

## **Counter-terrorism and humanitarian action**

**Public Event, ODI 17 October 2011**

### **Meeting Notes**

#### **PANELLISTS**

**Sara Pantuliano, Head of HPG, co-author of the Policy Brief, 'Counter- terrorism and humanitarian action'**

**Kate Mackintosh, independent consultant, and co-author of the Policy Brief**

**Jehangir Malik, UK Director, Islamic Relief**

**Mona Sadek, Deputy Head of Mission, International Committee of the Red Cross**

#### **CHAIR**

**Mike Wooldridge, BBC World Affairs correspondent**

Mike Wooldridge opened the event launching HPG's Policy Brief 'Counter-terrorism and humanitarian action' by noting that the circumstances in which humanitarian organisations operate changed significantly after the 9/11 attacks. He introduced the main theme of the report – counter-terrorism laws and measures and how these have hampered humanitarian work.

**Kate Mackintosh** addressed the development of counter-terrorism legislation after 9/11, despite the absence of any internationally agreed definition of terrorism. Key developments:

- The adoption of UNSC Resolution 1373 under Chapter VII obliging states to take measures to combat terrorism including assurances that no resources be provided to further the cause of terrorists. UNSC Resolution 1373 in turn incorporated into national laws to bring them into line with the resolution.
- The drawing up of consolidated terrorist lists – featuring many armed groups operating in areas where humanitarian organisations are active.
- The broadening of the definition of what constitutes 'material support', leading to fears among humanitarian organisations that they could inadvertently fall foul of the 'material support' prohibition.
- No intention to support an act of terrorism is required in order to fall foul of counter-terrorism laws.

She noted that many measures to combat terrorism appear quite reasonable but nevertheless present problems to humanitarian operations. For example:

- Humanitarian organisations may not have considered whether distribution of food or building a shelter or a food centre contributes to terrorism or not. Nevertheless under current law it could be the case that, if any of these resources were to find their way to a prohibited individual, they may be criminally liable.
- Humanitarian resources can constitute 'material support'. For example, in ***Holder vs the Humanitarian Law Project*** the Supreme Court found that 'even material support meant to promote peaceable lawful conduct could be diverted to advance terrorism in multiple ways'.
- In *US vs Shah* (2007) and *US vs Farhane* (2011) the Court examined whether the provision of medicine contravened the law. It found that the treatment of fighters breached the 'material support' statute because medical treatment constituted 'material support'. This represents a contravention of a fundamental principle of international humanitarian law – that all sick and wounded have a right to medical treatment.

It was further noted that, although there have been few prosecutions, the threat of criminal legislation has nevertheless had an impact. Legislation has had effects on donor policy since in implementing legislation donors insert clauses into grant agreements requiring that humanitarian organisations do not support terrorism. Although not, on the face of it, objectionable, in practice this presents considerable difficulties as humanitarian organisations have to operate in areas where 'terrorists' are present in order to gain access to affected populations. Aligning themselves with the other side can present difficulties.

In the second presentation, **Sara Pantuliano** considered the impact of counter-terrorism legislation at the operational level. Assessing the impact as 'profound' the author identified five broad areas:

**Firstly, a decrease in funding** – especially acute for Islamic organisations under greater scrutiny since 9/11. This has had a significant impact on local NGOs – for example, sponsorship schemes for orphans in Gaza had to stop altogether because they were supported through donations by citizens in the Gulf. However, impact has not been restricted to Islamic organisations. Until recently there was a level of tolerance of aid diversion – considered an acceptable cost of doing business in volatile environments. However, this risk is no longer tolerated – irrespective of the level of need. It is important to stress that it is almost impossible to eliminate all risk of aid diversion – but this is what is expected of humanitarian organisations today. This presents considerable difficulties for humanitarians operating in environments like South/Central Somalia where it is difficult to establish beyond any reasonable doubt that misappropriation of aid will not occur. However, if assurances are not provided, funding has been stopped.

**Secondly, an increase in the administrative burden** – which can deter aid actors operating in high-risk environments. The study found that humanitarian organisations experience difficulties in transferring monies including donations from Western governments to their country offices. Banks can halt funds for three months while they conduct investigations – for which humanitarian organisations have to bear the costs – even when there is no evidence of wrong-doing. Increased vetting procedures to satisfy donor requirements entail investments as extra resources and staff have to be found to collect and monitor information to ensure legal compliance with donor regulations. The author noted that all the humanitarian organisations interviewed during the course of the study considered risk mitigation necessary, but many feel that it has become too cumbersome and prevents humanitarian organisations from taking necessary risks to reach communities in need. It was observed that this increase in the administrative burden is also affecting the ability to respond to humanitarian crises in a timely manner – as witnessed in Somalia.

**Thirdly, relations with local communities have been undermined** by vetting requirements, perceived as invasive and accusatory, undermining the neutrality of humanitarian organisations, making acceptance difficult to achieve and compromising access to people in need. The study's sources said that compliance with US legislation is seen as endorsing the political view of the government.

**Fourth, decreased transparency.** For example it was found that in Gaza cluster meetings were not minuted as people were concerned that they would be compromised for association with a proscribed organisation – Hamas. Charitable giving has also become less transparent because people have been afraid of falling foul of counter-terror legislation.

**Fifth, lack of coordination.** The study found that fear of prosecution has led to a reluctance to discuss the issues, still less find a coordinated position. Sharing of information around these issues has become very problematic. At donor level this is reflected in a 'don't ask, don't tell' approach. Initiatives to document the impact of counter-terrorism legislation led by the Inter-Agency Standing Committee and by some individual organisations have resulted in very little uptake.

## Case study: SOMALIA

The authors found that counter-terrorism legislation has affected humanitarian organisations globally, but the effects in Somalia and Gaza have been particularly severe. In 2008 Al Shabaab was proscribed by the UNSC. In 2010, a humanitarian exemption was introduced by the UNSC – however, this exemption only applied to UN agencies and their partners – and therefore did not apply to organisations such as the ICRC or MSF. Nor was it mandatory which meant that member states were not obliged to incorporate the exemption into their domestic law. Subsequently, funding declined massively principally as a result of the reduction in US contributions.

In addition, humanitarian organisations have been asked to introduce an array of risk mitigation measures. These requirements exceed those which are considered acceptable in other contexts. The combination of hostility of Al Shabaab toward aid agencies, the insecurity of the environment in South Central Somalia and the impact of counter-terrorism measures and what they require – have all led to deterioration in humanitarian assistance since 2008.

Humanitarian organisations have become increasingly less able to operate in Al Shabaab controlled areas which has slowed the humanitarian response. The current famine has put these restrictions in the spot light, donors have relaxed their requirements and the US Treasury's Office of Foreign Assets Control (OFAC) restrictions have eased. Over the summer of 2011 licences have been granted to the US State Department, US aid partners and contractors [enabling them] to operate in Somalia. OFAC announced that non-US partners could operate in Somalia without a licence and that 'incidental benefits to Al Shabaab' – ie food and medicine that might fall into their hands are 'not the focus for OFAC sanctions enforcement' – an ambiguous statement that has created confusion. If 'incidental benefits to Al Shabaab are not the focus it does not necessarily guarantee that OFAC will not take action in the future, nor does it bar prosecution under US criminal law in relation to the 'material support' statute. The net result is that humanitarian organisations remain very cautious despite the current conditions in South Central Somalia.

## Conclusions

- The application of counter-terrorism measures is challenging principled humanitarian action.
- Preventing 'material support' to terrorists is a laudable objective, however steps many states are taking to achieve this objective are having an unnecessarily adverse impact on life-saving assistance to victims caught up in conflict.
- The study recommends that more open and transparent dialogue between humanitarian organisations and donor governments should be established and that humanitarian organisations need to share information.

In the third presentation, **Jehangir Malik** welcomed the report and pointed out that the challenges it identifies are particularly felt by Islamic organisations operating with a humanitarian mandate. Adding that Islamic organisations are operational in highly volatile areas such as Afghanistan, Pakistan, Gaza and Somalia, he said the difficulties they face can be not only challenging but disabling and crippling.

Reiterating Islamic Relief's commitment to the core principles of humanitarianism such as providing life-saving aid in a context of neutrality and impartiality, he said that humanitarian aid workers put their lives at risk. In addition they now face the possibility of criminalisation, and this additional burden can make it almost impossible to operate. He confirmed that the report's identification of

vetting procedures, transfer of monies, OFAC licences and beneficiary lists are all challenges faced by Islamic Relief.

Mr Malik cited South/Central Somalia as an example of where Islamic Relief UK have found difficulties with counter-terrorism mechanisms which can make it difficult to operate. Comparing Islamic Relief, a member of the DEC with 20 years' experience, with many other Islamic organisations, he noted that the difficulties less established Islamic charities face are considerably greater.

He noted that effective and timely humanitarian response to the Pakistani floods was hampered [because of the risk] of [resources] going to warring parties. He said that humanitarian aid organisations are questioned about how they will ensure that aid and assistance does not reach entities such as the Taliban, fighters in the tribal areas, Hamas, Al Shabaab etc, saying that although the names change the tune stays the same.

Establishing that Islamic Relief is compliant, safe and not in violation of the rules – which can be ambiguous – can mean that [procedures] are challenging at the best of times and crippling at the worst. Mr Malik noted that at the same time [entities] like Al Shabaab are not comfortable with beneficiary lists and getting details of everyone operating in the area [can create] an impasse. He said that conundrums can 'put us between a rock and a hard place and at times I feel so crippled that we [ought] to be honest with our donors and say, "pull out and give everyone their money back"'. He concluded that the humanitarian mission must continue, which will require creativity in finding ways to get aid and assistance to those most in need, and that legislation and politics should not prevent the flow of money getting to people in their hour of need. Mr Malik also clarified that he was not against putting mitigation measures in place, acknowledging that aid organisations work in [difficult terrain] to navigate [but that if] they don't then 750,000 lives in Somalia will be put at risk.

**Mona Sadek** thanked HPG for a timely and substantive report and reiterated that, in the post-9/11 decade, there had been a proliferation of counter-terrorism measures including the compilation of lists of proscribed bodies drawn up by the UN, EU, regional bodies and individual states. The speaker noted that the exclusion of contacts with parties who *de facto* control territories has severely curtailed the ability of humanitarian organisations to reach affected populations. This curtailment derived from the criminalisation of any form of support, services or assistance with non-state armed groups proscribed as terrorist organisations. Armed groups designated as terrorist organisations include many of the entities with which the ICRC is current engaged. She noted that counter-terrorism measures had affected humanitarian actors in a number of ways including the level of funding and the potential imposition of criminal liability. Ms Sadek added that activities which are exclusively humanitarian, impartial and neutral may still fall within the definition of what constitutes support or services to terrorism.

The ICRC's concern is that the prohibition of impartial and neutral humanitarian activities could result in the criminalisation of many of the organisation's core activities, which are aimed at meeting the needs of victims of armed conflict. ICRC activities which fall under this rubric include:

- Visits and material assistance to people suspected of terrorism or charged with terrorist-related offences.

- Visits to detainees held by entities proscribed as terrorist.
- First aid training.
- War surgery seminars.
- International humanitarian law dissemination to members of armed opposition groups.
- Distribution of food in IDP camps where some beneficiaries may be on proscribed lists.

In assessing how counter-terrorism legislation could contravene international humanitarian law Ms Sadek stressed that:

- Common Article 3 of the four Geneva Conventions of 1949 provides a bedrock provision specifying that ‘an impartial humanitarian body such as the ICRC may offer its services to the parties of the conflict’. Humanitarian engagement with non-state armed parties to non-international armed conflict is a task explicitly granted by states to the ICRC. Criminal legislation which prohibits services or support to terrorists can prove a serious impediment to the ICRC’s carrying out its mandate.
- International humanitarian law prescriptions aimed at fostering national reconciliation after a non-international armed conflict would be very difficult to negotiate with groups proscribed as terrorist since talks aimed at securing a ceasefire or peace agreement would be subjected to the absolutist prohibition of the international anti-terrorism regime.
- Treaty-based and customary international humanitarian law requirements relevant to amnesties would also be very difficult to apply where non-state armed actors are designated as terrorist.

Adherence to the principle of neutrality means that the ICRC may not take part in controversies of a racial, political or ideological nature. If the ICRC directed its work in favour of a population on one side of a political divide it would force the organisation to work only in territories controlled by government forces or recognised by other states, internationally.

The speaker noted that ICRC visits to places of detention are provided for in the universally ratified Geneva Conventions. This provision, underpinned by a position of neutrality, is in tension with counter-terrorism and threatens ICRC’s endeavours to visit all people detained to ensure that they are humanely treated.

Noting that this role forms the crux of the ICRC’s work with detainees, the speaker said that this provision could run counter to anti-terrorism laws because of the lack of exemptions for humanitarian activities. This has led to fears on the part of the ICRC that access to the most vulnerable people caught up in conflict could be jeopardised. Furthermore, it is the view of the ICRC that persuading a party – regardless of whether it is designated terrorist or not – to respect humanitarian obligations should not fall foul of anti-terrorism clauses.

The principles of neutrality and impartiality can be undermined by *de facto* distinctions between ‘good’ and ‘bad’ victims, depriving people of their rights because of political affiliation or because they are under the authority of designated terrorist groups.

The ICRC’s provision of medical assistance to victims of armed conflict could be hindered by anti-terrorism legislation since a strict interpretation could mean that medical services to people rendered *hors de combat* by wounds or sickness could be prohibited on the grounds that it

constitutes support or assistance. This would challenge the principles and ideas which underpinned the creation of the ICRC 150 years ago.

The speaker concluded that there is a need for states to harmonise their legislation and policy in the humanitarian and anti-terrorism realms so that the provision of legitimate and necessary humanitarian aid is not hindered. Legislation which creates criminal offences should be excluded from the ambit of activities which are exclusively humanitarian in character.

In the specific case of the ICRC, it should be recognised that humanitarian engagement with non-state armed actors is a task expected of the ICRC under Common Article 3, which allows the ICRC to offer its services to all parties in non-international armed conflict. Criminalisation of humanitarian action would run counter to the letter and spirit of the Geneva Conventions.