

CTN Electronic Journal

Preventing the Abuse of Non-Profit Organizations for Terrorist Financing

June 2011

“OSCE participating States (should) ensure that legitimate activities of non-profit organizations and charities are not restricted and that they cannot be misused by terrorist organizations (...)”
OSCE Permanent Council Decision No. 617 (2004) *on Further Measures to Suppress Terrorist Financing*

NPOs and Terrorism in Latin America and the Caribbean: Legal Framework, Red Flags and Case Studies

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Introduction: legal framework and main characteristics of NPOs in the region

When we refer to terrorism financing, we refer to the way in which terrorists sustain themselves, their operations and their day to day, economically, through monetary and financial instruments of any kind. In the legal sphere, the international community arrived at a consensus around the definition of the crime of terrorism financing through article 2 of the International Convention for the Suppression of the Financing of Terrorism (1999) [\[LINK\]](#). Additionally, this Convention, in article 5, obliges State Parties to adopt all necessary measures to hold liable—in a criminal, civil or administrative way—any legal entity located in its territory or organized under its laws that commits an offense set forth in article 2.

Non-Profit Organizations (NPOs), according to the definition of the Financial Action Task Force (FATF) are “a legal entity or organization that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of “good works.” [\[LINK\]](#) Therefore, NPOs fall under the scope of article 5 of the 1999 Convention.

Despite the preventive legal measures put in place by the international community, the tragic attacks of September 11, 2001 served as a wake-up call in the fight against the financing of terrorism. Particularly, NPOs and other charitable institutions, as sources of funding, were shaken to their core: It is believed that 9/11 attacks and the cells that participated were mainly financed through the *Zakat* or *Zadakat*—a charitable legal institution through which Muslims are required to pay 10% of their business earnings and savings—in amounts estimated at 300 to 500 million dollars in a period of ten years.^[1]

Undoubtedly, NPOs are a very attractive option for terrorists to fund their activities. These organizations, particularly charities, have the public’s trust, they are a growing sector worldwide both economically and politically, they have access to considerable and diverse sources of funding, they circulate large amounts of cash, they usually operate both at the national and international levels, they frequently have offices close to deprived or socially marginalized areas—where criminals feel more comfortable operating. Often, NPOs are not subject to as strict regulation and are easy to set up as they are seen to conduct beneficial social work with resources outside the reach of governments. Therefore, in developing countries of the Latin America and Caribbean region, as in other developing countries, the risks associated with NPOs’ characteristics tend to increase.

As a consequence of 9/11, the United Nations Security Council decided to take a step forward and adopt—under chapter VII of the Charter—resolution 1373 of September 28, 2001 ^[2]. The resolution begins its operative section—which shows the importance of the topic—emphasizing the need to prevent and suppress the financing of terrorism, criminalizing it (reproducing almost the same formula of article 2 of the 1999 Convention), freezing without delay funds and related assets related to terrorism, and taking measures against the people and *entities* that participate in the financing plot.

Coincidentally, on September 11, 2001, the Ministers of Foreign Affairs of the Americas were meeting to adopt the Inter-American Democratic Charter, and did not hesitate to condemn the attacks and initiate the steps to adopt specific Inter-American measures against terrorism. On June 3, 2002, all Member States of the Organization of American States (OAS) adopted the Inter-American Convention against Terrorism in Barbados [\[LINK\]](#). The Inter-American legislator understood the importance not only of

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creating a comprehensive and complementary regional framework to the universal one—especially through article 2, which specifically refers to it—but also of establishing sound counter-terrorism financing obligations for State Parties. The first operational section of the Convention, articles 4 to 6, deals with measures to prevent, combat and eradicate the financing of terrorism, seize and confiscate funds and assets, and establish terrorism financing as a predicate offense to money laundering—a measure that was innovative for an international counter-terrorism treaty as it was not part of the 1999 Convention. Article 4.1.a specifically obliges Parties to institute or develop a “*comprehensive regulatory and supervisory regime for banks, other financial institutions, and other entities [stress is ours, as it includes NPOs] deemed particularly susceptible to being used for the financing of terrorist activities.*”

Since 2002, 25 OAS Member States out of 35 have ratified the Inter-American Convention against Terrorism. Although its implementation is still under way and has been uneven, there are good examples in the region of national counter-terrorism financing legislation that has been drafted, sometimes with the support of the CICTE Secretariat and other technical assistance providers—partners such as the United Nations Office on Drugs and Crime (UNODC) and the Financial Actions Task Force of South America (GAFISUD)—, in full accordance with the universal and regional legal framework and other international standards, specially FATF’s 9 Special Recommendations, adopted in October 2001 and updated in October 2004 [[LINK](#)]. It is worth mentioning, as models in different topics and aspects, counter-terrorism financing legislation from Colombia, Costa Rica, Honduras, Peru, and Uruguay, among others.

In regard to NPO’s, Panama has developed over the past years a good legislative model by which only legal persons with ministerial authorization—i.e. license—can lawfully collect funds and economic resources for religious, charitable or cultural purposes. Additionally, there are specific requirements that must be met by associations in order to be recognized as legal persons and proceed to open accounts. Such legal persons are monitored and their transactions analysed by the Financial Intelligence Unit (UAF, by its initials in Spanish). Furthermore, article 3 of Act 50 (July 2, 2003), states that “*Non profit associations shall have an obligation to keep track of any funds that they receive, generate or transfer.*” To that end, they must keep a detailed record of financial operations or transactions and donations, verifying the origin and nature thereof [3]. Finally, Executive Order No. 524, issued on 31 October 2005 pursuant to article 3 of Act No. 50 of 2 July 2003, regulates recognition of legal status of private non-profit organizations and foundations. [4]

Typologies and red flags

A “typology” could be defined in the anti-money laundering and counter-terrorism financing (AML/CFT) context as the method or technique that criminal and terrorist organizations use to confer an appearance of legality to the money used to finance their activities. Among other things, typologies are used to identify the modus operandi and criminal patterns of these organizations, which in turn allow us to conduct sound analytical investigations and build the capacities to fight terrorism financing.

Hence, the use of typologies creates a virtuous cycle that analysts use to examine a case or to illustrate it as a way to improve overall understanding of how the criminal scheme may be operating. This virtuous cycle comes to an end when the investigator realizes that the typology used by the criminal organization cannot be associated to an already known one, or when the case presents variations from the typology that has been used as guidance—making it necessary to modify it or to create a new one. There are not many terrorism financing typologies per se, as there are few successfully prosecuted and well documented cases. However, typologies linked to money laundering can usually also be applied to terrorism financing due to certain similarities between the two crimes, especially in regard to how assets or financial instruments are transferred, transported or converted into other assets as in the “placement” phase in the money laundering cycle.

In regard to NPOs, identified typologies have traditionally been linked to the way in which shell—or front—companies operate when laundering assets. This comparison is useful to draw similarities on how they

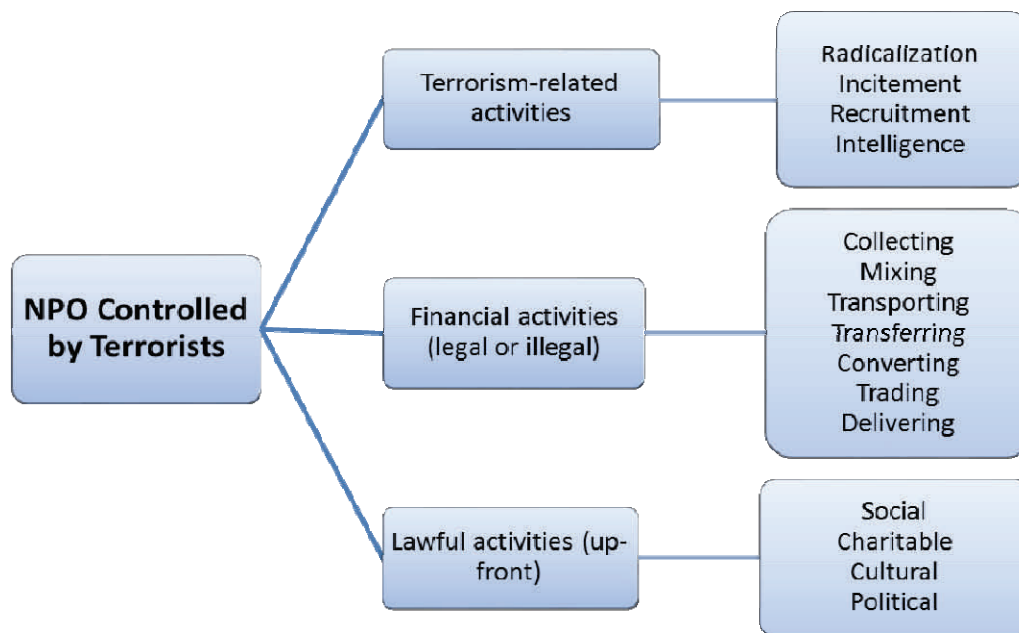
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constitute themselves, but is worthless when examining their transactional behavior or how they pursue their corporate purpose, as they are radically different. For instance, some of the better known cases of NPOs used by terrorists [\[LINK\]](#) show that these organizations not only help them raise, place and change the nature of funds to finance their activities, but also allow terrorists to meet their radicalization, recruitment and incitement goals—something quite unique that sets these typologies apart from the already existing ones.



For each of the financial services mentioned in the diagram, the terrorist organization can conform to complementary typologies to take advantage of the vulnerabilities of the system (normative as well as those inherent to financial products), according to variables of the environment such as the financial products used, the availability of front companies and supporting networks, or the place in which they will be used.

The complexity of the operations associated with NPOs related to terrorist organizations (taking into account their clandestine nature), results in one operation with various typologies, depending on the needs of the organization and the available resources. This complexity makes their detection more difficult and increases the relevance of exhaustively documenting its activities and swiftly addressing red flags (warning signs) that allow us to identify them.

Some of the typologies that could be linked to NPOs are the simulation and structuring of donations (“smurfing”), originated locally or abroad; the development of operations of foreign exchange arbitration mixing legal and illegal assets; open smuggling operations carried out by terrorist organizations taking advantage of mobility corridors used by them or criminal partner organizations; cross border bulk currency smuggling [5]—including cash and new payment methods such as pre-paid value cards; and the use of other illegal methods such as extortion or kidnapping [6], in order to facilitate or generate their financing.

How can we develop a preventive system to disrupt these terrorism financing schemes? A first step would entail developing an early-warning system for suspicious NPOs, which would in turn depend on identifying red flags. Red flags are particular behaviors and atypical situations that present themselves in transactions of clients or users of obligated entities that could be linked to illegal activities. Thus, red flags facilitate the identification of operations potentially associated with the financing of terrorism by linking them to previously mentioned typologies.

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Like typologies, these warning signs are compiled based on the analysis of cases that have been previously investigated and/or prosecuted. However, their usefulness truly depends on the expertise and knowledge that investigators and analysts must have to identify them when confronted by a specific case—for instance, in reports sent by obligated entities related to operations potentially associated with the financing of terrorism.

Red flags related to NPOs include:

- NPOs whose corporate purpose does not pertain to the place in which it carries out its activities;
- NPOs that despite being tax exempt do not take advantage of that benefit;
- The transfer of money between local and foreign NPOs that because of the quantity, destination, or corporate purpose do not fit the characteristics of the NPO from which it came;
- NPOs that suddenly show a significant increase in volume or amount of incomes;
- NPOs that after remaining financially inactive for some time make transactions for sums significantly higher than usual;
- NPOs that keep their financial products funded for very long periods of time;
- Financial products under the name of the NPO that present a high volume of cash transactions;
- NPOs that despite developing projects for high sums of money do not have either the employees or the capacity to execute those projects;
- NPOs that open financial projects with hardly verifiable personal and/or commercial references, or whose partners or legal representatives are never in the country;
- NPOs which use a name that suggests a relationship with another recognized NPO or is similar to another NPO in order to deceive potential donors or clients;
- NPOs that often make changes in its shareholders, legal representatives, and/or administrators;
- NPO employees or executives that claim to work for the organization but do not have legal permits to work in that country;
- NPOs that are lawfully constituted but manage its financial resources through the personal bank accounts of its executives or employees, thus avoiding opening financial products on behalf of the NPO as such.

From the financial intelligence analysis point of view, investigators should carefully handle any information linking NPOs to terrorist organizations, as some red flags could also point to a money laundering scheme deprived of any terrorist component. Consequently, law enforcement agencies and investigators play a crucial role in linking money laundering schemes to terrorist organizations or plots, and analysts and investigators can only put the pieces together and build a case that can successfully be prosecuted if information is exchanged at both the strategic and operational levels.

Nevertheless, NPOs represent an investigative challenge. This complexity calls for an integrated approach that requires efficient public-private partnerships as a component of any preventive system. In this regard, it is worth praising the European Commission's current effort in drafting voluntary guidelines to establish an auto-regulatory NPO regime that aims to address risks related to the financing of terrorism by increasing information and transparency [7]. It seems to us that this model should be followed closely and, based on its results, even adapted and exported to the Latin American and Caribbean region.

Case studies

Once the legal context and main characteristics of terrorist-controlled NPOs have been laid out, it seems important to assess what has been the practical impact of the theoretical instruments developed in the last twenty years. To this end, we will chronologically present two case studies with NPO implications, linked to terrorist groups in Latin America. The first case refers to the use of educational organizations

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by the Peruvian terrorist group Shining Path (*Sendero Luminoso*) in the 1990s [8], and the second one involves a Spanish-based NPO, headed by an alleged member of the terrorist group Revolutionary Armed Forces of Colombia (FARC by its acronym in Spanish), which has been under investigation for the last couple of years [9].

1) Albeit “Cesar Vallejo” and “ADUNI” were preparatory academies officially aimed at helping students pass pre-college tests, both academies were used in the 1980s and 1990s by Shining Path to finance its activities, to serve as logistical centers for the terrorist organization, and to incite, recruit and radicalize young individuals.

As the evidence proved during the prosecution of the case, the heads of both academies, Luís Manrique Lumba, Alfonso Joel Ascencio Borja and Luís Alberto Aguirre Gómez, gave Shining Path’s directorate cash and other financial instruments through different intermediaries. The three of them were aware of Shining Path’s structure and aims, they were aware that the money given was being used to finance Shining Path’s activities, and one of them was a member of the organization and even held a face-to-face meeting with Mr. Abimael Guzmán, leader of the terrorist group.

This behavior would clearly fall under article 2 of the 1999 Terrorist Financing Convention, as they were “directly or indirectly, unlawfully and willfully” providing and collecting funds with the intention or knowledge that they will be used to carry out terrorist offenses. As the academies were legal entities, the scope of application of the international legal regime would have also reached the entities as such under article 5 of the 1999 Convention, and article 4.1.a. of the 2002 Inter-American Convention against Terrorism. Unfortunately, both legal instruments did not exist when the offenses were committed. Therefore, the offenders were prosecuted according to legislation in force in Peru at the time of the commission of the offense. For this same reason, the legal entities as such were neither prosecuted nor sanctioned criminally, civilly, or administratively, and are still today functioning—without any known links to Shining Path or its members, though.

Should a similar case occur today in a country in which international legal standards have been implemented, prosecutors would find it much easier to find support in a variety of legal tools to bring to justice not only the persons responsible for the management or control of the entity—probably under harsher penalties—but also the legal entity as such.

Finally, it is worth stressing that although these academies were not, strictly speaking, NPOs, the case is very relevant for our purposes as it follows typologies characteristic of NPOs—e.g. the educational purpose of the institution to cover terrorist objectives such as radicalizing, indoctrinating, inciting and recruiting students. Additionally, certain characteristic red flags mentioned earlier could have been identified in the NPO’s financial information: financial products funded for very long periods of time; high volume of cash transactions; and not having either the employees or the capacity to execute its corporate purpose.

2) In 2008 an NPO called “Redvivar”—headed by an alleged member of political wing of the Marxist Terrorist Guerrilla FARC, Jaime Cedano Roldán—was granted 81,378 euros to conduct a development project in Puerto Brasil, a rural area in Colombia. The Foundation that granted this funding—which came in turn from a Fund of the municipality of Sevilla, Spain—was “DeSevilla”, a local political Foundation headed by Antonio Torrijos, a member of Spain’s communist leaning party Izquierda Unida.

In this case, in addition to a typology commonly used by terrorist-controlled NPOs [10]—i.e. a request for funding to undertake a development project—there are a number of red flags that should have been addressed: the head of the NPO had been one of the heads of the extinct “Union Patriótica”, a political wing of FARC; the development project was vaguely described and its objectives were not clearly defined; the authorities of the beneficiary area of the project, Puerto Brasil, Viotá, Cundinamarca, Colombia, were not aware of the project; the proposed development projects were not in line with usual economic activities in the region—i.e. mostly seasonal and weekend tourism; and finally, as of October 2010, no spending details or invoices had been provided by Redvivar or DeSevilla.

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Although the case is still under investigation, it should be made clear that, contrary to the Peruvian academies case, nowadays analysts, investigators and prosecutors have a larger number of tools to effectively address alleged criminal activity. In addition to the international legal instruments in place and their applicable provisions, Colombia and Spain are two of the countries with the most developed counter-terrorism and counter-terrorism financing legislation in the world. Moreover, Colombia and Spain effectively cooperate and exchange information with one another [11], which are certainly key aspects to ensure a successful investigation and prosecution of any terrorism financing case.

Conclusion: some recommendations to strengthen a preventive approach

As the legal framework and the analysis of cases show, the Latin America and Caribbean region has developed different tools to prevent terrorists from using NPOs to fund their activities and to serve as recruitment and indoctrination entities. There has been significant progress in this area.

Although this preventive system has been positively developed, several challenges remain. For one, from the legal perspective, many countries in the region still have to adopt as national legislation, and develop through different regulations, the tools that the international framework offers. Furthermore, full implementation of available tools will also require—to ensure maximum effectiveness—strengthening international cooperation and enhancing, both from a quantitative and qualitative perspective, the exchange of information among all stakeholders from the private and public sectors, as well as from the national and international level. This cooperation is paramount to the swift detection, investigation and successful prosecution of individuals and NPOs linked to terrorist organizations.

The provision of any kind of material support to these criminals should be strongly discouraged, regardless of any charitable or social purpose the terrorist-controlled NPO may have, through sound and tailored legal regimes, comprehensive and sustained capacity-building programs for public and private sector officials, and constant exchange of information and cooperation with international partners.

Until that holistic framework is fully achieved, other preventive measures should be immediately implemented as a first step. The lack of legislation related to NPO supervision in most countries of the Latin American and Caribbean regions should be temporarily addressed by the public sector through the adoption of relevant international best practices and standards—e.g. through operational manuals, guidelines or regulations. Along the same lines, NPOs should implement self-regulating mechanisms aimed at increased transparency of their activities, thus building public confidence. Finally, financial institutions should implement specific procedures when doing business with NPOs—knowing their clients (legal representatives, stakeholders, and even donors) through reinforced due diligence procedures; creating risk-profiles and risk-managing NPOs financial portfolios as they do with Politically Exposed Persons (PEPs) [12]; familiarizing themselves with typologies and red flags related to NPOs; improving reporting mechanisms to relevant authorities,

Most economies of the Latin American and Caribbean regions are expected to grow at an average projected real GDP of above 4%, and many of them of above 6% [13]. Should the growth be sustained and political stability ensured, significant growth of the middle class will most likely ensue in the middle to long run. In turn this will strengthen civil society, increasing the number of organizations, foundations and associations in the region [14], and their financial resources. Latin American and Caribbean countries must be ready to benefit from these expected increases, but also remain vigilant and prepared to address its challenges. We must not allow terrorists to use NPOs for their purposes. Let's get ready before it is too late.

End Notes:

[1] Practical Guide to the Prevention, Detection and Suppression of Terrorist Financing; Inter-American Committee against Terrorism, Organization of American States; ed. 2006-2007; p. 147

[2] “(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of

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persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;” S/RES/1373 of September 28, 2001 [\[LINK\]](#). In relation to the fight against the financing of terrorism it is also worth mentioning the S/RES/1267 (1999) regarding al-Qaeda and the Taliban.

- [3] Republic of Panama, Act 50 of 2 July 2003, Official Diary of the State n. 24.838, which legislates on and criminalizes terrorist and terrorist financing offenses modifying Title II, Book II of the Criminal Code. Art. 3 stipulates: “Non-profit organizations shall have the obligation to keep records of the funds they receive, generate or transfer. To that end, they shall keep detailed log of all financial operations and transactions and of donations, substantiating their origin or nature.
- [4] Executive Order No. 524 issued on 31 October 2005 pursuant to article 3 of Act No. 50 of 2 July 2003 regulates recognition of the legal status of private non-profit organizations and foundations. This Executive Order empowers the Ministry of Interior and Justice to recognize or deny recognition of the legal status and oversee the operations of private non-profit organizations and foundations; churches, congregations and other religious communities or organizations; federations and any other organization not concerned with sports, agriculture, cooperatives or labour matters. It also authorizes the creation of an office under the Ministry of the Interior and Justice for the purpose of keeping records of the activities of non-profit organizations and foundations.
- [5] In the Latin America and Caribbean region, it is interesting to study how criminal networks operate smuggling money and goods, especially at the US-Mexico border. A remarkable study on this topic has been co-authored by the U.S. Immigration and Customs Enforcement (Department of Homeland Security/ICE) and the Mexican government (Secretaría de Hacienda y Crédito Público, SHCP) [\[LINK\]](#).
- [6] Daniel Benjamin, Co-ordinator for Counter-Terrorism at the U.S. State Department recently noted in an interview with the Financial Times that “al-Qaeda groups were increasingly financing themselves through kidnappings, with terrorist organisations netting more than \$100m from ransoms in recent years.” Financial Times, May 9, 2011, available at: <http://www.ft.com/cms/s/0/e064f490-7a65-11e0-af64-00144feabdc0.html?ftcamp=rss#axzz1LyuyYrzw>
- [7] Cf. “EU prepares voluntary anti-terrorist financing guidelines for non-profit organizations” (10/06/2010) <http://www.efc.be/EUAdvocacy/Pages/Transparencyandaccountability.aspx> ; and DISCUSSION PAPER 3rd conference on “Enhancing Transparency and Accountability of the Non-Profit Sector” on 2 July 2010 in Brussels. Voluntary Guidelines for EU based non-profit organizations [\[LINK\]](#).
- [8] The authors would like to thank Peruvian Senior Prosecutor Ms. Luz del Carmen Ibáñez, who provided us with the details of the case. Prosecutor Ibáñez was one of the main prosecutors in the “Mega-Process” conducted against Abimael Guzmán and the leaders of Shining Path (Exped. 560-2005 and subsequent).
- [9] Sources: ABC newspaper (04/03/2009) http://www.abc.es/hemeroteca/historico-04-03-2010/abc/Internacional/el-ayuntamiento-de-sevilla-subvenciona-a-un-terrorista-de-las-farc_1134220875651.html; El Mundo newspaper (18/03/2009) http://www.elmundo.es/elmundo/2009/03/18/andalucia_sevilla/1237363677.html; ABC newspaper (06/07/2009) <http://www.abcdesevilla.es/20090706/sevilla-sevilla/redvivir-presenta-ahora-proyecto-20090706.html>; ABC newspaper (11/10/2010) <http://www.abcdesevilla.es/20101011/sevilla/exige-aclare-destino-dinero-20101011.html>.
- [10] For instance, Hamas social and community assistance projects.
- [11] Particularly some investigations about the FARC-ETA connections in Spain and Colombia.
- [12] For PEPs see FAFT definition [\[LINK\]](#): ““Politically Exposed Persons” (PEPs) are individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.”
- [13] See International Monetary Fund, April 2011, World Economic Outlook. Latin America and the Caribbean: Average Projected Real GDP Growth during 2011-12 (percent) [\[LINK\]](#).
- [14] Although precise data is difficult to obtain, according to the World Association of Non-Governmental Organizations (WANGO, www.wango.org), there are currently around 1360 NGOs in the Latin-America and Caribbean region.

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Respecting freedom of association while countering terrorism

Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights

Context

The international community is in agreement that the protection and promotion of human rights is essential to the success of any counter-terrorism strategy. The OSCE Charter on Preventing and Combating Terrorism and the United Nations Global Counter-Terrorism Strategy have emphasized two points: counter-terrorism measures must respect human rights and; protecting and promoting human rights is essential to reducing conditions which may engender support for terrorism and/or terrorist recruitment. A number of studies have confirmed a correlation between poor human rights protection and terrorism.

The OSCE regards human rights as an integral element of security and considers that combating and ultimately overcoming terrorism will not succeed if the means to do so are not in conformity with human rights standards. In this perspective, the Office for Democratic Institutions and Human Rights (ODIHR), which is the OSCE Institution assisting OSCE participating States in implementing their human dimension commitments, takes a principled but practical approach to supporting the participating States in their efforts to develop effective human-rights compliant counter-terrorism legislation, policies and practices.

Yet countering terrorism while upholding human rights is easier stated than put into practice. As recent years have demonstrated, counter-terrorism policy makers have been, perhaps understandably, tempted to focus on security measures but neglected the task of developing a comprehensive, human-rights compliant approach.

In this context, freedom of association that is guaranteed under a number of international instruments, such as the International Covenant and Civil and Political Rights (ICCPR); the United Nations Declaration on Human Rights Defenders and OSCE commitments may at times have been jeopardized. Far from being a hindrance to countering terrorism, respecting freedom of association is a tool to achieve security. Government authorities should acknowledge that Non Governmental Organizations (NGOs) are generally recognised as making an essential contribution to the development and realisation of democracy and human rights. The significance of involving civil society in a comprehensive and multidimensional response to the threat of terrorism has been stressed by various international documents and NGOs have an important and meaningful role to play in preventing terrorism and addressing its root causes.

This contribution aims to highlight OSCE commitments on freedom of association and challenges faced by States and NGOs as a result of countering terrorism, in particular when it comes to its financing.

The right to freedom of association in practice

An association is a voluntary grouping of people for a common goal. Freedom of association enables citizens to join together without interference by the state in order to achieve various ends.

Freedom of association is a fundamental right and not something that must be granted by the government to individuals. Requirements to register or obtain a license for the association are compatible with human rights standards as long as these schemes do not impair the activities of the association.

The scope of freedom of association includes:

- Right to have a multitude of NGOs working in the same field: Freedom of association encompasses the right to set up an organisation in an area of activity, even if other organisations

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doing similar work already exist.

- Freedom from direction by public authorities applies to the decision to establish an NGO, the choice of its objectives, the way it is managed and the focus of its activities.
- Presumption of legality: The fundamental principle for policy makers and legislators to be respected, when developing legislation that may impact on freedom of association, is that NGOs should enjoy the presumption that any activity is lawful in the absence of the contrary evidence.

Therefore,

- NGOs should conform to democratic principles. They should not seek changes through violence and should not resort to unlawful means;
- NGOs should not be banned for pursuing unpopular causes or causes which oppose state policies as long as their actions are peaceful and lawful.

Restrictions to freedom of association

The right to freedom of association may be subjected to interference in order to protect important state's interests, such as national security and the rights of others. For example, one person's right to association may conflict with the state's interest in protecting national security by preventing terrorist financing.

However, grounds for restriction cannot be interpreted loosely. States are required to strike a permissible balance between competing interests and any interference with the right to freedom of association must satisfy several tests:

- Legality: there must be a sufficiently precise legal basis for the interference which contains a measure of protection against arbitrariness;
- Necessity: the interference should correspond to a “pressing social need” and, in particular, that it is proportionate to the legitimate aim pursued. The legitimate aims are included in the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (i.e. national security, public safety, protection of the rights of others).
- Proportionality: The European Court of Human Rights usually asks three questions in this regard:
 1. whether the measure is “suitable” or appropriate to the legitimate aim being pursued;
 2. whether there are less restrictive ways of achieving the same purpose; and
 3. whether the cost to the right is justified by the benefits to the pressing social need.
- Non-discrimination: finally any interference must not be discriminatory.

To address the legitimate concern of terrorist financing, States have introduced lists proscribing/sanctioning terrorist organization or individuals in order to curtail and/or control the financing of terrorism such as the Consolidated List of proscribed organisations maintained by the 1267 Sanctions Committee established pursuant a United Nations Security Council Resolution. Once an organisation is included on the Consolidated list, all United Nations member States are obliged to freeze its assets, among other sanctions. Such listing has an impact on fundamental freedoms, including freedom of association:

- Listing has consequences for “members” of organizations, but it is not always evident who is or is not a “member” of an organization or who is involved or not in terrorism;
- In addition, listing makes it a crime to provide funds to a listed organization. Many NGOs have complained that the listing regime has had a chilling effect on charitable donations, especially to Muslim charities. Certain governments have sought to alleviate this problem through the creation of lists of “approved” organizations, but these efforts have also been criticized as interfering with the freedom of association;
- Listing and freezing of assets in the absence of a possibility to challenge the decision may violate freedom of association and due process.

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Access to funding

Access to funding is an inherent element of the right to freedom of association. Without funding, an organization would not be able to operate and pursue its objectives. However, the possibility for NGOs to collect funds is not absolute and may be subject to regulation, with a view to protect the targeted audience.

The United Nations Declaration on Human Rights Defenders stipulates that NGOs can solicit, receive and utilise resources for the express purpose of promoting human rights through peaceful means. The Council of Europe Fundamental Principles recall exactly the same principles, and the United Nations Human Rights Committee indicates that control of funding would have to be consistent with article 22 of the ICCPR.

The Special Recommendation VIII on International Best Practices on Combating the Abuse of Non-Profit Organizations developed by the Financial Action Task Force of the Organization for Economic Cooperation and Development (OECD) reiterates the following fundamental principles that are covered by article 22 of the ICCPR and the Council of Europe standards:

- Legitimate activities of NGOs are not restricted; and
- Government oversight should be flexible, effective and proportionate to the risk of abuse.

Transparency, Accountability and Self-regulation

NGOs can be subjected to various obligations to ensure the transparency of their activities, which may also be supervised by one or more relevant public authorities. However, such obligations should only apply to NGOs receiving some form of state's support. Furthermore, supervision should be based on the presumption that the activities of such organizations are lawful and that self-regulation is prioritized. Accountability and transparency can be tempered by other obligations relating to respect for privacy and confidentiality. When in exceptional cases, the general interest may justify having access to private/confidential information and therefore interfering into the internal affairs of an NGO, the principle of proportionality should come into play.

To address abuse of NGOs by terrorist organizations, NGOs have been developing over the years some accountability mechanisms as a means to retain public trust and credibility such as:

- NGOs are accountable to their members. In this regard, one accountability mechanism is to submit annual reports on accounts and activities;
- NGOs are also accountable to state institutions in case they benefit from public support or preferential tax treatment; and
- NGOs are accountable to donors to whom they have to provide reports regarding their spending.

Conclusion

Terrorist financing represents a challenge for states' security and stability. Therefore, states have a legitimate interest in regulating NGOs in order to guarantee respect for the rights of third parties. International human rights standards provide all the necessary elements for regulating NGOs.

Such regulation of NGOs is certainly a means to prevent the abuse of NGOs for illegitimate purposes, such as terrorist financing. Cooperation between state authorities and NGOs is also key to ensure that the legislative framework put in place serves its purpose: allowing NGOs to fulfil their objectives and the state to protect the interests of others. In this regard, involving NGOs in the process of public policy formulation can certainly enhance the implementation of the legislation. Most importantly, the guiding principle the authorities should abide by when regulating the activities of NGOs is the following: failing proof to the contrary, NGOs' activities are lawful. In case limitations are imposed, they must be consistent with the principle of proportionality.

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Protecting freedom of association and countering terrorist threats are not conflicting goals but complementary and mutually reinforcing. The valuable role and expertise of civil society in addressing conditions conducive to the spread of terrorism and countering terrorism cannot be overemphasized. In the OSCE framework, the 2002 Charter on Preventing and Combating Terrorism recognised that it was vital to engage civil society in finding common political settlement for conflicts and to promote human rights and tolerance as an essential element in the prevention of terrorism and violent extremism. States should not miss the opportunity to enhance their cooperation with civil society when countering terrorism and thus, to foster freedom of association.

End Notes

- [1] Article 22 of the ICCPR is the main binding instrument, ICCPR is ratified by most states and reads as follows: “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. [...]”
- [2] The UN Declaration on Human Rights Defenders includes into freedom of association: (I) the right to form, (II) the right to join, and (III) the right to participate in associations.
- [3] 1990 Copenhagen Document: “(9.3) - the right of association will be guaranteed [...]”; (10) [...] the participating States express their commitment to “[...] (10.3) - ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in non-governmental organizations which seek the promotion and protection of human rights and fundamental freedoms, including trade unions and human rights monitoring groups; [...]”
- [4] The UN Global Counter-Terrorism Strategy on 8 September 2006, affirmed the determination of Member States to “further encourage non-governmental organizations and civil society to engage, as appropriate, on how to enhance efforts to implement the Strategy.” The 2002 OSCE Charter on Preventing and Combating Terrorism, recognised that it was vital to engage civil society in finding common political settlement for conflicts and to promote human rights and tolerance as an essential element in the prevention of terrorism and violent extremism
- [5] Fundamental Principles on the Status of Non-Governmental Organisations in Europe of the Council of Europe: Paragraph 50 of Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states provides: “NGOs should be free to solicit and receive funding - cash or in-kind donations - not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.”
- [6] Human Rights Committee, Concluding Observations on Egypt, CCPR/CO/76/EGY, 28 Nov 2002
- [7] Financial Action Task Force of the Organization for Economic Cooperation and Development (OECD), International Best Practices on Combating the Abuse of Non-Profit Organizations – Special Recommendation VIII: stresses that “government oversight should be flexible, effective, and proportionate to the risk of abuse. Mechanisms that reduce the compliance burden without creating loopholes for terrorist financiers should be given due consideration. Small organizations that do not raise significant amounts of money from public sources, and locally based associations or organizations whose primary function is to redistribute resources among members may not necessarily require enhanced government oversight.”
- [8] See Paragraphs 62 to 72 of the Council of Europe’s Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe.
- [9] OSCE Charter on Preventing and Combating Terrorism, MC(10).JOUR/2, 7 December 2002, Annex 1, Para. 20. The 2001 Bishkek Programme of Action on Strengthening Comprehensive Efforts to Counter Terrorism also stressed the importance of promoting active civil society engagement in the fight against terrorism.