal Justice, CUNY, 524 West 59th Street, New York, NY 10019, USA

² Centre for Financial Crime & Security Studies, Royal United Services Institute for Defence and Security Studies, 61 Whitehall, Westminster, London SW1A 2ET, UK

The recommendations had of course been reviewed in toto on three separate occasions (in 1996, 2003 and 2012) and the number recommendations had expanded and contracted (from 40, to “40 + 8,” then “40 + 9,” then back to 40) over time, reflecting both FATF’s evolving mandate, as well as the occasional need for rationalization. But the reissue of Recommendation 8 (“R8”) on protecting non-profit organizations (“NPOs”) from terrorist financing abuse was a first. The change in the language of R8 was admittedly subtle and casual observers might have been forgiven for asking why it warranted such special attention. Indeed, the announcement of this change was barely noted in the financial press; after all, the plenary had dealt with much higher-profile issues, such as the suspension of some FATF countermeasures against Iran. But the apparent modesty of this change should not diminish its importance, as underscored by its timing. To the contrary, the revision of R8 manifests the outcome of a long process of advocacy and dialogue among unfamiliar interlocutors that was itself unique in the history of FATF.

This article analyzes FATF’s role in the global effort to counter terrorist financing through the non-profit sector. These developments follow an arc. After the terrorist attacks in the United States on 11 September 2001 (“9/11”), the initial response was broad in its scope and deep in its reach. But that approach soon yielded unintended consequences. These were documented by NPO advocates, who mobilized to press for dialogue and reform. The revision of R8 reflects the value of those efforts. Beyond the change in the text alone, the process that preceded it warrants close attention among FATF-watchers, NPO advocates and other stakeholders for three reasons. First, FATF-NPO engagement on R8 and related advice yielded a framework for such interactions going forward. Through newly created contacts, and in regularly scheduled consultations, NPO advocates have an enhanced capacity to call FATF to account on issues affecting NPOs, including the mutual evaluation process and emerging topics such as bank derisking [1]. Second, the success of NPO advocates in arguing for the revision of FATF rules and guidance provides a demonstration effect for those in other sectors affected by FATF. That is, as FATF’s mandate and influence have grown over time, actors in an increasing range of economic sectors have been impacted; they now have a model for how to respond should they seek to do so. Finally, we hope that documenting the record of NPO advocacy prompts some critical reflection among FATF member states and within the Secretariat, as well as across the broader professional community of AML/CFT practitioners. Despite oft-heard claims that FATF is technical and apolitical, its rise to prominence has occurred within a political context. FATF exhibited the capacity for policy learning in this case, revising its approach after unintended consequences came to light. But those consequences might have been anticipated if decision makers had considered the political context of their actions. For this reason, we suggest that the legitimacy and long-term sustainability of FATF depends in part on its ability to reach out to affected parties, engage in consultation and build consensus.

In sum, the events surrounding the revision of R8 provide important insights into how FATF works – and how it should. The article proceeds in four parts. The next section describes FATF’s expansion in the immediate post-9/11 period, wherein an information and policy gap concerning NPOs and terrorist financing was quickly filled. We then analyze the response from civil society advocates. Their

mobilization yielded a “transnational advocacy network” [2] and they sought to influence decision makers by reframing the issue to emphasize rights (to freedom of association and religion, among others) and proportionality. Following that, we describe the most recent developments, including reissued FATF guidance and the new R8, and show how stakeholder dialogue yielded positive change. In concluding, we underscore the broader importance of these developments, whose dialectical nature was neither natural nor inevitable. For this reason, we emphasize the need for ongoing dialogue between governments, civil society and other stakeholders (especially banks) to ensure that recent advances on this issue are realized in practice.

Before proceeding, a note on terminology: in this article, we utilize FATF’s functional definition of “NPO” to describe entities, “that primarily engage in raising or disbursing funds for charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of “good works”” ([3], p.54). Consistent with FATF, we intend that “NPO” be understood as an umbrella term, subsuming other phrases, such as “charity,” “NGO” and “civil society organization”.

“Particularly vulnerable”: the response to 9/11

Prior to 9/11 the problem of terrorist financing generally, and of terrorist financing through the non-profit sector specifically, were known concerns. But they were far from a key counterterrorism priority and attracted relatively little attention beyond a handful of experts and commentators. Few measures to counter the financing of terrorism (“CFT measures”) had been advanced against charities and other NGOs by states, and multilateral action had barely advanced. The 1999 International Convention for the Suppression of the Financing of Terrorism contains a single, passing reference to charities and that is in the preambular (non-operative) paragraphs. FATF’s mandate did not include terrorist financing and charities were not mentioned its 40 Recommendations. The worlds of counterterrorism and civil society organizations were disconnected.

That changed quickly after 9/11. The dissension surrounding the US-led war in Iraq often obscures the fact that following 9/11 the Bush Administration were enthusiastic multilateralists – and that US’ counterterrorism measures attracted strong consensus. Such was the case in FATF. In early October 2001, G7 finance ministers convened in Washington, DC, and vowed that FATF should “play a vital role” in combating terrorist financing by elaborating “special recommendations” to complement the existing 40 recommendations against money laundering [4]. Later that month, under Hong Kong’s presidency, FATF convened in an extraordinary plenary – again in Washington – to formally expand its mandate and adopt the “8 Special Recommendations” to combat terrorist financing, including a standard on terrorist financing through the non-profit sector. A ninth “special recommendation” was added in 2004.

Detailed accounts of the emergence of the broader “CFT regime” are available elsewhere [5]. Here, we focus on how NPOs were impacted by the post-9/11 expansion of CFT measures through FATF. Most notably, in its standard-setting role, FATF

elaborated a recommendation on CFT and NPOs that emphasized the vulnerability of the sector. Special Recommendation VIII (SRVIII)¹ set out that:

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

- a. by terrorist organizations 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 organizations.

On the one hand, the recommendation simply calls on implementing states to undertake a review of the non-profit sector in light of concern about terrorist financing. But on the other hand, it contains an unsupported empirical claim – that NPOs are “particularly vulnerable” – and asks states to ensure against their abuse on that basis. No evidence was offered at the time to justify this claim. Rather, across the literature, it remains widely accepted that terrorist financing is a dynamic and clandestine phenomenon that does not lend itself straightforward quantification and comparison (see [6]).

Nonetheless, the die was cast. FATF’s influence put this assertion regarding the vulnerability of NPOs on the global agenda. Despite its limited membership,² FATF’s reach is far greater on account of the so-called “FATF Style Regional Bodies” (FSRBs), which implement FATF’s standards and adopt its procedures at the regional level. In 2001, there were five such groups in existence (covering the Caribbean, the Council of Europe area, the Asia-Pacific, Eastern and Southern Africa, and South America) and four have been added since (for Central Asia, West Africa, the Middle East and North Africa, and Central Africa). By the end of 2015, more than 180 jurisdictions were committed to implementing FATF standards; all were obliged to prevent abuse of NPOs on the basis of their “particular” vulnerability.

Further, as part of its outreach efforts over the years, FATF has engaged a range of other regional and specialist organizations, from the World Bank and International Monetary Fund, to the World Customs Organization and Interpol, to the Egmont Group of Financial Intelligence Units and the Basel Committee on Banking Supervision. Also included are several United Nations bodies, and the Security Council and General Assembly both endorsed FATF’s recommendations, elevating their status in international law (see UN docs S/RES/1617 (29 July 2005), para.7 and A/RES/60/288 (20

¹ In February 2012, FATF consolidated the “40 + 9 recommendations” on AML and CFT into a revised “40 Recommendations.” In that transition, SRVIII became R8 and the text remained identical. Consistent with FATF usage, we refer to “SRVIII” in citing the recommendation prior to 2012 and “R8” after that. The text of R8 was only revised in 2016.

² When Special Recommendation VIII was adopted in 2001, FATF’s membership comprised 29 governments and 2 regional organizations [7]

September 2006), para.II.10). Therefore, within a few short years NPOs found themselves subject to international soft law that reflected an empirically unfounded global consensus concerning their relative vulnerability.

In turn, FATF guidance left ample room for states to interpret SRVIII in line with their interests and linked compliance with more rigorous regulation of NPOs. For example, in January 2002, FATF issued a self-assessment questionnaire on the new special recommendations. It prompted states to consider whether their existing regulations require NPOs to: obtain a license or register; ensure that authorities have access to such information; observe certain recordkeeping norms; publish reports; refrain from engaging in certain activities and; identify beneficiaries and office holders [8]. The questionnaire inferred that such relatively burdensome measures – out of step with prevailing practices for NPOs in many countries – should apply across-the-board, without regard to risk or proportionality.

Formal FATF guidance comes in the form of “best practice papers” which are non-binding and “interpretive notes” which are binding. A best practices paper on SRVIII was issued in October 2002 and partly qualified the assertive language of the recommendation. For example, it noted the importance of the non-profit sector in the world economy, such that the, “practice of charitable giving and the strong and diversified community of institutions through which it operates,” should be safeguarded ([9], p. 1). But at the same time, the paper – while technically addressed to member states – set out a range of “best practices” that pertain directly to NPOs, effectively setting a general standard for the internal governance of NPOs. In an annex, the paper provided four examples of NPO abuse by terrorists – an initial attempt to provide “typologies” of terrorist financing through NPOs. But there was no discussion of risk to the sector overall and the evidentiary gap opened by the recommendation itself remained unaddressed. Overall, given that the paper was issued without consultation, it contributed to the perception that SRVIII was something being done to the non-profit sector and that an old solution (more regulation) was being applied to this new problem.

An interpretive note on SRVIII was not issued until February 2006 – more than four years after the recommendation emerged. Like the paper, the note approached the subject in less stark terms than the recommendation. For example, it affirmed that, “Measures adopted by countries to protect the NPO sector from abuse should not disrupt or discourage legitimate charitable activities” ([3], p. 20). Further, the note acknowledged that some NPOs are more vulnerable than others and suggested that states prioritize those that account for, “(1) a significant portion of the financial resources under control of the sector; and (2) a substantial share of the sector’s international activities” ([3], p. 22). Still, the note reproduced the regulation-heavy aspects of the self-assessment questionnaire and best practices paper, for example, by emphasizing the importance of supervision and monitoring, and information gathering and investigation. The note again addressed NPOs’ internal procedures directly, including by adapting the “know your customer” rule for the non-profit sector, i.e. “NPOs should follow a ‘know your beneficiaries and associate NPOs’ rule” ([3], p. 23). And despite the more integrative framing of the issue, the note drew attention to generic aspects of NPOs’ work that make them vulnerable (such as their “global presence”). Again without providing evidence or context, the note averred that, “Terrorist organizations have taken advantage of these characteristics” ([3], p. 20). Other attributes of NPO activity had drawn similar attention, too. In September 2005, the Middle East and North Africa FATF

(MENAFATF, the FSRB in that region) issued its own best practices paper on charities, which drew the grave conclusion that, “In addition to their local activities, some charitable institutions/associations carry out similar activities outside their home country, but such activities may be dangerous and must be subjected to special regulation” ([10], p. 7).

The quality of advice regarding SRVIII/R8 would improve over time. A turning point in this regard was the 2011 typologies report issued by another FSRB, the Asia/Pacific Group on Money Laundering (APG), which acknowledged that, “It is currently impossible to determine the extent to which terrorist abuse of NPOs occurs worldwide, including among APG members,” and made a stronger case for engaging the sector on the issue ([11], p. 15). But for at least the first decade after the adoption of SRVIII, FATF guidance rather invited a robust regulatory response.

The impact of SRVIII on the non-profit sector was also in evidence through the FATF and FSRB evaluation processes, as unusual results began to emerge. FATF’s primary method for enforcing compliance with its recommendations is the “mutual evaluation” process, wherein trained peer evaluators undertake in-depth, structured assessments of member state compliance according to an established methodology. These evaluation visits produce extensive reports, at the heart of which are the grading of compliance with each of FATF’s recommendations according to a straightforward ordinal scale (compliant; largely compliant; partially compliant; non-compliant and; not applicable). A review of 159 mutual evaluations undertaken from 2005 to 2011 revealed that 85% of cases were rated either non-compliant or partially compliant with SRVIII ([12], p. 9). On one reading, this may be greeted as good news, i.e. that implementing states approached the sector with a light touch. But given the extent to which countries were encouraged to take remedial action, such ratings invited states to ratchet up regulation in the pursuit of compliance. Around the world, examples of overzealous implementation of SRVIII soon emerged including onerous licensing or registration requirements, intrusive powers for investigation and audit, restrictions on foreign payments and advance approval for projects [13]. In terms of ratings, Tunisia and Egypt were two of only five countries to be granted compliant status over this period – surprising candidates for such a classification in light of state-civil society relations there. Another surprise is Saudi Arabia, which is often criticized for being both lax on terrorist financing through charities ([14], p. 1) and for its restrictive environment for civil society [15]. It was classified as largely compliant, beating out democracies such as Australia and New Zealand, whose laws and policies were deemed partially compliant only. Such results suggested a zero-sum dynamic, wherein states achieved compliance with SRVIII at the expense of civil society.

Other examples abound. One anecdotal explanation for them is that FATF recognized the unintended consequences of its CFT measures for NPOs such that evaluators engaged in selective grade inflation to discourage states from over-regulation. Either way, the sector faced a good deal of uncertainty regarding SRVIII at this time. It was caught between governments prone to restricting civil society and an international process that had yet to balance its new counter-terrorism mandate with longstanding principles (in support of charitable activity) that it occasionally sought to affirm.

It is worth recalling, too, that these developments occurred against the backdrop of a general public debate that reflected a climate of fear and suspicion, particularly pertaining to the activities of Muslim charities, wherein the assertion contained in

SRVIII was uncritically accepted and loudly trumpeted. For example, in his widely read book on al Qaeda, Rohan Gunaratna claimed (without citation) that, “Al Qaeda has set great store by establishing, infiltrating and trying to gain control of many Islamic NGOs ... According to the CIA, one-fifth of all Islamic NGOs worldwide have been unwittingly infiltrated by Al Qaeda” ([16], p. 8–9). Similar figures were offered to describe the use of charities for terrorist financing in other parts of the world. In his treatment of Jemaah Islamiya in Southeast Asia, for example, Zachary Abuza cited original interview research in claiming that, “Indonesian intelligence officials estimate that 15 to 20 per cent of Islamic charity funds are diverted to politically motivated groups and terrorists. In the Philippines, estimates range from 50 to 60 per cent” ([17], p. 173).

Such claims were common in the academic literature on terrorist financing (e.g. [18]), which began to grow quickly at that time. They also resonated in more policy-oriented fora. For example, in its staff monograph on terrorist financing, the 9/11 Commission devoted significant attention to charities, positioning them as a key source in al Qaeda financing: “al Qaeda was funded, to the tune of approximately \$30 million per year, by diversions of money from Islamic charities and the use of well-placed financial facilitators who gathered money from both witting and unwitting donors, primarily in the Gulf region” ([19] 4). Prior to that, in 2002, the Council on Foreign Relations in New York had stated confidently that, “Al-Qaeda’s global fund-raising network is built on a foundation of charities, non-governmental organizations, mosques, websites, intermediaries, facilitators, and banks and other financial institutions,” noting that, “individuals and charities based in Saudi Arabia have been the most important source of funds for al-Qaeda” ([14] 1). Such arguments were not limited to the US. In a later-discredited report for the President of the UN Security Council, Jean-Charles Brisard claimed that the, “most important Islamic charities around the world have been founded or are controlled by radical religious or political leaders” ([20], p. 26; on the discrediting of this report, see [21], p. 262–63).

Over time, the academic literature on terrorist financing has become more robust as conventional evidentiary standards have been affirmed and the dearth of robust primary data has been acknowledged [21–23]. But the tone of the initial debate – among academicians and policy makers alike – was unmistakable. On this view, the idea that NPOs were “particularly vulnerable” was a product of its time.

In sum, decisions made after 9/11 reflect the sense of crisis that prevailed at that time. As a result, FATF committed both acts of misfeasance (singling out the non-profit sector as “particularly vulnerable”) and nonfeasance (by taking so long to issue balanced and binding advice, and to curb over-implementation by states). These were perhaps inevitable as member states pushed the boundaries of what is achievable through FATF, rapidly expanding its mandate to cover new sectors of economic activity (like the non-profit sector) where levels of understanding were low, and professional networks were absent. Without a significant expansion of FATF’s small secretariat, some issues had to be deferred. In this regard, any costs to the sector resulting from the overzealous implementation of SRVIII can be viewed in part as the price of FATF’s ambitious and unprecedented expansion. With that said, the member states that oversaw these developments ought to have known that, far from stigmatizing the sector, civil society groups are of course vital partners in responding to contemporary threats. To some extent, a more balanced appreciation of state-civil society relationships in the context of counterterrorism has evolved since then. Today, many governments seek to

reach out to such groups towards the goal of “countering violent extremism” (“CVE”). It is ironic and unfortunate that, in the immediate post-9/11 period, too little concern was given to the negative effects of CFT measures on the same kinds of civil society actors with whom governments now seek partnerships.

Responding to the response to 9/11: the emergence of a “transnational advocacy network”

In their work on normative and policy change in world politics, Margaret Keck and Kathryn Sikkink define “transnational advocacy networks” as “actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services” ([2], p. 89). These actors may be diverse including, for example, international and domestic NGOs, faith-based organizations, regional and international intergovernmental organizations, and national governments or parts thereof. They act through networks by utilizing information, to hold decision makers accountable and seek influence towards the goal of policy change and also to reframe the terms of the debate.

As research on the formation, operation and effects of transnational advocacy networks has grown, scholars have identified several general strategies that they use to gain and leverage the attention of decision makers. For example, they distinguish between “activist” (exerting public pressure) and “lobbyist” (seeking direct engagement) strategies (e.g. [24]). The case of NPO advocacy on CFT measures is an apt illustration of both. That is, in response to the developments described above, we show here that a range of NPO advocates emerged to document the unintended consequences CFT measures and campaign against them. Over time, we suggest, this transnational advocacy network became increasingly coherent in resisting government overreach and reframing the debate about NPO vulnerability to terrorist financing in such a way as to preserve rights to freedom of association and religion. As the negative impact of CFT measures grew, the increasingly robust chorus of criticism began to resonate with policymakers – including within FATF – yielding dialogue and reform.

An initial point of mobilization for NPO advocates in the post-9/11 period was not FATF and SRVIII but measures taken domestically, which had an immediate impact on the non-profit sector. Those first to mobilize were civil society organizations with a mandate to advocate on behalf of the sector. In the US, for example, OMB Watch (later the Center for Effective Government) had an existing project on strengthening non-profit advocacy. The passage of the USA Patriot Act and related CFT measures were greeted with great concern. OMB Watch legal counsel, Kay Guinane, warned in March 2002 that if the Patriot Act is “used in a way that interferes with the right to associate in nonprofit organizations or to speak out on issues as a community, it will be added to the list of abuses of democratic rights in the name of security” [25].

Beyond highlighting the potential for abuse, OMB Watch and others began documenting such abuses when they occurred, drawing particular attention to the plight of certain US-based Muslim charities that found themselves on lists or were prosecuted (OMB [26]). The publication by the US Treasury in November 2002 of the “Anti-Terrorist Financing Guidelines: Voluntary Best Practices for US-Based Charities,” had the effect of “galvanizing” the non-profit sector ([27], p. 111). The request for comment

on the guidelines prompted the Council on Foundations in January 2003 to coordinate a Treasury Guidelines Working Group, which included almost 50 NPOs and other stakeholders. By spring 2005, the Working Group released its “Principles of International Charity,” as a direct response to the Treasury’s request, and as a way to reaffirm fundamental norms in light of evolving strictures [28]. In time, too, the emerging network developed guidance for charities affected by CFT measures (e.g. [29]).

Similar developments played out elsewhere as NPO practitioners began to notice how post-9/11 CFT measures were impacting their ongoing activities (e.g. [30]). In the UK in particular, the presence of an independent charities regulator – in the form of the Charity Commission of England and Wales – meant that initial interventions by police to investigate terrorist financing through the non-profit sector were perhaps less confrontational than in the US. Indeed, on a few occasions, the Charity Commission was prepared to diverge from US measures against particular charities after conducting its own investigations ([31], ch.2). Nonetheless, the British government’s undertaking to review the non-profit sector for vulnerability to terrorist financing (thereby complying with then-SRVIII) prompted the National Council for Voluntary Organisations to convene an advisory group. Its subsequent report argued that FATF measures, and efforts to implement them domestically, “have been developed without the involvement of the sector and with little understanding of voluntary organisations or the environment in which they operate. As a consequence these measures are unlikely to be effective and may actually be counter-productive, because they are not sufficiently targeted on specific risks and vulnerabilities. The sector is seen as being part of the problem, not part of the solution” ([32], p. 7).

At the European level, mobilization accompanied the development in 2005 of the “Recommendation for Member States and a Framework for a Code of Conduct for NPOs to Enhance Transparency and Accountability in the Non-profit Sector to Prevent Terrorist Financing and other Types of Criminal Abuse,” ventured by the European Commission to enhance compliance with SRVIII [33]. The Commission would go on to help advance the goals of the emerging transnational advocacy network by funding a study to establish an evidentiary basis on the topic. That study, perhaps the first of its kind, concluded that, “There is daunting variation in available information about NPOs and their financial abuse across the EU” (Matrix [34], p. 66). As the case against post-9/11 CFT measures was being built by NPO advocates across the world, this particular criticism – that there was a poor empirical basis on which to ground those measures – became a key argument.

While NPO advocates in the US, UK and Europe were quick to mobilize to resist post-9/11 CFT measures, similar developments arose elsewhere, including in the Global South (e.g. [31, 35, 36]). Indeed, within a few years, advocates launched several initiatives to globalize concern about the impact of CFT measures on NPOs, rendering the emerging network genuinely transnational. From 2005, the Swiss and other governments funded the Montreux Initiative, which had a specific focus on new challenges facing Islamic charities and undertook a range of measures including research, workshops, capacity building and the elaboration of a Code of Conduct for Muslim NPOs ([31], ch.6). Also with a focus on Islamic charities, the Humanitarian Forum brought together a wide range of organizations in different countries, for example, convening 14 workshops and gathering 1400 NGOs across the Muslim world in 2005–06 alone ([31], ch.6). A process to encourage dialogue on the issue among NGOs from the North and

South was initiated by the International NGO Training and Research Centre (INTRAC) from 2006. Here again, the emphasis was on documenting the effects of CFT measures, raising awareness among NPOs, providing guidance and defending space for civil society actors [37, 38].

Similarly, in 2007, the World Movement for Democracy and the International Center for Non-Profit Law assembled an Eminent Persons Group and held consultations with civil society actors in five locations worldwide. These meetings provided an opportunity to vet the “International Principles to Protect Civil Society,” which aimed to preserve civil society space against counterterrorism measures and related government actions inimical to NPO operations [39]. In 2008–09, the Dutch Catholic Organisation for Relief and Development, Cordaid, convened four international working conferences bringing together more than 400 civil society participants and seeking to reframe the relationship between civil society actors and state security institutions as “friend not foe” [40].

Further still, the globalization of concern about the impact of CFT measures on NPOs was aided by actors within the United Nations system. The main coordinating mechanism for UN action against terrorism – the Counterterrorism Implementation Taskforce – commissioned a working group of multilateral agencies on the topic of terrorist financing, which met with experts in 2007 and 2008. Its subsequent report reflected many of the themes that NPO advocates had raised to date, including the absence of an evidentiary baseline to define the problem, the need to avoid overheated rhetoric about charities funding terrorism, the importance of consultation with the NPO sector and the principle that, “Oversight [of NPOs] should be proportional to the risk of abuse” ([41], p. 18). Prior to that, in 2005, the UN Commission on Human Rights initiated the position of “Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.” The first such Rapporteur, Finnish international law professor Martin Scheinin, soon began revealing the use of CFT measures to inhibit rights to freedom of association and peaceful assembly (e.g. [42], p. 6–18). Relatedly, a further UN Special Rapporteur, on “Rights to freedom of peaceful assembly and of association,” was created by the renamed Human Rights Council in 2010 and echoed many of rights-based arguments that had been raised by NPO advocates.

By 2008, the nascent transnational advocacy network took on a more formal organizational manifestation when OMB Watch initiated the Charity and Security Network (CSN) to provide “logistical, legal and technical support for stakeholders from across the nonprofit sector to convene and engage in dialog, analysis and joint efforts that can bring about positive change” [43]. Directed by Kay Guinane, who had tracked the issue closely since the immediate post-9/11 period, the CSN advisory board comprised advocates from across civil society, while its website provided a clearinghouse for related publications. By this time, too, the ill-effects of post-9/11 CFT measures were well documented (e.g. [44]), and often supported by academic work in the area (e.g. [27, 31, 45]). It soon became clear that the arguments put forward by NPO advocates were being taken seriously in officialdom. Most notably, the 2010 World Bank Working Paper by Emile van der Does de Willebois on “Non-profit Organizations and the Combatting of Terrorism Financing,” devoted a separate chapter to criticism of CFT measures regarding NPOs and cited much of the literature produced by NPO advocates ([46], ch.4). Similarly, as noted above, the typologies report produced by the APG in 2011 struck a decidedly more balanced tone than previous such documents.

With that said, the *Holder v. Humanitarian Law Project* decision by the US Supreme Court in 2010 prompted concern – and increased activism – from NPO advocates in the humanitarian sector in particular. Humanitarians had long expressed concerns about the potential breadth of the USA Patriot Act’s “material support” provision. *Holder* rather brought those fears to fruition. The court found that the provision of legal services and advice to terrorist organizations, even for the purpose of peaceful conflict resolution, can constitute “material support.” Advocates responded that this brought CFT measures into conflict with humanitarian norms and operations (e.g. [47, 48]). To better understand the effects of counterterrorism measures on humanitarian action, the UN Office for the Coordination of Humanitarian Affairs (OCHA) and the Norwegian Refugee Council (NRC) commissioned an independent study, analyzing the CFT requirements of donors in detail and documenting their impacts in Somalia and the Occupied Palestinian Territories [49]. The report makes the case for a more integrative approach to balance the objectives of humanitarian assistance and counterterrorism in practice.

The idea of dialogue among stakeholders, including those from the non-profit sector, was pursued through a UN-led process from 2011 to 2013, designed to reduce the sense of opposition between the NPO sector and relevant government and international actors [50]. Funded by Canada and others, this process featured meetings on 7 continents, including 50 states, more than 80 NPOs, as well as experts from FATF, the FSRBs and other international and regional organizations. (Canada’s interest in the issue stemmed from the Commission of Inquiry into the Bombing of Air India 182, where the topic of terrorist financing and NPOs had been explored in some depth) [51]. As such, the meetings provided an opportunity for awareness raising, information sharing and networking among NPO participants, linking them up with arguments put forward among transnational NPO advocates.

In sum, while CFT measures and FATF were largely unknown within civil society prior to 9/11, the changes wrought by SRVIII and its implementation had the effect of mobilizing a range of NPO advocates. Over time, they cohered into a transnational advocacy network. Consistent with Keck and Sikkink, and with subsequent accounts, their focus was on developing and using information, raising awareness among affected parties, emphasizing longstanding principles and highlighting the unintended consequences of CFT measures focused on NPOs. This network mostly comprised civil society organizations but also included international organizations and states. Faced with challenges to civil society space as a result of CFT measures, the emergence of the network reflects the determination of NPO advocates to force the pendulum back toward a more reasonable position. Through activism (public pressure) and lobbying (direct appeals), they sought to reassert the values of freedom of assembly, speech and religion, and with the principles of proportionality and a risk-based approach to CFT. As the network matured, the clarity of its message and the stridency of its claims increased. A marker here is Ben Hayes’ [12] report for the Transnational Institute and Statewatch, in which he robustly criticized FATF:

While this was obviously not the intention of the seven governments that established the FATF, its evaluation system has endorsed some of the most restrictive NPO regulatory regimes in the world, and strongly encouraged some already repressive governments to introduce new rules likely to restrict the political space in which NGOs and civil society actors operate ([12], p. 10).

For Hayes and others, FATF had strayed far from its initial objectives – and in a damaging way. With a network now in place to hold FATF and its membership accountable, NPO advocates sought further direct engagement.

Towards proportionality? Recent developments on NPOs and CFT

Despite the momentum that NPO advocates had built on this issue, they faced particular challenges in advancing their case further. The academic literature on FATF provides some insight in this regard. For example, scholars draw attention to FATF's unique structure, designed as it is to maximize the influence of powerful states. FATF is a standard-setter with relatively robust enforcement mechanisms (mutual evaluations, backed by the threat of sanctions) and global reach (through the FSRBs). But its membership is limited and meaningful participation so costly (in terms of expertise and capacity) that larger, wealthier states maintain an advantage. For Dan Drezner, FATF is an exemplar case of a “club inter-governmental organization,” wherein, “great powers were able to cajole, coerce, and enforce a global anti-money-laundering standard into existence” ([52], p. 145).

Moreover, analysts describe the chummy nature of professional and personal relationships within that “club.” In his role as participant observer at a FATF plenary meeting, Jason Sharman relates that a first-time plenary attendee told him that, “It feels like you’re crashing someone else’s party,” such is the depth of familiarity and collegiality among regular participants ([53], p. 147). Despite the nature of the issues under discussion and the high stakes involved, Sharman underscores that those participants see their work as technical and apolitical ([53], p. 147–48).

For these reasons, the barriers to entry – let alone influence – for outsiders are perceived to be high. While FATF had increasingly close consultations with the financial services industry dating back to 1996, there was no precedent for dialogue between FATF and the non-profit sector. Still, the volume and substance of criticism regarding R8 did eventually find an audience within FATF following the 2011 appointment of a FATF vice-president from Norway. Unlike his predecessors, president-in-waiting Bjørn Skogstad Aamo identified the lack of dialogue between FATF and NPOs as a focus for his presidency and accepted contact from key NPO advocacy groups. His statement of “Priorities for the Norwegian Presidency” in August 2012 set out that FATF, “must ... have an open dialogue with representatives of civil society” [54]. The timing of his intervention in this regard was perhaps no accident. In February 2012, FATF reissued its 40 recommendations. Although the text of R8 remained the same, a new recommendation (R1) was inserted to enshrine a risk-based approach in implementing AML/CFT measures [3]. The idea that FATF recommendations should be implemented in a manner proportional to risk had of course been a part of NPO advocacy for years, opening the possibility that unfamiliar interlocutors might yet find common ground.

The arrival of the Norwegian FATF President was thus eagerly welcomed by NPO advocates. His commitment was not empty. In London in April 2013 the first formal engagement by FATF with civil society took place, nearly a dozen years after SRVIII was originally published. It was led by the Transnational NPO Working Group on FATF, which reflected the further formalization of the transnational advocacy network that had emerged over time. Subsequently renamed the Global NPO Coalition on FATF,

the representative group is led by four of the leading members of the network in the US and Europe (the Charity and Security Network, the European Center for Not-for-Profit Law, the European Foundation Centre, and the Human Security Collective), and supported by others (see www.fatfplatform.org).

These investments in organization have been more than warranted on the part of NPO advocates. Their initial contact with FATF has given rise to a period of remarkably dense interactions, yielding new or revised guidance documents, as well as the revision to R8 itself. Following the London meeting, FATF committed to conduct an interim update of the 2002 best practices paper and to undertake a typology study, “to gain a better understanding of the vulnerabilities and risks currently facing NPOs” [55]. Published initially as a “limited update” at the June 2013 plenary meeting in Oslo, the updated best practices paper was generally well received by the NPO community. Whilst the paper continued to emphasize the potential for NPOs to be misused, it also recognized the “intent and efforts” of the NPO community to promote transparency and to prevent misuse. Furthermore, FATF acknowledged the, “importance of ensuring that Recommendation 8 is not misinterpreted or misused to suppress NPO activities” or frustrate their legitimate operations, noting that NPOs, “play an important role in preventing the causes of radical ideology from taking root and are, therefore, potential allies in the fight against terrorism” [56].

With the limited update to the best practices paper completed, a committee co-chaired by the UK and Canada began work on the typologies report with a view to informing a more comprehensive revision of the best practices paper, if warranted, in light of the typology findings. In contrast to the limited revision to the paper in 2013, the typology work inevitably proved more controversial. The publication of the typologies report in June 2014 [57] was generally greeted with dismay by NPO advocates with some arguing that it continued to conflate identified risks with evidence of abuse using a handful of case studies to support broad, sector-wide assertions of weakness and threat. Others believed that the title and tone of the report contradicted prior advice that threats should not be overstated (e.g. [41]).

Despite these concerns, in some ways the typologies report demonstrates the progress made by the transnational advocacy network, for example, in securing acknowledgement from FATF that, “some national responses to international standards have misused FATF recommendations to justify the abuse of civil society for political purposes, particularly to suppress dissent” ([57], p. 33). Moreover, both the limited revision of the best practices paper and the typologies report involved a previously unseen level of consultation between FATF and NPO advocates, including the solicitation of comments on drafts and the communication of formal responses following publication. In other words, even if the outcomes were not in complete accordance with the preferences of NPO advocates, there could be little doubt that the process reflected the success of their past advocacy.

That pattern continued as the completion of the typologies work paved the way for consultation on an update to the R8 Interpretive Note. By our count, between April 2013 and June 2016, representatives of FATF and the Global Coalition met formally or informally on at least six occasions. Over this period, too, the Global Coalition called for the formalization of dialogue between FATF and the sector, effectively replicating the practice of structured outreach between FATF and the financial services industry that had long existed. That request was positively received by FATF, which announced at its June 2015 plenary that an annual discussion would be held [58].

The signature achievement of NPO advocacy has been the revision of the text of R8 and its accompanying interpretive note. According to the Global Coalition's website it was deeply involved in this process, initially calling for the revision in October 2015, providing input that November, engaging in lobbying efforts directed at FATF and releasing a press advisory on it (both in January 2015) [59]. Members of the Coalition have noted their satisfaction with this outcome [60]. R8 now reads:

Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse, including:

- a. by terrorist organisations posing as legitimate entities;
- b. by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and
- c. by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

Importantly, the language of “particular” vulnerability has been replaced with explicit references to proportionality and the risk-based approach. These themes are reinforced in the revised interpretive note. Of course, beyond these texts lies implementation. FATF's fourth round of mutual evaluations commenced in 2014 and is utilizing a revised methodology that is focused not just on technical compliance as in the past, but also on effectiveness and outcomes. This approach, “seeks to assess the adequacy of the implementation of the FATF Recommendations,” focusing on the, “extent to which the legal and institutional framework is producing the expected results” ([61], 5). Combined with the risk-based approach (per new Recommendation 1) this second line of assessment will consider materiality as a key component, something that should benefit NPOs given how very few of them operate in a manner, field, or geography that exposes them to terrorist acts and terrorist financing.

Under this new methodology, the effectiveness of a country's actions to prevent terrorists from abusing the NPO sector will be measured by “Immediate Outcome 10” that will, *inter alia*, ask: “To what extent, without disrupting legitimate NPO activities, has the country implemented a targeted approach, conducted outreach, and exercised oversight in dealing with NPOs that are at risk from the threat of terrorist abuse?” ([61], p. 116). On the basis of fourth round mutual evaluations reported thus far, the implementation of this approach varies in practice. For example, some governments have been criticized for lacking a basic knowledge of the terrorist finance risks posed by NPOs while for others a lack of outreach has been noted. The challenge for FATF is that having spent a quarter of a century urging organizations and governments to suppress illicit finance with very little restraint, and over a decade identifying NPOs as “particularly vulnerable,” it now finds itself in the position of needing to advise countries to be more targeted, more nuanced, more proportionate, and perhaps even more lenient. In many cases this will certainly bring FATF into direct conflict with an individual country's internal security agenda. How this will be handled by FATF, and

the extent to which it is prepared to highlight misuse and overzealous application, will be indicative of whether FATF is genuinely prepared to take ownership of the global regime to which it gave rise.

Conclusion: towards proportional implementation of R8

2014 marked a quarter century since FATF was founded. Over time, FATF has undoubtedly raised standards to combat money-laundering and terrorist financing. But as the case of R8 and the NPO sector demonstrates, decisions with far-reaching consequences have been made with little, if any, evidence base. Only now, 16 years since SRVIII labelled NPOs “particularly vulnerable” to abuse by terrorist financiers, is this engrained narrative being successfully challenged and the relationship between FATF and NPOs being recast. The revision of R8 seemed unattainable when the transnational advocacy network first coalesced. That change came about through a dedicated and targeted effort, marshalling information and leveraging contacts to reframe the terms of the debate and hold decision makers accountable. Transnational advocacy networks work by engaging in persuasion and applying pressure [2]. In this case, those efforts were robust enough to precipitate a policy opening and course correction.

In the context of this special issue, the developments described here have three important implications for those concerned about the ongoing impacts of FATF’s work. First, as a result of NPO advocacy, dialogue between FATF and NPO representatives has now been institutionalized (in the form of annual consultations). Having a seat at the table will improve the ability of NPO advocates to hold FATF accountable on a range of issues that affect NPOs’ interests, while providing an opportunity to monitor and comment on ongoing activities, especially the mutual evaluation process. In this regard, NPO advocates have taken up related issues, including bank de-risking and foreign funding restrictions. Other issues affecting NPOs may come on to the agenda, too. For this reason, ongoing dialogue can mitigate against a repeat of past missteps and enable consensus solutions to future challenges, especially if other stakeholders – such as banks – are included.

Second, the transnational advocacy network that mobilized around SRVIII/R8 provides an important precedent for others seeking to reform the process and substance of FATF’s work. If in the past FATF had given the appearance of a closed shop, this case shows that meaningful dialogue and engagement are possible beyond the current range of traditional outside interlocutors, such as the financial services industry. It is of course unfeasible for FATF to give a hearing to all of those apparently aggrieved by its work. But NPO advocates have perhaps set the standard in this regard, given the sustained, evidence-based and transnational nature of their efforts in lobbying FATF. David Lewis, the current Executive Secretary of FATF, seems to agree. He recently tweeted that NPO engagement with FATF was “organized, informed and constructive. A great model for others to follow” [62]. Under the right conditions, it seems, influence is possible.

Finally, we hope that this case prompts some critical self-reflection among FATF officials and participants, and the broader AML/CFT community of practice. Those participating in FATF are inclined to see their work as technical and apolitical. But FATF is clearly responsive to the preferences of its most powerful members, as Drezner’s characterization of the body as a “club” would predict. Moreover, FATF’s

members clearly implement its recommendations with politics in mind – hence, the prominence of CFT measures as part of a worldwide crackdown on civil society in the last decade or more (The Economist [63]). Certainly, many NPOs on the ground – i.e. those affected by government measures pursuant to FATF recommendations – perceive FATF to be political. To FATF’s credit, this case reveals its ability to learn from mistakes. The bigger question is whether those errors might have been avoided if due consideration had been given to the political context in which FATF operates. In this regard, the unintended consequences of adopting and implementing SRVIII ought have been anticipated in advance. As we note above, the implementation of R8 may well bring political tensions to the fore more often in the future. This will challenge both FATF’s self-perception and its operation. In the longer term, FATF’s legitimacy will derive in part from its ability to exhibit awareness of the political context in which it operates and to mitigate unintended consequences through consultation. With dialogue comes transparency and accountability, and – in this case, at least- better policy.

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