June 14, 2014

Alexandra Eckert, FATF/GAFI Secretariat
Annexe Franqueville 238
2, rue André Pascal
75016 Paris, France

By Email

Re: NPO Response to Draft Typologies Report

Dear Ms. Eckert,

Thank you for the opportunity to comment on the draft Typologies report, *The Risk of Terrorist Abuse in the Non-Profit Organisation (NPO) Sector*. Our comments are intended to contribute to the best possible and most useful report and we recognize the extensive effort that has gone into the process to date. We hope that constructive dialogue between civil society groups and FATF will continue as you finalize this draft. Given that, we have concerns about the report in its present state and believe it needs more work before it can be used as the basis of policy formation or update of the Best Practices Paper.

The undersigned, organizations dedicated to the public good and human security globally, share FATF’s goal of protecting the nonprofit sector and ensuring that a fact-based approach prevails in the determination of the scope of terrorist abuse of the NPO sector and the potential for such abuse. As groups engaged in spreading peace, alleviating suffering and promoting fair and equal societies, NPOs are dedicated to ensuring that their activities are consistent with internationally recognized standards and respect for human rights.

As you know, we are deeply concerned that some national laws and regulations implementing FATF Recommendation 8 (R8) are unduly constraining NPOs’ ability to operate in already challenging environments. We believe that by addressing the issues raised below, the final version of the Typologies report can help mitigate these risks and better contribute to effective and proportionate measures that address the risk of terrorist financing while respecting the value, independence and diversity of the NPO sector.

The undersigned recommend that the FATF continue to work on the draft to address the following issues:

1) Recognize and describe the greater context within which the risk or abuse of NPOs by terrorist organizations occurs and the role of FATF within that larger context;

2) Refine and clarify the methodology and recognize the limits in the data set;

3) Incorporate and recognize information supplied by civil society and from academia;

4) Take analysis a step further to make critical distinctions and provide clear definitions;

5) Recognize that the NPO sector’s values are a strength, not a vulnerability.
1. Recognize and describe the greater context within which the risk or abuse of NPOs by terrorist organizations occurs and the role of FATF within that context.

In general the report needs to provide a broader framework within which terrorist abuse or risk of abuse of the NPO sector occurs. While some of these factors are described in the report, they do not connect in a way that puts R8 in a larger context. This “big picture” would enable readers to make more informed use of the report information and encourage effective and proportional responses to it.

For example, the counterterrorism (CT) framework has had a pervasive impact on the NPO sector, and the report needs to address this. As noted in recommendations from the Transnational NPO Working Group on FATF, domestic laws and regulations, sanction regimes and other CT measures have impacted NPOs’ ability to carry out their good work. Details of these impacts are provided in the input submitted by the NPO working group in February 2014.¹

The draft report also fails to note that states have binding international human rights obligations that are not abrogated by R8 or other anti-terrorist finance (ATF) programs. These obligations derive from treaties and other legal instruments, while R8 and other FATF Recommendations, although important, do not have the force of international law.

As a result, it is incorrect for the draft report to portray fundamental human rights that are enshrined in documents such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights as simply “part of the discussion.” International human rights are at the heart of the UN system and place binding obligations on states to ensure that CT and ATF programs are designed in a way that is consistent with these obligations, that is to say proportionate, necessary and effective. This includes freedoms of association, assembly and expression as well as international humanitarian law.

Maina Kiai, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has warned against the “implementation of restrictive measures – such as FATF R8 – which have been misused by States to violate international law.”² These freedoms form part of the larger framework that ATF fits within, and not vice-versa. Respect for these rights will produce more effective ATF policies in the long run.

The draft report should be revised to recognize the importance of international human rights obligations of states and the need for ATF policies to be consistent with it. It should also recognize issues that are outside the scope of ATF or the scope of R8. For example, the draft report addresses both finances and “material support” of terrorism. The definition of “material support” varies by jurisdiction and in some cases, such as the United States, includes support that is non-tangible in nature, such as speech and other expressive activities. This falls beyond the financial focus of FATF and should be left to the discretion of nation-states and dedicated international fora to deal with contentious issues, such as what constitutes

¹ The Transnational NPO Working Group on FATF Recommendations: Financial Action Task Force Typology Review was sent to FATF in February of 2014. The report gives recommendations crafted by the NPO working group after substantial analysis of available literature on the risk of terrorist abuse of NPOs and on a survey conducted by the working group of NPOs operating around the world. Annex I of the report contains an analysis of available cases studies from the literature review and Annex III contains the report, NPO Sector Risk and Risk Mitigation Survey Analysis.

“extremism.” Case studies that do not relate to financial or other tangible support should not be used to infer a risk of terrorist financing on the part of the NPO sector.

We appreciate the fact that the draft report does not indicate that “radical” or “extremist” speech per se is an indicator or risk of terrorism. However, the discussion of recruitment moves in that direction. The report should be clear that recruitment to political causes is not the same thing as recruitment to become part of a terrorist organization.

Finally, in setting the context we recommend that more weight be given to the impact and effectiveness of NPO due diligence as a preventive measure. While such efforts are acknowledge in the draft, there should be more discussion of the impact NPO sector due diligence has. The final report should make it clear that the overall low incidence of terrorist abuse of NPOs, despite the vulnerabilities cited, can be explained in large part by the efforts of NPOs working in the world’s most difficult places.

2. Refine and clarify the methodology and recognize the limits in the data set

The final report needs to recognize the inherent limitations in its reliance on an unscientific sample of case studies, include information from a broader array of sources and address other methodological challenges. Without these changes readers may draw unsupported conclusions and policy decisions may be based on inaccurate and unsupported assumptions. Where statistical data based on the case studies is presented it should always be qualified with a statement that notes it only represents the case studies submitted and is not a representative sample of the sector as a whole.

While the sample of 102 case studies highlights various ways in which NPOs have been implicated in terrorist financing and other terrorist offences, the sample is too unrepresentative to infer concrete conclusions about the NPO sector as a whole (estimated at millions of organizations worldwide), or indeed any single part of the sector. Moreover, because the case studies are not included in an Annex, it is difficult for the reader to assess the quality and veracity of the data, and in turn how much risk or vulnerability should be inferred from it. We note that the report Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals published by the FATF in June 2013 contains all of the case studies in an Appendix. Given the “sanitization” of the case studies by the authors and contributors in this draft report, it is difficult to understand why the whole body of evidence has not been presented.

The use of technical statistical terms such as “correlation” and “frequency” exacerbate the methodological confusion and should be avoided. For example, the claim that “Affiliation with a Terrorist Entity” has a “frequency observed” of 45 percent is particularly problematic in the context of such a limited sample, equating as it does to some 0.001 percent of the NPO sector as a whole. It is simply impossible to infer meaningful conclusions about the entire sector from the limited sample. When these statements are not analyzed in relation to the overall size of the sector, they tend to overstate the incidence of terrorist abuse, which can lead to inappropriate overregulation. In accordance with the recommendations of the Working Group on Tackling the Financing of Terrorism of the United Nations Counter Terrorism Implementation Task Force, the report should take great care to avoid rhetoric and unfounded assertions that tie NPOs to terrorism financing in such general terms, because it overstates the threat and unduly damages the NPO sector as a whole.

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Furthermore, although relatively few are cited, the majority of cases did not involve situations in which the NPO was convicted or sanctioned for providing material support to a terrorist organization. Many of the cases involved sham or front organizations, social wings or external bad actors. In many of the case studies vague terms such as “suspected,” “affiliated” or “linked” were used. Since only a few involved criminal prosecutions it is impossible to come to any conclusion about the veracity of the allegations. It should be noted that administrative proceedings do not have the same evidential or due process basis as criminal cases and therefore cannot be easily evaluated. Taken together the case studies that are presented are not sufficient for making any verifiable generalizations about risk or vulnerability of the NPO sector as a whole or in part.

The draft report prejudges the most important question of all: whether the NPO sector as a whole faces a systemic threat or suffers from unique systemic vulnerabilities. There is no attempt to compare the instances of abuse of the non-profit sector collected for the report with, for example, a representative sample of for-profit organizations, or to analyze the data in the context of the wealth of evidence amassed by academia and civil society.

The theoretical framework for analysis lacks definitional nuance and infers a systemic vulnerability of the NPO sector as a whole from a small number of instances of abuse. It then conflates vulnerability (the possibility that something could happen) and risk (the increased likelihood that something will happen) to imply a need for a comprehensive regulatory approach to the NPO sector.

There is also no attempt to identify the opportunity costs attendant in addressing the perceived threat. This is particularly problematic because the “worst case scenario” provides the basis for the approach to the sector as a whole. The assumption presented in the report is that NPOs closest to areas prone to terrorism are most at risk and should therefore be subject to the most robust preventative strategies. The opportunity costs of this approach are clear insofar as NPOs have become increasingly risk-averse and are already limiting or ending their engagement in some of the areas in which they are needed most, not because of terrorism but because of the legal and regulatory environment designed to combat terrorism. These opportunity costs – which undermine the fight against terrorism and leave social wings of terrorist organizations an open field– must be properly assessed and analyzed alongside the perceived risks and vulnerabilities and actual instances of abuse. This will make the final report more useful in developing policy.

3. Incorporate and recognize information supplied by civil society and from academia

The draft typology report mentions, but does not utilize the data gathered by the NPO sector and presented to FATF. This research was conducted by the Transnational NPO Working Group on FATF.

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4 The work of NPOs is fundamental to preventing terrorism. As stated in a report by Maina Kiai, UN Special Rapporteur on the freedom of peaceful assembly and of association, “the Special Rapporteur believes 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.”
which was established specifically to engage with the FATF, and consisted of two international workshops,\(^5\) a detailed survey, literature review and typology recommendation report.\(^6\)

The survey by NPOs focused on the impacts that NPOs face in light of the proliferation of CT measures and the steps they take to prevent or mitigate risk. Four trends from the survey respondents were identified: 1) The overall NPO experience is that actual abuse is very rare. 2) There is a wide variety of NPO approaches to risk management and due diligence. 3) Financial exclusion, via money transfer delays and bank account closures is a serious concern, as it pushes money out of transparent and regulated channels. 4) As suggested above, the operational impacts of counterterrorism rules, and the cost burdens associated with it, should not be taken lightly.

The literature review analyzed academic studies on the threats that terrorist groups posed to NPOs. It specifically also analyzed the available case studies\(^7\) and categorized them by different typologies of abuse. These case studies suggest that a majority of the cases of terrorist abuse was through sham charities or related to the designation of the social or political wings of organizations that use terrorism to pursue their agenda. These complicit organizations are distinct from legitimate NPOs and require dedicated strategies to combat them rather than top-down approaches to the sector as a whole.

**4. Take analysis a step further to make critical distinctions and provide clear definitions**

The draft report should go further in its analysis in several respects. Lack of necessary nuance in the analysis could lead to problematic policy implementation.

First, the concept of proportionality is not adequately integrated into the analysis. It should be mentioned in the description of the sector and the methods of disruption. This can be accomplished in part by showing comparative data. For example the report could show the number of terrorist financing cases that do not involve the NPO sector as well as the funds or support in case studies of the NPO sector as opposed to case studies showing illicit criminal activity and standard business activity (i.e. oil, coal sales). R8 cannot support a statement that the NPO sector is “particularly vulnerable” without some comparative analysis.

Second, vulnerability and abuse are often lumped together. This tends to lead to overstated conclusions. Third, there is inadequate attention paid to complicit versus non-complicit types of abuse. This leads to inadequate analysis of the difference and what that means for types of abuse and methods of disruption. The academic and think thank literature generally use this distinction in defining typologies and it is an

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\(^5\) Two meetings organized by the Transnational NPO Working Group on FATF were convened in New York in December 2013 and in Brussels in January 2014. These meetings were attended by the co-chairs of the FATF RTM Group’s Typology Project and by NPO sector leaders.

\(^6\) Transnational NPO Working Group on FATF Recommendations: Financial Action Task Force Typology Review was sent to FATF in February of 2014. The report gives recommendations crafted by the NPO working group after substantial analysis of available literature on the risk of terrorist abuse of NPOs and on a survey conducted by the working group of NPOs operating around the world. Annex I of the report contains an analysis of available cases studies from the literature review and Annex III contains the report, NPO Sector Risk and Risk Mitigation Survey Analysis.

important one that FATF should not underestimate or ignore. The current report could lead to serious policy problems by failing to adequate analyze this distinction.

Fourth, the draft report focuses on risk and vulnerabilities of the NPO sector globally. We recommend that the final report emphasize a country by country approach to assessing risk. For it to be useful in the next phase, the analysis should disaggregate the sector by key variables, going beyond the service delivery/expressive organization dichotomy. A close examination of the case studies should indicate what these variables are. Otherwise the report will run the danger of focusing on the entire NPO sector and entire countries and populations, inferring all aid going to the populations is risky, despite need for aid and the role of NPOs in stemming the pre-conditions for extremism.

5. Recognize that the NPO sector's values are a strength, not a vulnerability

The draft report describes "values" and human rights as something that must be balanced against CT and ATF interests. This is a false dichotomy that not only ignores the legal obligations of states but also fails to account for the ways in which the work of service delivery/humanitarian organizations contributes to human security and competes against/displaces the faux humanitarian operations of social wings of terrorist groups.

This is reflected in the way the report frames the sector's strengths as vulnerabilities. While the same factors can be both, the report gives insufficient weight to the strength factor in the analysis. These values are the very factors that most protect the sector from abuse. Value driven due diligence and program operation is the best way to ensure that resources are not diverted.

Conclusion

The Risk of Terrorist Abuse in the Non-Profit Organisation (NPO) Sector has been characterized as a technical document that is not intended to communicate policy. But because this report will be used to inform policy formulations and the Best Practices Paper, we believe that it is of the upmost importance that it accurately reflects the actual, quantifiable risks the NPO sector faces from terrorist organizations. We believe the current draft report does not yet reach this benchmark due to the deficiencies detailed above. The undersigned hope that the FATF will address the concerns detailed in this letter during the further typology drafting process.

This is a large and difficult subject to address and the process of comment and review can only strengthen the final result. We remain available should you require any further input on this typology review as well as future projects.

Sincerely,

Australian Council for International Development
Brot für die Welt - Evangelischer Entwicklungsdienst (Bread for the World - Protestant Development Service) (DE)
CDA Collaborative Learning Projects (US)
Charities Aid Foundation (UK)
Charity & Security Network (US)
Conciliation Resources (UK)
DAFNE (Donors and Foundations Network Europe)
Defending Dissent Foundation (US)
European Center for Not for Profit Law
European Foundation Centre (EFC)
Fund for Global Human Rights (US)
Global Partnership for the Prevention of Armed Conflict (GPPAC),
Humanist Institute for Co-operation with Developing Countries (NL)
Human Security Collective (NL)
International Center for Not for Profit Law
Islamic Relief USA
KinderUSA
Muslim Charities Forum (UK)
Transnational Institute (NL)
Transparency International

Cc: Alastair Bland, Co-Chair, RTM Working Group
Nigel Tarling, Co-Chair, RTM Working Group