

Impact of donor counter-terrorism measures on principled humanitarian action: What can the EU do?

Brussels, 4 November 2013,

VOICE organised an event to raise awareness of NGOs and other stakeholders about the impact of counter-terrorism laws and policies on humanitarian action. The event gathered seventy-five participants from NGOs, Red Cross Movement and the European Commission. In the aftermath of the attacks on the United States in 2001, a number of countries have embarked on the development of expansive counter-terrorism laws and policies. However, these have had an impact on the funding, planning and delivery of humanitarian assistance and protection activities to people in need. Humanitarian principles require that assistance and protection be provided where it is needed most. They are also important to get access to affected populations, especially in conflict. Working in complex crises, humanitarians are by nature most exposed to the consequences of counter terrorism measures, and can experience tension between the humanitarian principles and donor requirements. As demonstrated in a recent report commissioned by the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) and Norwegian Refugee Council (NRC), many humanitarians fear that this can prevent them from doing their job.

Mr. Nicholas Borsinger – *VOICE President* – welcomed the audience, presented VOICE and the Chair, Ms. Ingrid MacDonald.

Ms. Ingrid MacDonald – *Representative NRC Geneva & co-chair IASC Task Team on Humanitarian Space and Civil-Military Relations* – covered three main areas:

- ❖ Purpose of the report: This may be an issue where the US is in the driving seat, but it is crucial to be aware of its impact in an EU context.
- ❖ Future work to take forward: It is important to hear the audience's perspectives. Some outreach to national platform has been done, but other ideas are welcome.
- ❖ Recommendations of the report: One of the key recommendations is that dialogue is needed. There has been a level of self-censorship within the humanitarian community and a reluctance to engage on this issue because of its nature and its legal implications. The problem is that there is a lack of understanding from the security and political decision makers of what humanitarians do. Dialogue is thus very much encouraged from across the board.

Ms. Naz Modirzadeh – *Senior Fellow Harvard Law School, Counterterrorism and Humanitarian Engagement Project* – focused on the legal questions; what happens when counter-terrorism laws intersect with humanitarian action?

- ❖ Dilemma: The impetus driving counter-terrorism regulation is the idea to cut off as much as possible any resources from reaching terrorists. There are two countervailing trends:
 - International policy framework: contemporary humanitarian action from humanitarian NGOs and UN agencies must include engagement with armed groups, negotiations, training and expansion of networks for access purposes, with all parties in armed conflict, including non-state actors.

- The trend that seeks to curtail, restrict and limit engagement with, support to and transactions with armed groups that are listed as terrorist groups.
- ❖ Legal frameworks: There is an increasing tension between the two motives.
 - There are two key UN *Security Council Resolutions* that come into tension with this notion of working closely with non-state actors:
 - o Resolution 1373 (2001) demands that States enact counter-terrorism laws that ensure that terrorists are not able to take advantage of that particular State in order to launch attacks globally. In many EU countries, the primary rationale for changing or strengthening counter-terrorism domestic laws has been compliance with 1373.
 - o Resolution 1267 (1999) is the primary mechanism by which the Security Council lists individuals and groups as terrorists at global level. If an individual/group on this list is on its territory, utilizes its financial systems or is benefiting from transactions emanating from the same territory, the relevant State must stop it.
 - *US counter-terrorism law* has been the fastest growing and most wide-ranging in its scope of coverage, at least among major donor governments.
 - o Any material support (tangible or intangible) is considered as transfer of an asset/resource to a listed terrorist organisation. This is therefore a crime if you knew the group or individual was listed- even if you did not intend to support the terrorist aims of the group.
 - o Financial regulation of transaction: the US Treasury measures may affect the work of humanitarian organisations through regulating transactions in the area where a listed terrorist group has power.
 - o The Partner Vetting System (PVS): If an organisation (no matter if European, American or other) is receiving USAID funds, it may be required to obtain and provide to USAID very detailed personal information of senior staff and any partner organisations under a new pilot program currently under consideration. This may prove impossible for principled humanitarian organizations in conflicts like Afghanistan, where provision of such information to parties to conflict would be considered highly problematic. According to information currently available on the pilot program, there is very little transparency regarding how the information will be maintained, for how long, or under what circumstances it will be shared with other government agencies. There are currently two partner vetting programs active in West Bank/Gaza and Afghanistan, with five pilot countries in various degrees of implementation: Kenya, Guatemala, Philippines, Ukraine and Lebanon. USAID has stated that, pursuant to a pilot period, the program may be expanded worldwide.
 - *EU law* is much stronger than US law in data protection and privacy, particularly as to individuals' control over their personal information. This raises questions of obligations for humanitarian organisations to ensure the privacy and protection of staff, partner organization personnel, and – in some cases - beneficiaries.
- ❖ Current and potential responses: This research demonstrates that the humanitarian community is engaging in a variety of approaches to address the dilemmas discussed here:
 - *Due diligence and risk mitigation:* an increasingly dynamic discussion within the humanitarian sector regarding what humanitarian organisations are doing to demonstrate to governments that they take seriously the notion of diversion (what steps and procedures are in place to avoid it)?
 - *Unified standards* for how to avoid diversion?: some suggest that it will be critical to develop unified standards for due diligence, risk mitigation, assessment of risk for the sector, particularly when humanitarian organizations operate in areas controlled by listed actors.

- *Obfuscation*: 'Don't ask, don't tell'. One approach at field level is to remain vague about what is going on. For many organisations, it has become the modus operandi in an increasingly confusing legal terrain.
- *Raising awareness*: Having a conversation within humanitarian and donor communities about this issue and its potential implications.
- *Exemptions*: One possible avenue that remains to be explored is incorporating a humanitarian exemption into the counter-terrorism and sanctions laws.

Ms. Lisa Reilly – *Executive Coordinator, European Interagency Security Forum* – shared operational concerns which may arise in the field:

- ❖ Negotiation/Liaison for safe access to communities means talking to both sides of a conflict. There is ambiguity here: engagement is not considered as material support, but negotiations might be if it is seen as giving credibility to the actors.
- ❖ Non-food items/Food distributions: In a camp situation where there is a belief that members of a proscribed organisation are present, does aid distribution count as giving material support? How to decide which people in the camp the organisation should give support to? How should this be measured?
- ❖ Payments to suppliers/partners: A lot of work on due diligence has been done on financial aspects and the due diligence that is required to make payments. What are the consequences if payments are delayed? Does it mean that the partner organisation cannot carry on with the implementation of the programme? Is local staff at risk because of threats and issues that could come from the local suppliers if the payments are delayed?
- ❖ Provision of information: Often the first time that counter-terrorism legislation is raised at field level, is in association with a request for information. Can organisations provide information? What if local governments use this information to levy taxes or to put pressure on local staff members?
- ❖ Who is proscribing organisations?: There is the US list, the EU one, the UN one, etc. But what about some of the governments that are recipients of aid? They are using these lists to proscribe organisations that may not otherwise be considered as terrorist, for example as a way of stopping aid and support for opposition parties.
- ❖ Self-censorship and lack of information exchange – people and organisations are scared and not sharing information. They are acting individually, leading to no consistency or solidarity (common approach) on this issue.

What can we do?

- ❖ Raise awareness of the facts. Make sure it is clear what to do and what not to do.
- ❖ Gather information/evidence: What is the actual impact of these laws on the ability to implement programmes?

Dr Christiane Höhn – *Adviser to the European Union Counter-terrorism Coordinator* – gave an overview of relevant EU legislation:

- ❖ EU criminal law: The framework decisions of 2002¹ and 2008² are the baseline of the counter-terrorism law that every Member State has to implement in its national law. In contrast to the US law, what the EU criminalizes is participating in the activities of a terrorist group, including by supplying information of resources or by funding its activities in any way, with the knowledge of the fact that such participation will contribute to criminal activities of the terrorist group

¹ Framework Decision 2002/475/JHA on combating terrorism

² Council Framework Decision 2008/919/JHA amending Framework Decision 2002/475/JHA on combating terrorism

- ❖ Sanctions: The EU has two options for applying sanctions: 1) UN-implemented; 2) autonomously implemented. Before listing an organisation under the autonomous sanctions regime, the EU looks if it legally fulfils the definition of a terrorist group and if listing would pose a political problem.
 - *Terrorist-based sanctions*: The EU definition is different from the US definition. One case focused on social security payments made to the family of a terrorist – was this in opposition to the sanctions applied? The European Court of Justice said that as basic subsistence to the family such payments were not considered to further terrorist activity. The provision of humanitarian assistance has not been ruled on, but it is the same argumentation which could apply.
 - *Country-based regimes*: Asking for derogations from country-based sanctions for humanitarian purposes takes time and there are no standard exception derogations.
- ❖ Looking at recommendations from OCHA-NRC report:
 - *Negotiations/contact with terrorist groups*: The EU does not have a no-contact policy.
 - *Humanitarian aid to population in controlled areas of listed groups*: ECHO does not change funding if an area is controlled by them, since funding is based on needs assessment. There is no partner vetting for counter-terrorist purposes.
 - *Payment of fees to terrorist groups*: This is not possible at the moment.
 - ECHO and its implementing partners seek to apply the *humanitarian principles* – there are no counter-terrorism clauses in humanitarian aid contracts.
 - *More dialogue* on this issue among governments and the humanitarian community is crucial.
 - *Additional guidance* for humanitarian actors is needed.

At EU level, it doesn't seem that the counter-terrorism measures are undermining the humanitarian purposes. A formal exception for humanitarian aid could be pursued, but for now it seems to work in practice. The EU is doing not so badly in regards to the recommendations of the report, but there is still space for improvement.

Ms. Ingrid MacDonald concluded with the importance of being aware that the strictest standards are usually applied throughout the donor chain, all the way down to the implementing partners e.g. in the case of pooled funds. In the field, there is too much flexibility and ambiguity; even if prosecutions might not yet be taking place now, will they in the future? It should also be noted that Islamic charities are impacted much more by counter-terrorism measures than other organisations.

Summary of questions and answers

- There are many reasons why there are counter-terrorism measures in place – no one has the right to perpetrate atrocities against civilians. This is where humanitarian action and counter-terrorism measures can be viewed to have a **common concern**: around the protection of civilians.
- Sometimes, it is hard to distinguish the general debate on the erosion of neutrality and loss of **independence** and the discussion of counter-terrorism measures. Some of these measures can go across the red line of acceptable compromise. This is why this debate is so important.
- Many **EU member States** have domestic laws which are much stricter than what the EU prescribes.
- **Financial institutions** are adopting and applying stricter laws to avoid risks. On the **Hawala systems** (informal system to make transfers of funds via networks outside the formal banking systems), banks are much stricter than governments. Banks determine internally through their risks management systems not to foster in any way this kind of transfers.
- The **UN agencies and PVS**: an NGO cannot vet a UN agency, but a UN agency has to ask the NGOs whom they have contracts with to vet themselves. So, vetting the staff against the UN Security Council counter-terrorism list is required in almost all UN contracts. There is immunity for UN staff themselves to be vetted.

- **Do we real want more clarity?** The concern on the lack of clarity is that NGOs are ending up being more self-censoring (and less risk-taking) than they need to be. This is why more clarity is needed. But also internally in governments or across regional governmental bodies there is no agreement on how to deal with this, what the priorities should be etc. If we get a restrictive kind of clarity, would NGOs like it? On the other hand, organisations should be very careful that the informal assurances of colleagues in donor agencies of governments do not lead us to forget the laws that apply to us through contracts. How much should NGOs care if their staff is engaging in activities that, in a variety of jurisdictions, may be crimes, but where the respective authorities choose for the time being not to prosecute it as crimes?
- There is a tension between the **humanitarian exemptions and peace-building objectives**. Will a humanitarian exemption make engagement for peace-building, for political purposes, more difficult?
- It is difficult to tell if the **humanitarian space** is reduced because of these counter-terrorism measures, because we so far only have anecdotal information. We need more discussion and evidence to know if that could be the case.
- There is **no international judicial body** that can deal with this. The US is not part of the International Criminal Court. The International Court of Justice is not ruling on this kind of issues. So there are no judgments that can bind both parties. However, there is much EU-US dialogue ongoing and the US counter-terrorism framework is still evolving.
- **Medical care to wounded terrorist fighters** could be a case of direct tension between counter-terrorism law and IHL. In an armed conflict situation, clearly the Geneva Convention ensures medical care for wounded fighters if they are no longer participating in combat. And many governments – including the US – have a proud tradition of providing excellent medical care in the field to enemy fighters. However, legally speaking, US law criminalizes medical care for a wounded fighter of a listed terrorist organisation.

Ms. Kathrin Schick – *VOICE Director* – thanked the panel for their valuable contributions and the audience for their participation.

The full study is available [here](#).