Introduction

The Humanitarian Policy Group (HPG) at the Overseas Development Institute (ODI) and the Norwegian Refugee Council organised a roundtable meeting to discuss the impact of counter-terrorism legislation and policy on humanitarian action. This reflects growing concern among the humanitarian community that counter-terrorism legislative and policy frameworks are restricting, and even in some cases, criminalising the engagement of humanitarian actors with non-state armed actors, thereby limiting humanitarian access to populations in need and efforts to promote protection of civilians. This roundtable meeting is the fifth in a broader series organised by HPG that runs between October 2010 and March 2011. The meeting aimed to foster a better understanding of international and national counter-terrorism legislation and policy that is relevant to humanitarian actors, to facilitate agreement on priority areas of concern and to identify actions that agencies can take in response to this issue. Given the sensitivities of this topic and to promote an open and honest discussion the meeting was held under the Chatham House Rule. What follows is a summary of the discussion.

Legal and Policy Frameworks

There has been much talk of the 2010 United States (US) Supreme Court case Holder vs. the Humanitarian Law Project (HLP) due to its potential impact on humanitarian action in conflict settings. The case arose as a result of the plaintiffs’ pre-enforcement challenge of a domestic statute prohibiting "material support" to terrorism with regards to, among other things, proposed training in international human rights law and international humanitarian law (IHL) to two non-state armed groups that had been ‘listed’ by the US Secretary of State as Foreign Terrorist Organizations (FTOs). The plaintiffs were concerned that the trainings might be in breach of the statute, which criminalises a broad swath of activities that are deemed material support to terrorism when coordinated with or carried out on behalf of, or for the benefit of listed FTOs. The statute exempts only medicine and certain religious materials. Indeed, the US Congress revoked a broader humanitarian exemption that had been included in previous legislation.

The Supreme Court upheld the constitutionality of the ‘material support’ statute and affirmed that the activities at issue – including training listed FTOs in international law – constituted criminal activity. According to the decision, it appears that merely talking to an organization does not breach the statute, yet coordinating with an organization or providing them with a platform to speak would. The decision confirmed that providing ‘expert advice or assistance’ also constitutes unlawful material support, which raises serious concerns about its applicability to certain humanitarian activities, including training or other activities aimed at promoting adherence to international humanitarian law. In addition, the Supreme Court’s decision affirmed that much of what constitutes humanitarian goods and services in areas where listed FTOs are active may be construed as benefiting the organization and as such unlawful under the statute.
In practice, US legislation has not yet been used to prosecute major humanitarian organisations. The main targets thus far have been US-based Muslim charities. However, the law has the capacity to be applied extraterritorially, including to projects carried out by non-US citizens, without US funding, in conflicts to which the US is not a party.

While the concern regarding criminalization is critical, the most tangible effect of counterterrorism measures on humanitarian action may be in the arena of donor regulations and requirements. As donors change their policies to reflect more forceful counterterrorism laws, humanitarian organizations may be affected in myriad ways that do not involve prosecution but that nonetheless can significantly affect programming and operations. For example, organisations receiving USAID funding are required to comply with their strict administrative regulations, which are governed by overarching counter-terrorism legislation and policy. Adhering to this framework has required a number of measures, including checking beneficiary lists and entering information about local partner organisations into a government database.

Counter-terror legislation is not just a US phenomenon; there are similar laws in Canada, the UK, Australia, Colombia, Pakistan, Sri Lanka and the Philippines. Australia has a very limited exemption for certain forms of humanitarian assistance, and in the UK and Canada the criminal statutes require that prosecutors prove a higher level of intent to support terrorism than in the US. Some humanitarian and development donors may react to counter-terrorism legislation by becoming more conservative (both in terms of funding and oversight of activities) than the law actually requires.

In the UN, the General Assembly (GA) has focused on terrorism as an international problem since 1972 and has adopted a range of measures to counter terrorism and improve international cooperation. In 1994, the GA adopted a Declaration on Measures to Eliminate International Terrorism and an Ad Hoc Committee was subsequently formed that elaborated three of the most recent UN counter-terrorism conventions. In 2006 a strategy was adopted aimed at developing a comprehensive framework for the UN, which has four components: addressing the conditions that lead to terrorism; preventing and combating terrorism; building state and UN capacity to fight terrorism and ensuring respect of human rights while countering terrorism. Member States are currently drafting a comprehensive convention on international terrorism.

Counter terrorism policy debates have also taken place over many years at the level of the Security Council, which in the 1990s imposed a series of sanctions on states and non-state armed actors. Post 9/11, it adopted resolution 1373, which established a Counter Terrorism Committee (CTC) with the aim of preventing and tackling terrorism. This includes the improvement of the legal and institutional frameworks to counter terrorist activities, such as the criminalisation of financing of terrorism. The Secretary General established in 2005 a Counter-Terrorism Implementation Task Force (CTITF) that drafts legislation for states and plays a coordinating role to ensure coherence in the implementation of global counter terror strategies.

What impact have these had on humanitarian action? UN agencies are expected to support the work of the CTC on the ground and the emphasis on greater coherence within the UN means that humanitarian actors may be pressured to comply and adhere to these frameworks. The
CTITF is also tasked with preventing abuse of the charitable sector, yet, there are concerns that humanitarian and human rights considerations are not prioritised.

With regards to engaging with proscribed non-state armed actors, there has been a persistent perception amongst many humanitarian actors that there are so-called ‘no contact’ policies within the UN system. This not the case. The last two UN Secretary General’s reports on the Protection of Civilians and the Security Council Resolutions on Children in Armed Conflict specifically emphasise the importance of humanitarian engagement with non-state armed actors. However, in practice it may be the case that there have been some limitations placed by senior UN officials, such as SRSGs, on the timing of this engagement – this may occur in cases where there are concerns about the impact on higher level political negotiations with these groups. These misperceptions in the humanitarian community have hindered the development of coherent responses.

The biggest challenge perhaps stems from the blurring of the legal regimes governing acts of terrorism and armed conflict. Terrorism and armed conflict are distinct phenomena and are regulated differently. IHL allows certain violence to take place in armed conflicts (against military objectives), but prohibits violence against civilians or civilian objects. In contrast, a terrorist act is prohibited no matter what its form. IHL gives equal rights and obligations to the parties of a conflict, while counter-terrorism legislation does not follow that logic. There is little value added in applying counter-terrorism legislation in an armed conflict as non-state armed actors can already be prosecuted under IHL for war crimes if they attack civilians, carry out attacks against civilian targets or commit other violations of IHL (e.g. disproportionate attacks).

Reliance on the concept of terrorism leads to confusion in times of armed conflict as it also blurs the law with politics. Almost every non-state armed actor from the last twenty years is now labelled a "terrorist" organisation for essentially political purposes. In addition, there is no clear definition of "terrorism"; there are no clear, consistent criteria for listing organisations or individuals on various terrorist lists; and often there is no opportunity for appeal or review of a decision to list a group or individual. The decision to proscribe a group or individual is political. Prohibiting engagement with listed groups and individuals is also in contravention of the letter and spirit of IHL. For example, Common Article 3 to the Geneva Conventions is clear that humanitarian organisations can offer their services to the parties to an armed conflict, without distinguishing whether the beneficiaries of their action are located in areas under the control of the state or of non-state armed actors. IHL also explicitly encourages the dissemination of IHL to parties to a conflict and the civilian population.

These challenges are perhaps exacerbated by the fact that many humanitarian organisations are not purely humanitarian but also engage in development, peace-building and state-building activities. Therefore, their engagement with non-state armed groups can sometimes go beyond humanitarian purposes. The delineation between activities that are purely humanitarian in nature and strict adherence to humanitarian principles in their performance could help ease fears that engagement with non-state armed actors implies providing support to terrorists.

**Impacts on Humanitarian Operations: field perspectives**

Humanitarian organisations are faced with a complex array of legislation, stemming from different countries. Humanitarian organisations must be able to understand and comply with a complex array of international, regional and national legislation and policy stemming from all
donors at the same time. Many of the main humanitarian donors now require agencies to make/sign declarations that they will not provide any direct or indirect support to terrorist organisations and that they have not done so in the past. Some donors have also requested, or have implicitly required substantial checks on partners and implementing agencies to see if they are in any way related to listed organisations or individuals.

In the Gaza Strip, in particular, there have been significant challenges. Prior to 2005, the EU was keen for humanitarian organisations to work with local authorities in order to build the capacity of the government to deliver basic services. This changed after the parliamentary elections in January 2006 in which Hamas were elected and formed a government. Hamas has been proscribed by the EU, US, Canada and Japan. Although a unity government was formed in 2007 following the financial sanctions imposed by many member states in reaction to the election of Hamas, it broke down amid political violence with a take-over by Hamas. Later in 2007, President Abbas appointed a new (non-Hamas) Prime Minister and tasked him to form a new government. Whilst this is currently the internationally recognised government, in reality Hamas effectively retained control of central government functions in the Gaza Strip including line ministries. A number of Hamas mayors were also elected into office in the municipal elections in 2005.

Agencies have subsequently had to change their ways of working in order to effectively bypass both central and local government officials in the Gaza Strip. In one case example, the ‘clarity’ provided by the Holder decision in the US meant that training programmes for elected municipal authorities being undertaken by agencies had to stop as they were potentially in breach of US legislation, even though the US government was not actually funding that particular programme. Other donors are not necessarily aware of how problematic the situation is, or the impact this has on daily programming activities.

There have also been dilemmas on whether to pay the NGO registration fee required by the Ministry of Interior in Gaza and whether the use of materials smuggled from Egypt through the tunnels could be seen as providing ‘material support’ to Hamas, who benefit from providing licences to smugglers and taxes on goods. Restrictions have also meant that some agencies are unable to work in certain municipalities due to a Hamas-affiliated mayor or have to pull out when a new Mayor, affiliated to Hamas, is elected. There is also contradiction with regards to the Consolidated Appeals Process (CAP); the CAP calls on clusters to coordinate and work with the relevant line ministries of the Palestinian Authority but line ministries operating in Gaza are controlled by Hamas, rather than the ‘official’ line ministries operating in the West Bank.

The responsibility for ensuring compliance with counter-terror legislation is increasingly being shifted onto humanitarian organisations. Donors are including clauses in their contracts that pass on any responsibility for ensuring that no aid/assistance benefits proscribed organisations/individuals to the receiving organisation. This changes the level of risk for agencies as previously there was a presumption that they would be safer if they shared the responsibility to comply with donor governments. As a result there is a clear danger that humanitarians will become increasingly conservative and refrain from engaging with certain non-state armed actors, limiting access to populations in need. Moreover, there is a risk that assistance will shift from purely needs-based, to focusing on populations not linked with proscribed organisations. There is a fear amongst many humanitarian organisations of not just the risk to donor funding, but also to a wider reputational risk amongst the media, supporters and national constituents.
Donors have reportedly given different advice on what is permitted or how to respond in these situations. This lack of consistent feedback and clarity has meant that each humanitarian organisation is responding in different ways, which in turn hinders effective coordination, particularly at the cluster group level as different organisations are reluctant to share information. In addition, coordination meetings do not involve local authorities or actors, duplicating efforts and hindering the overall response.

The fear and confusion resulting from these trends has been compounded by the response of some donors implying that they would simply prefer not to officially know what engagement is taking place. As a result there is a high level of paranoia within the humanitarian community, with an increasing lack of trust, accountability and transparency. In some examples, minutes are not recorded at cluster meetings so as to avoid officially acknowledging any level of engagement with proscribed organisations. The lack of transparency and trust extends to the relationship between the humanitarian community and host government, de facto authorities and affected populations. The resulting behaviour can increase the perception that NGOs are spies or agents of powerful Western states. In some cases, this may be reinforced by the rigorous vetting procedures that some humanitarian organisations carry out on local partners in order to satisfy donor administrative requirements.

Donors have at times actually asked to receive information on national staff and local partners but there are concerns that disclosing such information may in turn violate national data protection laws. In Pakistan, there have been instances in which local authorities ask to see the beneficiary lists and then put pressure to remove those that are deemed to be linked to militants, either directly or indirectly as a member of their family.

Donors are clearly facing significant domestic pressure not to be seen in any way to inadvertently support terrorist organisations. A recent opinion article in the US press accused USAID of funding terrorism in Gaza, which led Congress to commission an audit of USAID to see whether these allegations were true. This highlights the huge pressure aid ministries/departments are under in their own national context. Given these internal pressures, there is serious concern that if humanitarian agencies push for greater clarity on the applicability of the law to certain humanitarian activities, it may actually force governments to explicitly prohibit activities which are humanitarian in nature.

The pressures of counter-terrorism legislation are changing traditional ways of working for humanitarian organisations. In Afghanistan during the 1990s, most agencies had contact and worked closely with the mujahidin and other armed militias. There is now a widespread perception that this is no longer possible.

**Concluding Discussion**

Counter-terrorism legislation is clearly having a significant impact on humanitarian operations and given the sensitivities, there is a concerted need to address this in an appropriate manner. Efforts to mitigate the impact on humanitarian action could include advocacy (quiet diplomacy or public information where appropriate) that demonstrates the impact these legislative and policy frameworks are having on affected populations; this may be a strategic way to ensure member states understand the full implications of their actions in this regard.

Some humanitarian actors feel that they need to insist that engaging with non-state armed actors is an essential component of humanitarian action – that it is the way they do business.
Counter-terror legislation and policy is not aimed at humanitarian actors and one possible way of ensuring it does not affect them is to engage the general public in donor countries so they understand why such engagement is crucial to humanitarian operations and therefore support humanitarian action. This may put pressure on donors to institute a waiver for humanitarian organisations. As waivers have existed in the past, it might be possible to reinstitute them. Putting together common standards on aid diversion might also help instil confidence among governments that humanitarian organisations are not providing ‘material support’ to proscribed organisations.

Advocacy efforts should also target national authorities that re-label armed conflicts as counter-terrorism operations. There needs to be a greater emphasis on the applicability of IHL, which in turn provides a framework for humanitarian engagement and negotiation with armed actors.

Humanitarian organisations also need to support each other by sharing experiences on how they are dealing with counter-terror legislation or how they engage with certain groups. Since organisations are cautious not to go public with the way they are responding, there needs to be confidential collaboration within the humanitarian community to share guidance and best practices.