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IHL and the humanitarian impact of counterterrorism measures and sanctions

Unintended ill effects of well-intended measures

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Summary

- In recent decades international and domestic counterterrorism (CT) measures have addressed ever broader forms of support to terrorist acts and groups designated as terrorist. When these measures apply in armed conflict there is a real risk that they can impede the operations of humanitarian organizations. Country-specific sanctions can raise similar problems.
- Challenges arise as a direct result of the restrictions themselves, their incorporation in funding agreements and their cascading effects, as commercial actors that provide services necessary for humanitarian operations – such as banks, insurers and commodity providers – restrict the services they are willing to provide.
- The problems are not new, but the COVID-19 pandemic has led to greater scrutiny of the impact of sanctions. Greater awareness is beginning to lead to some encouraging developments in the inclusion of safeguards for humanitarian operations.
- Security Council CT measures and country-specific sanctions are beginning to include binding demands to member states to ensure that the measures they take to give effect to them comply with international humanitarian law (IHL).
- Similarly, new domestic CT legislation adopted by a number of states has included safeguards for humanitarian action.
- From the perspective of humanitarian organizations, all restrictions in sanctions should include express exceptions for humanitarian action. Until that goal is attained, solutions need to be sought in a more calibrated manner, addressing the tensions on a context-by-context and restriction-by-restriction basis.
- Restrictions in funding agreements pose challenges. Some donors include restrictions that go beyond the underlying CT measures and sanctions they aim to promote compliance with. Requirements to screen and thus potentially exclude final beneficiaries are particularly problematic, being contrary to IHL and humanitarian principles.
- Neither CT measures nor country-specific sanctions preclude engagement with members of designated groups to conduct humanitarian operations. Nonetheless, confusion among staff of humanitarian actors and donors is leading to unwarranted limitations, which impede a principled, effective and safe humanitarian response.
- Now the UK is setting its own sanctions strategy, it must recognize the relevance of IHL and humanitarian principles as it elaborates sanctions policies and the regulatory framework. This is an opportunity for exploring ways of addressing the adverse impact of sanctions, whether by the introduction of exceptions, or by means of general licences for humanitarian action.

01 Introduction

Counterterrorism measures address increasingly broad forms of support to terrorist acts and groups. When they apply in armed conflict such measures can impede the operations of humanitarian organizations. Country-specific sanctions can raise similar problems.

The attacks of 11 September 2001 were not the first instance of international terrorism on a large scale. But the extensive counterterrorism (CT) measures adopted by states and international organizations in the years that followed have given rise to new clashes with protections afforded under other areas of international law, most notably international humanitarian law (IHL) and human rights.

As these CT measures adapt to respond to the constantly evolving manifestations of international terrorism, they continue to give rise to new points of contact, and frequently friction, with IHL. These are the subject of this research paper.

For a number of years, one such point of friction has been with the rules of IHL that regulate humanitarian operations. CT measures once focused on prohibiting and criminalizing acts of violence, but they have progressively expanded to address ever broader forms of support to terrorist acts and groups designated as terrorist. When these measures apply in situations of armed conflict there is a real risk that, unless they include adequate safeguards, they can impede humanitarian organizations from operating as foreseen by IHL, and in accordance with humanitarian principles. Country-specific sanctions imposed for other objectives, such as ending conflicts or protecting civilians, raise similar challenges for humanitarian action.

These problems are not new, and there have been efforts to resolve them. But the details of the interplay between the different bodies of law are complicated, and new issues arise as CT measures continue to evolve. Solutions at international and national level remain elusive.

The tensions between these legal measures and the lack of clarity surrounding them are having a significant impact on humanitarian actors' capacity to operate in contexts where groups designated as terrorist are active or where country-specific

sanctions are in force. This occurs as a direct result of the prohibitions themselves, their incorporation in funding agreements and their cascading effects, as commercial actors that provide services necessary for humanitarian operations – such as banks, insurers and commodity providers – restrict the services they are willing to provide to humanitarian actors for fear of liability.

This paper:

- presents the three bodies of law – CT measures, country-specific sanctions and IHL – identifying the principal points of friction;
- clarifies outstanding questions and frequent misunderstandings;
- makes recommendations to contribute to finding practical solutions for resolving the tensions.

A note on terminology

The present paper uses the term 'CT measures' to refer to international and domestic instruments whose objective is preventing and suppressing acts of terrorism and support thereto. They include multilateral conventions requiring states to criminalize, prosecute or extradite persons suspected of certain acts, sanctions adopted for CT purposes, domestic criminal measures, and restrictions in funding agreements.

For the sake of simplicity, the paper uses the term 'sanctions' to refer to measures adopted by the UN Security Council, the EU and states unilaterally, whether for CT or other purposes; they give rise to similar adverse effects on humanitarian action. An analysis of the precise nature of these restrictions and their legal basis – measures not involving the use of armed force under Article 41 of the UN Charter in the case of UN 'sanctions', and countermeasures or retorsions in the case of EU restrictive measures and sanctions adopted by states unilaterally – is beyond the scope of the paper.

The paper draws a distinction in its treatment of those measures which require states to criminalize terrorist acts and support thereto on the one hand and, on the other, sanctions (whether for counterterrorist or other purposes) which do not, even though the domestic implementation of such sanctions may provide criminal penalties for their violation.

Methodology

This research paper was elaborated on the basis of a desk review, interviews conducted from September 2020 to July 2021 and a small expert consultation convened by Chatham House in April 2021. It also draws on discussions hosted by other organizations in this same period.

02
The relationship between CT measures and IHL

Legal criteria exist for determining the existence of an armed conflict. If these criteria are met, IHL is applicable, regardless of the designation of organized armed groups as terrorist.

2.1 When does IHL apply to 'terrorist' violence?

IHL applies in situations of armed conflict, including occupation. The challenges identified in this research paper arise primarily in non-international armed conflicts, that is, situations of protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.

The purpose of classifying a situation as either armed conflict or another form of violence is to determine which law is applicable. Classification can be complex as a matter of law and fact.[1] The mere fact that violence is carried out by groups labelled as 'terrorist' using 'terrorist' methods does not mean it should not be classified as an armed conflict, with the consequent application of the protections and restrictions laid down by IHL. The difficulty of determining whether violence labelled as 'terrorism' amounts to armed conflict is not a new issue. It has manifested itself in different ways over the decades.

States are frequently concerned that acknowledging the existence of an armed conflict may grant some status or recognition to the groups they are fighting. This is notwithstanding the express statement in the Geneva Conventions that

1 For some of the problems in classifying particular situations of violence, see Wilmshurst, E. (ed.) (2012), *International Law and the Classification of Conflicts*, Oxford: Oxford University Press.

the application of common Article 3 – the minimum rules of IHL that regulate non-international armed conflicts – do not affect the legal status of parties to the conflict.

States have taken varying approaches to classifying situations of 'terrorist violence' but this should not obscure the fact that legal criteria exist for determining the existence of an armed conflict, leading to the consequent application of IHL. If these criteria are met, IHL is applicable, regardless of any state rhetoric or formal designation of groups as terrorist. IHL may apply concurrently with international or domestic CT measures that may come into play as a result of such designation or otherwise.

2.2 The rules of IHL on humanitarian relief and medical assistance

There are two sets of rules of IHL that are of particular relevance to this paper: those regulating humanitarian relief operations, and those relating to medical assistance.

2.2.1 Rules regulating humanitarian relief operations[2]

Primary responsibility for meeting the needs of civilians lies with the party to the conflict in whose control they find themselves – state or organized armed group. If this party is unable or unwilling to meet these needs, offers may be made to carry out relief actions that are humanitarian and impartial in character. The consent of affected states is required, but may not be arbitrarily withheld. Once consent has been obtained, parties to the conflict and other relevant states must allow and facilitate the rapid and unimpeded passage of supplies, equipment and personnel involved in the relief operations. They may prescribe measures of control under which such passage is permitted.

The fact that civilians are under the control of a designated group is not a permissible ground for withholding consent to relief operations.

As far as the interplay between these rules and CT measures and sanctions is concerned, three key points can be drawn out. First, relief operations are for the benefit of civilians. The fact that civilians may be under the control of a group designated as terrorist or subject to sanctions does not affect these rules.

Second, and flowing from this, the fact that civilians are under the control of a designated group is not a permissible ground for withholding consent to relief operations.

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2 For the most part the rules are the same in international and non-international armed conflicts. See Akande, D. and Gillard, E. (2016), *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (hereafter *Oxford Guidance*), United Nations Office for the Coordination of Humanitarian Affairs.

Third, the risk that goods provided in the course of relief operations may be diverted to designated persons or groups can be addressed by means of the measures of control that parties to the conflict are entitled to adopt. These could include arrangements for their distribution.

The role of humanitarian organizations' state of registration must be considered. Although it is not generally involved in such organizations' operations, its entitlements and obligations can arise indirectly. Humanitarian organizations must comply with the CT measures and country-specific sanctions adopted by their state of registration. These measures could have the effect of preventing or restricting the organizations from conducting operations that have been consented to by the state in whose territory they will be conducted. This could be the case, for example, if states of registration preclude travel to areas under the control of designated groups, or if sanctions require them to issue licences for certain operations.

How can these situations be addressed? As will be discussed in this paper, CT measures and country-specific sanctions should be elaborated and, to the extent possible, interpreted and implemented in a manner that is consistent with IHL obligations. Restrictions that these measures impose must not amount to an arbitrary withholding of consent to relief obligations. Nor can states implement the measures in a manner inconsistent with their obligation to allow and facilitate relief operations. Further, measures of control adopted by states of registration must not be such as to prevent humanitarian operations from being conducted in accordance with humanitarian principles.

2.2.2 Rules on medical assistance

These rules consist of two interrelated elements: first, the entitlement of wounded and sick civilians and fighters who refrain from acts of hostility to receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition. In the provision of such care no distinction may be drawn on any grounds other than medical ones.[3]

The second element is the prohibition on harming, prosecuting or otherwise punishing those who provide medical assistance, regardless of the nationality, religion, status or affiliation with a party to the conflict of the person receiving such care.[4]

These are foundational rules of IHL. CT measures or country-specific sanctions that would preclude or punish the provision of such medical assistance, including on the grounds that people receiving the care are designated as terrorist or under such sanctions, would come into direct conflict with IHL. Equally problematic are more general restrictions that could, for example, prevent travel by staff of humanitarian organizations to provide such assistance. As in the case of relief operations, CT measures and sanctions must be framed so as to avoid conflict with IHL.

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3 Article 12, 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); Article 12, 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces; Article 10, 1977 Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (AP I); and Article 7, Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts, (AP II).
4 Article 18 GC I; Articles 16(1) and 17(1) AP I; and Article 10(1) AP II.

The states negotiating the Additional Protocols to the Geneva Conventions considered it necessary to include an express prohibition on prosecuting those who provide medical assistance, in view of problematic practices in conflicts. The absence of a similar express prohibition in the general rules on relief operations should not be interpreted as indicating that states may prosecute staff of humanitarian organizations that have conducted their operations in accordance with IHL, including the technical arrangements imposed by relevant parties.

2.3 The relationship between CT measures, country-specific sanctions and IHL

States have adopted a range of measures globally, regionally and domestically to prevent and punish acts of terrorism. Legal restrictions take two principal forms: the criminalization of certain acts, and the imposition of sanctions on groups or persons designated as terrorist.

At the international level, criminalization was traditionally effected by conventions requiring parties to criminalize particular manifestations of terrorism, such as threats to civil aviation or maritime navigation, terrorist bombings, and the financing of terrorism, and to prosecute or extradite persons suspected of such acts.

In these conventions the interplay between IHL and CT measures was considered principally in relation to acts of violence. One concern has been that acts of members of organized armed groups that comply with the rules of IHL on conduct of hostilities – such as attacks against government military facilities – could fall within the scope of the offences in the CT conventions. This would oblige all states parties to the conventions to prosecute or extradite persons accused of acts that were lawful under IHL. To avoid this, some states and humanitarian actors contributing to the negotiations of the conventions have sought to include clauses to exclude activities that are not unlawful under IHL from the scope of the offences.[5]

Since 2001, the UN Security Council has assumed a key role in the international community's CT response. The Council had addressed international terrorism before this, but it had done so in response to *specific* acts of terrorism, usually by condemning particular attacks, and, most significantly, establishing a sanctions regime focusing on one terrorist group: ISIL (Daesh)/Al-Qaeda.[6]

With Security Council Resolution (SCR) 1373 (2001), the Council started addressing CT as a thematic issue across contexts. SCR 1373 was the first in a series of resolutions – for the most part adopted under Chapter VII of the UN Charter, and

5 On different approaches for articulating the interplay between the conventions and IHL, and ongoing challenges, see Pejic, J. (2012), 'Armed Conflict and Terrorism: There is a (Big) Difference', in Salinas de Frías, A., Samuel, K. and White, N. (eds) (2012), *Counter-Terrorism: International Law and Practice*, pp. 171–204, Oxford: Oxford University Press; Hmoud, M. (2006), 'Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention', *Journal of International Criminal Justice*, 4(5): pp. 1031–43; and Saul, B. (2021, forthcoming), 'From Conflict to Complementarity: Reconciling International Counter-Terrorism Law and International Humanitarian Law', *International Review of the Red Cross (IRRC)*. See, for example, Pejic (2012), 'Armed Conflict and Terrorism'.

6 In line with the UN Security Council's terminology, this paper uses ISIL (Daesh) to refer to the group also known as Islamic State, or ISIS. The sanctions regime as initially established by UN Security Council Resolution [henceforth SCR] 1267 (1999) targeted the Taliban. SCR 1390 (2002) expanded it to cover Al-Qaeda.

thus binding on all UN member states – that require states to take a broad range of measures to prevent and suppress terrorist activities. These include criminalizing as terrorist various modes of support to terrorism beyond those addressed in the conventions. As part of this framework, the Council has also established a complex institutional architecture for elaborating and coordinating the UN and member states' CT response.[7]

A key strand of the international community's response to terrorism is stemming the flow of funds to groups designated as terrorist. In addition to criminalizing the provision of funds or assets for the commission of acts of terrorism, this has been achieved by the imposition of financial sanctions – by the Security Council, the EU and states unilaterally – on groups or persons designated as terrorist. These measures prohibit making funds or other assets available directly or indirectly to such groups and persons.

Most of these CT measures apply in armed conflict, as well as in times of peace. In view of this, and because of the broad scope of activities that are now prohibited and criminalized, there is a real risk that these measures may criminalize or otherwise adversely impact acts and activities that are foreseen and regulated by IHL, including, most notably, the conduct of humanitarian relief operations, and the provision of medical care. Unless there are adequate safeguards, terrorist financing crimes and prohibitions in sanctions on making funds or other assets available directly or indirectly to designated groups could capture incidental payments made in the course of humanitarian operations, and relief consignments that are diverted and end up in the hands of designated groups.

The cascading effects of the CT measures and sanctions are also problematic. To comply with these measures, states have included restrictions in funding agreements to ensure funds or assets do not reach or benefit terrorist groups. At times these are more onerous than the measures with which they aim to promote compliance, or they impede a principled humanitarian response.

Commercial actors such as banks, insurers, freight companies and providers of commodities that play a role in humanitarian operations must also comply with CT measures and country-specific sanctions. Fears of violating these measures, coupled with the reality that humanitarian organizations are rarely profitable clients, have led the commercial entities to restrict the services they provide. These restrictions have been so severe as to threaten humanitarian actors' capacity to operate in areas perceived as 'high-risk'.

7 See, for example, Debarre, A. (2018), Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework, New York: International Peace Institute (IPI). Although they are beyond the scope of the present research paper, concerns have been expressed about the precise mandates of some of the bodies in the UN's CT architecture, including in particular the role that the Counter-Terrorism Committee Executive Directorate (CTED) should play in determining whether states' CT measures comply with IHL. See Lewis, D., Modirzadeh, N. and Burniske, J. (2020), *The Counter-Terrorism Committee Executive Directorate and International Humanitarian Law: Preliminary Considerations for States, Legal Briefing*, Harvard Law School Program on International Law and Armed Conflict.

03
Tensions between CT measures, sanctions and humanitarian action

The restrictions that raise the greatest tensions with humanitarian action are CT measures that criminalize financial and other types of support to designated persons and groups, and financial sanctions.

The CT measures that raise the most significant tensions with humanitarian action are those that criminalize financial and other types of support to persons and groups designated as terrorist, and financial sanctions. Neither of the two foundational instruments in this area – the 1999 International Convention for the Suppression of Terrorist Financing and SCR 1373 – refers to, let alone excludes, humanitarian action. This is not surprising, as both instruments were adopted before their impact on humanitarian action was identified. It is precisely because they did not include safeguards that problems are now arising. As problems have become apparent, progressively more significant steps have been taken to avoid and mitigate the adverse impact of CT measures on humanitarian action.

This chapter discusses the two kinds of measure – criminal measures and financial sanctions – and, in relation to each, notes how they can give rise to tensions, and the approaches adopted to date for safeguarding IHL and humanitarian action.

3.1 Criminal measures

Traditionally, new international legal obligations in the field of CT are elaborated by treaties. These multilateral conventions are negotiated by all states that wish to participate in the process, on an equal footing and in a transparent manner. They are instruments of criminal law, where offences are defined as clearly as possible to meet requirements of legal certainty.

Since 2001 the Security Council has also been 'legislating' in this area by means of binding resolutions requiring all UN member states to criminalize particular acts. The practice of the Council in imposing binding obligations on states, rather than leaving states to negotiate treaties themselves, has been criticized on substantive and procedural grounds.[8] As a matter of substance, resolutions are the result of political negotiations rather than expert legal discussion, which can lead to wording that is frequently general and vague and does not provide the legal certainty required for criminal offences. Procedurally, the process deprives states that are not Security Council members of the opportunity to contribute to the elaboration of the offences, even though they are obliged to give effect to them.

To capture the evolving manifestations of terrorism, the acts criminalized by the Security Council, and by states when giving effect to the resolutions domestically or when elaborating additional offences, have become progressively more remote from actual acts of violence. This has occurred, for example, in relation to terrorism-funding crimes, where the offence has shifted from the provision of funds with the intention or knowledge that they would contribute to an *act* of terrorism, to support of a terrorist group more broadly.

The present research paper focuses on the implications of the crimes for humanitarian action. However, concerns have been also expressed about this progressive broadening of CT offences from a criminal law and human rights perspective. Among other things, the sustained creep of offences into the 'pre-crime space' means that they cover actions that are not criminal or illegal *per se* – such as purchasing a plane ticket or fertilizers – but only become so because of their purpose.[9] Consequently, establishing the requisite mental element – determining that the acts were carried out for a particular *purpose* – assumes centre stage in prosecutions. This raises concerns that such intentions may

8 See, for example, Talmon, S. (2005), 'The Security Council as World Legislature', *The American Journal of International Law*, 99(1), pp. 175–93; and, more recently, McKeever, D. (2021), 'Revisiting Security Council Action on Terrorism: New Threats; (a Lot of) New Law; Same Old Problems?', *Leiden Journal of International Law*, 34(2): pp. 441–70.
9 United Nations, General Assembly, Human Rights Council (2020), *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/43/46 (21 February 2020), available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/43/46.

be inferred at least in part from a person's ideologies or religious beliefs, or that, conversely, potential 'foreign fighters' may be acquitted because of the challenges of establishing this purpose.[10]

As discussed below, precisely to avoid having to establish this purpose, some states have adopted extremely broad laws prohibiting travel to areas under the control of groups designated as terrorist. In turn, this has given rise to challenges for humanitarian action that would not have arisen, or not so starkly, had the offences been more narrowly defined, retaining the requirement of purpose.

From a human rights perspective, concerns have also been expressed that the curtailment of human rights this extensive criminalization entails may not meet the requirements of necessity and proportionality.[11] It may also be incompatible with the principle of legality, which requires offences to be defined with sufficient precision to allow a person to foreseeably know the scope of liability. These questions must be addressed on an offence-by-offence basis.

As far as humanitarian action is concerned, it is the measures that criminalize the provision of funds or assets or other types of support that raise the most significant tensions.

As far as humanitarian action is concerned, it is the measures that criminalize the provision of funds or assets or other types of support that raise the most significant tensions. In addition, when giving effect to SCR 2178 (2014) on 'terrorist fighters', a small number of states have established extremely broad crimes that can capture travel undertaken to conduct humanitarian operations.

Retaining the focus on the measures that give rise to the greatest tensions with humanitarian action, the following sections consider the restrictions adopted in conventions, Security Council resolutions and domestic law, presenting the offences and any safeguards that exist.

3.1.1 The 1999 Terrorist Financing Convention

The 1999 International Convention for the Suppression of the Financing of Terrorism was the first treaty to focus on activities that *support* acts of terrorism rather than acts of terrorist violence. It requires parties to make it an offence to 'provide or collect funds by any means, directly or indirectly, unlawfully and wilfully, with the intention that they should be used, or in the knowledge that they are to be used, in full or in part, in order to carry out' an act of terrorism as defined in the Convention.[12]

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10 Paulussen, C. and Pitcher, K. (2018), *Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges*, International Centre for Counter-Terrorism – The Hague (ICCT) Research Paper, pp. 30–1.
11 See, for example, Parliament of the Commonwealth of Australia (2020), *Review of the 'declared areas' provisions*, Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Intelligence and Security, 28 August 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/DeclaredAreasProvisions/Submissions.
12 UN General Assembly (1999), *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349, Article 2(1).

The scope of the offence is limited in a number of important ways, both in terms of the acts that are criminalized, and the mental element required for the commission of the offences. In terms of the acts, the crime relates to the collection or provision of 'funds'. These are defined broadly to include assets of every kind, so could cover food, medicine, water, fuel and shelter materials provided in the course of humanitarian operations. The definition does not include services.[13] Importantly, the funds must be provided to carry out an *act of terrorism*. The Convention does not prohibit making funds available to a terrorist group more generally. Moreover, the mental element required for the commission of the offence is high: the funds must be provided with the *intention* or *knowledge* that they would be used for the commission of an act of terrorism.[14]

For these reasons, funds or assets that might end up in the hands of terrorist groups in the course of humanitarian operations are extremely unlikely to lead to the commission of the offence under the Convention. This possibility was addressed during the negotiations, and it was considered that the requirement that the funds be provided 'unlawfully' in the definition of the offence sufficed to exclude such cases.[15]

In addition, like all CT instruments adopted under the auspices of the UN since 1997, the Convention includes a safeguard clause noting that:

> [n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.[16]

This clause could arguably be invoked to exclude from the scope of the Convention assets provided in the course of humanitarian operations. Criminalizing their provision would 'affect other rights, obligations and responsibilities of States and individuals'[17] under IHL. This said, in view of the narrow scope of the offence, it is hard to see how assets provided in such circumstances could fall within it in the first place.

3.1.2 Security Council resolutions

Two aspects of the 1373 series of CT-related resolutions need to be considered: first, which measures raise particular challenges for humanitarian action; second, and more generally, how, if at all, they address their interplay with IHL.

3.1.2.1 Terrorist financing

The Security Council has addressed financial support to terrorism from the outset of its thematic involvement in CT. Resolution 1373 itself required states both to criminalize terrorist financing and to impose financial sanctions on those who commit or attempt to commit terrorist acts.[18]

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13 Ibid., Article 1(1).
14 Ibid., Article 2(3).
15 Aust, A. (2001), 'Counter-Terrorism – A New Approach', *Max Planck Yearbook of United Nations Law*, pp. 285–306, at pp. 294–5.
16 UN General Assembly (1999), *International Convention for the Suppression of Financing of Terrorism*, Article 21.
17 Ibid.
18 SCR 1373 (2001), OP 1(c) and (d) respectively.

As far as the crime is concerned, the Council requires states to:

> [c]riminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts[…].[19]

SCR 1373 thus mirrors the approach of the 1999 Convention, requiring a link between the funds and the commission of terrorist acts.

Since 2015, however, the Security Council has progressively called upon states to adopt a broader approach to terrorism financing offences. The Financial Action Task Force (FATF) played a key role in this. FATF is an intergovernmental body, with a membership of 39, representing most of the world's major financial centres. It has developed a series of recommendations to promote the implementation of measures to combat terrorist financing. Its Recommendation 5 of 2012 on terrorist financing recommended that states 'should criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or acts'.[20]

SCR 1373 thus mirrors the approach of the 1999 Convention, requiring a link between the funds and the commission of terrorist acts.

Guidance on Recommendation 5 and its Interpretive Guidance issued by FATF in 2016 stated that the Recommendation deliberately went beyond the obligations in the 1999 Terrorist Financing Convention by requiring states to also criminalize the financing of terrorist organizations and individual terrorists on a broader basis, *without* a link to specific terrorist acts.[21] According to this Guidance, this was necessary because terrorist organizations do not actually use the majority of financing to meet the direct costs of mounting attacks, but rather for broad organizational support including propaganda, recruitment, radicalization and training.

FATF's approach is also driven by its view that 'all funds or other assets are fungible'. An organization may spend available assets on activities other than those for which they were originally intended. Even if specific funds or assets are used for non-attack expenses, they may substitute for other resources which can then be used to pay for attacks.[22] In view of this, FATF considered it necessary to criminalize the provision of funds to terrorist organizations more generally.

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19 SCR 1373 (2001), OP 1(b).
20 Financial Action Task Force (2012/2020), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*, Paris: FATF, 2012, updated October 2020, https://www.fatf-gafi.org/recommendations.html.
21 FATF (2016), *Guidance on the Criminalisation of Terrorist Financing (Recommendation 5)*, Paris: FATF, https://www.fatf-gafi.org/publications/fatfrecommendations/documents/criminalising-terrorist-financing.html, para 1.
22 Ibid., paras 19–20.

While these may be valid reasons for expanding the scope of the crime, what is problematic is the fact that this recommendation, by a self-described 'policy-making body' with limited membership, was taken up by the Security Council and transformed into an obligation binding on all UN member states.

The nuance that existed in the 2016 FATF Guidance between existing binding obligations under the 1999 Convention and the broader approach that FATF *recommended* states to adopt was lost in the references to Recommendation 5 in Security Council resolutions. These progressed from highlighting that the Recommendation 'applies to the financing of terrorist organizations or individual terrorists for any purpose […] even in the absence of a link to a specific terrorist act';[23] to emphasizing 'the importance of States establishing as a serious criminal offence […] the willful violation of the prohibition on financing of terrorist organizations […] for any purpose […] including […] even in the absence of a direct link to a specific terrorist act';[24] and culminating with SCR 2462 (2019) on terrorist financing. Here the Council adopted a binding decision requiring states to criminalize the wilful provision of funds and assets:

> […] directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, *even in the absence of a link to a specific terrorist act* […].[25] (Emphasis added.)

This is a significantly broader offence than that in the 1999 Terrorist Financing Convention and covers the provision of funds to a terrorist organization.

On this occasion the Security Council once again assumed a 'legislative function' in CT matters. It deprived states that were not Council members in 2019 of the opportunity to discuss the broadening of the offence, and to determine whether it would be appropriate to include express exclusions, most notably for humanitarian action. The dynamic dialogue on the interplay between new crimes and IHL that has marked the negotiations of the various CT conventions was bypassed.

3.1.2.2 Foreign fighters

Since 2001 Security Council CT resolutions have addressed an extremely broad range of topics, reflecting the evolving manifestations of international terrorism.[26] In addition to the measures on terrorist financing, the resolutions on 'foreign fighters' have the most immediate point of contact with humanitarian action and other aspects of IHL.

In addition to recruitment-related offences, SCR 2178 (2014) requires states to establish criminal offences to penalize travel or attempted travel 'for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training.'[27] Despite the clear requirement that prohibited travel be for the *purpose* of conducting various forms of terrorist activity, and possibly precisely because of the difficulty of determining the

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23 SCR 2253 (2015), OP 17.
24 SCR 2322 (2016), OP 6.
25 SCR 2462 (2019), OP 5.
26 McKeever (2021), 'Revisiting Security Council Action on Terrorism', pp. 7–8.
27 SCR 2178 (2014), OP 6.

existence of this purpose, a small number of states have broadened the scope of the offence. They have criminalized entering or remaining in areas under the control of terrorist groups, without requiring any additional intent to engage in or support terrorist activity.[28]

This approach raises immediate problems for humanitarian organizations and their staff, as civilians in areas under the control of groups designated as terrorist, including ISIL/Al-Qaeda affiliates in Syria and Yemen and the Sahel, and Boko Haram in Nigeria, are often in extreme need. As discussed below, after extensive legislative discussion, safeguards were eventually included in the relevant domestic measures.

3.1.2.3 The interplay with IHL

There has been a steady evolution in how the Security Council has articulated the interplay between the measures it requires states to adopt and IHL.

The earliest resolutions in the 1373 series did not refer to international law.[29] As of 2003, they started to include a general reminder that states must ensure that measures taken to combat terrorism are in accordance with international law, and, in particular, international human rights, refugee and humanitarian law. Initially this language was in preambular paragraphs,[30] but as of 2005 the Council started also including it in operative paragraphs.[31] Since then, resolutions have systematically included references to the need to comply with international law, including IHL.[32]

Resolution 2462 (2019) on terrorist financing has taken this progression one step further. Here, acting under Chapter VII of the UN Charter, the Council

> *[d]emands* that Member States ensure that *all measures taken to counter terrorism*, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law.[33] (Emphasis added.)

There was never any question that states must comply with IHL. However, the adoption by the Council of a binding decision, which expressly requires member states to ensure that all CT measures they adopt comply with IHL, puts to rest any doubts that may have existed as to whether the Council had intended to override IHL.

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28 Paulussen, C. and Gillard, E. (2021), 'Staying in an Area Controlled by a Terrorist Organisation: Crime or Operational Necessity?', ICCT Perspective, 11 January 2021, https://icct.nl/publication/staying-in-an-area-controlled-by-a-terrorist-organisation-crime-or-operational-necessity.
29 PP 5 of SCR 1373 reaffirms the need to combat threats to international peace and security caused by terrorist acts 'in accordance with the Charter of the United Nations'. SCR 1455 (2003) PP 3 expanded this to include 'international law'. The first reference to IHL was in a Ministerial Declaration attached to SCR 1456 (2003).
30 SCR 1535 (2004), PP 4; SCR 1566 (2004), PP 6; SCR 1624, PP 2. Such reminders continue to be included in the preambles of counterterrorism resolutions.
31 SCR 1624, OP 4.
32 SCR 2170 (2014), OP 8; SCR 2178 (2014), OPs 2, 3, 5, and 11; SCR 2396 (2017), OPs 3, 4, 7 and 8.
33 SCR 2462 (2019), OP 6. In OP 5 the Council also stated that states must adopt measures to criminalize terrorist funding in a manner 'consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law'. OP 6 is broader in scope, applying to *all* measures taken to counter terrorism. Additionally, in OP 24 the Council urged states 'to take into account the potential effect of [measures to counter the financing of terrorism] on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law'.

Some analyses of the interplay between CT measures and IHL suggest that tensions and inconsistencies should be resolved by determining which body of law is the *lex specialis*, or by giving priority to measures adopted by the Security Council pursuant to Article 103 of the UN Charter.[34] However, the evolving Council practice just outlined confirms a requirement of 'coordinated interpretation', whereby CT measures are adopted, implemented and interpreted by courts and other relevant bodies so as to comply with IHL.[35]

The need to comply with the Security Council's express demand that all CT measures comply with IHL is a powerful argument for including safeguards for humanitarian action when states adopt new measures.[36] While it is unlikely to lead states to amend existing law – like, for example, the US's notoriously broad Material Support Statute[37] – it can be invoked in litigation as a guide to how it should be interpreted.

These resolutions are addressed to member states. Must the Security Council itself also comply with IHL when adopting CT and other relevant measures such as sanctions? There are a number of grounds for concluding it should, but the question remains unsettled.[38] Whatever the arguments, it seems clear that, in the absence of a 'manifest intent' by the Council to derogate from other rules of international law, including IHL, the same argument for coordinated or harmonious interpretation can be made for measures adopted by the Council *itself* and not just their implementation domestically.[39]

3.1.2.4 Recommendations

- The Security Council should continue to use proscriptive language requiring states to ensure that all CT measures they adopt are consistent with IHL.
- This obligation to ensure that CT measures are consistent with international law should continue to guide domestic legislative and other processes for the elaboration and implementation of CT measures.

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34 See, for example, McKeever, D. (2020), 'International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations', *International and Comparative Law Quarterly*, 69(1): pp. 43–78, at pp. 71–2.
35 The Council has not specified what measures states should take to ensure consistency with IHL. For a recent analysis of suggestions see Lewis, D. and Modirzadeh, N. (2021), *Taking into Account the Potential Effects of Counterterrorism Measures on Humanitarian and Medical Activities: Elements of an Analytical Framework for States Grounded in Respect for International Law*, Harvard Law School Program on International Law and Armed Conflict, May 2021, https://pilac.law.harvard.edu/take-into-account-report-web-version.
36 This demand was also taken up by the General Assembly in its 30 June 2021 resolution on the seventh review of the UN Global Counter-Terrorism Strategy in the same month. Here the Assembly '[reaffirmed] that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law and international humanitarian law […]. UN General Assembly Resolution 75/291, OP 9.
37 18 U.S.C. § 2339A. The periodic review processes between states and the UN Counter-Terrorism Committee Executive Directorate (CTED), as well as FATF mutual evaluations, put pressure on states to continually update their laws. While usually this has led to a broadening of offences, there is no reason why it should not also lead to their alignment with IHL.
38 See, for example, Wood, M. (2006), Hersch Lauterpacht Memorial Lectures, *The UN Security Council and International Law*, Second Lecture: The Security Council's Powers and their Limits, https://www.lcil.cam.ac.uk/press/events/2006/11/lauterpacht-lectures-2006-united-nations-security-council-and-international-law-sir-michael-wood; and Tzanakopoulos, A. (2011), *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions*, Oxford Monographs in International Law, Oxford: Oxford University Press, Chapter 3.
39 Gowland-Debbas, V. (2009), 'Is the UN Security Council Bound by Human Rights Law?', American Society of International Law, *Proceedings of the Annual Meeting*, Vol. 103, 199.

- FATF should update its Guidance to Recommendation 5 to clarify that the expanded definition of terrorism financing that it proposed, and that has been promoted by the Security Council, should not apply to funds or assets provided in the course of humanitarian operations.[40]
- Once FATF has adopted this guidance, it should be reflected in relevant Security Council resolutions.
- If states adopt a definition of terrorist financing in their domestic law that goes beyond that of the 1999 Terrorist Financing Convention, they should couple it with an exception for funds or assets provided in the course of humanitarian action.
- While it is preferable for new offences to be elaborated pursuant to multilateral treaty negotiations, whenever the Council adopts measures requiring states to establish new offences it should continue also to demand expressly that the measures adopted by states comply with IHL.

3.1.3 Domestic implementation of international criminal CT measures

It is left to member states to give effect in domestic law to their obligations under CT conventions and binding Security Council resolutions. States can, of course, adopt additional measures. Retaining the focus on offences that raise the most significant tensions with humanitarian action, the present section outlines some recent practice.

3.1.3.1 Criminal CT measures adopted by the European Union

As far as the European Union and its member states are concerned, EU Directive 2017/514 on combating terrorism is the most recent in a series of EU measures that harmonize member states' criminal justice CT response, including by giving effect to Security Council CT decisions.[41]

For present purposes, it suffices to consider the aspects of the Directive of immediate relevance to humanitarian action: how the offences of terrorist financing and travel for the purpose of terrorism are framed, and how humanitarian activities are safeguarded.

With regard to terrorist financing, the Directive follows the approach of the 1999 Terrorist Financing Convention, limiting the crime to where the funds or assets are to be used to commit, or to contribute to the commission of a terrorist act.[42]

The offence of 'travelling for the purpose of terrorism' is also framed narrowly, retaining the requirement in SCR 2178 that the travel have a purpose connected to terrorism.[43]

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40 FATF has demonstrated its willingness to refine its recommendations – in far more significant ways – by amending Recommendation 8 on non-profit organizations following engagement with the sector.
41 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism.
42 Article 11, Directive (EU) 2017/541.
43 Article 9, Directive (EU) 2017/541. This is also the approach taken in the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.

Importantly, the Directive includes two preambular paragraphs or recitals that specifically address the interplay of all the criminal measures in the Directive with IHL. The first emphasizes that the Directive should not alter 'the rights, obligations and responsibilities of the Member States under international law, including under international humanitarian law'.[44] The second recital was included by the European Parliament when it reviewed the draft of the 2017 Directive, and is of direct relevance to humanitarian action.[45] It notes that:

> [t]he provision of humanitarian activities by impartial humanitarian organizations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, while taking into account the case-law of the Court of Justice of the European Union.[46]

Recitals are not operational paragraphs, and it is regrettable that the safeguards could not be included in the binding parts of the Directive which would promote uniform implementation; nonetheless, recitals can provide guidance on interpretation. When implementing the Directive, a small number of member states included recital 37 setting out the exclusion and safeguard clause into their domestic law, and the courts of some member states have referred to it when interpreting crimes established pursuant to the Directive.[47]

It was not possible to determine for the purpose of this paper whether recital 38 has also been expressly included in domestic measures. A 2020 Commission report on the implementation of the Directive considered the recital and noted that:

> […] four Member States (Austria, Belgium, Italy and Lithuania) have legislation that provides limitations to the application of counter-terrorism legislation in case of humanitarian or other activities. In other Member States [Bulgaria, Croatia, Cyprus, Czechia, Estonia, Finland, France, Germany, Hungary, Latvia, The Netherlands, Romania, Slovakia, Spain and Sweden], generic legislation (such as the Criminal Code) can be interpreted to this effect, or the national authorities indicated that this is followed in practice.[48]

This provides a degree of reassurance that the EU and its member states are aware of the risks that CT measures may pose, and are taking measures to avoid criminalizing activities conducted in the course of humanitarian action.

3.1.3.1.1 Recommendations at EU level

- The EU should continue to include express safeguards for humanitarian action in future criminal terrorism instruments, ideally in operative paragraphs.
- EU member states should retain the 2017 Directive's narrow focus of criminal offences of terrorist financing and travel for the purpose of terrorism when establishing domestic offences.

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44 Recital 37, Directive (EU) 2017/541. The recital also repeats the exclusion clause for members of the armed forces that is now standard language in UN counterterrorism conventions.
45 Outcome of the European Parliament's first reading, 6338/17, 21 February 2017.
46 Recital 38, Directive (EU) 2017/541.
47 Cuyckens, H. and Paulussen, C. (2019), 'The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship Between Counter-Terrorism and International Humanitarian Law', *Journal of Conflict & Security Law*, 24(3): pp. 537–65.
48 Report from the Commission to the European Parliament and the Council based on Article 29(1) of Directive (EU) 2017/541, COM(2020) 619 final, 30 September 2020, pp. 6–7.

— EU member states should also include the safeguard clause for humanitarian action in their domestic criminal CT measures – as a general exception and also in relation to specific offences.

3.1.3.2 Domestic measures

When establishing new domestic terrorism offences, states are beginning to include safeguards for humanitarian action. Submissions by civil society, think-tanks and academics appear to have played an important role in their inclusion by some states. The possibility of relying on Security Council resolutions or EU measures requiring the inclusion of such safeguards significantly strengthens the arguments.

When establishing new domestic terrorism offences, states are beginning to include safeguards for humanitarian action.

A comprehensive analysis of the approach taken by domestic legislatures is beyond the scope of the present paper, which limits itself to highlighting recent instances when express safeguards referring to humanitarian action have been included. It is important to note that no instances were found when efforts to include safeguards proved unsuccessful. The approaches adopted vary: some states exclude humanitarian action from *all* terrorism offences, while others only exclude it from certain offences.

Australia's Criminal Code was the first to include exceptions for humanitarian action for some crimes. These were particularly important in view of the breadth of certain offences and have proved useful precedents for encouraging other states to adopt similar safeguards. For example, the offence of 'associating with' terrorist organizations includes an exception for when this is only for the purpose of providing aid of a humanitarian nature.[49] Similarly, the offence of entering or remaining in a 'declared area' – i.e. an area declared by the minister for foreign affairs as one where a listed foreign entity is engaging in hostile activity – is not committed if a person enters, or remains in, the area solely for 'legitimate purposes'. These include providing aid of a humanitarian nature.[50]

Chad's 2020 law on the repression of acts of terrorism includes a general IHL safeguard clause,[51] and a clause specifically excluding humanitarian activities from its scope.[52]

In 2020 Ethiopia adopted a proclamation on the Prevention and Suppression of Terrorist Crimes. The crime of rendering support to the commission of a terrorist act or to a terrorist organization includes an exception for 'humanitarian aid given by Organizations engaged in humanitarian activities'.[53]

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49 Australia, Criminal Code, Division 102.8(4)(c).
50 Ibid., Division 119.2(1).
51 Chad Loi n° 003/PR/2020, *Loi Portant Répression des Actes de Terrorisme en République du Tchad*, 20 May 2020, Article 1(3).
52 Ibid., Article 1(4).
53 Ethiopia Proclamation No. 1176/2020 on the Prevention and Suppression of Terrorist Crimes, 25 March 2020, Article 9(5).

The Philippines' 2020 Anti-Terrorism Act takes a narrower approach: the exception only relates to one crime. The offence of 'providing material support to terrorists' includes an exception for 'humanitarian activities' conducted by certain actors: the International Committee of the Red Cross (ICRC), the Philippine Red Cross and 'other state-recognized impartial humanitarian partners or organizations in conformity with […] International Humanitarian Law'.[54] The Implementing Rules and Regulations to the Act task the Anti-Terrorism Council (ATC), consisting of cabinet members, with determining whether an organization falls within the scope of the exception. The ATC may adopt a mechanism for receiving recommendations to this effect.[55]

The criteria for determining what is a humanitarian organization, and fears about abuse of this 'status' are states' most frequent reservations about granting exceptions. At present the Philippines is the only state that has expressly addressed this issue in law, and identified which institution is responsible for making the determination. The country's Ministry of Justice has sought guidance from the UN to determine what constitutes an 'impartial humanitarian organization', but to date has not made its interpretation public.[56] The legislation of other states does not provide guidance on this issue, which is consequently left to courts to determine, if prosecutions are brought and the exceptions invoked.

In 2020 Switzerland amended its penal code by adding a new offence of 'support' to the activities of a terrorist organization.[57] This offence has been criticized for its breadth, as it is not limited to support to the illegal activities of the group.[58] On a positive note, it includes an exception for humanitarian services provided by an impartial humanitarian organization, like the International Committee of the Red Cross, in accordance with common Article 3 of the Geneva Conventions.

The dynamics surrounding the inclusion of the exception shed some light on the concerns of different stakeholders. The government's initial draft did not include it. Ministries took different views: while the Federal Department of Foreign Affairs supported its inclusion, the Federal Department of Justice and Police was opposed, as it did not want to include 'loopholes' or gaps in the law. Concerns were also expressed that if the law included an exception it would not comply with FATF Recommendations – another instance of FATF's pervasive influence.

Ultimately the exception was included by Parliament, where the concerted submissions and efforts of humanitarian organisations and academics played a significant role. Within Parliament, concerns related to the risk of abuse by 'self-declared' humanitarian actors.

This experience is telling, as it shows that 'even in Switzerland', the state most closely associated with humanitarianism, ministries may have priorities other than safeguarding humanitarian action. As in the cases of the UK and the Netherlands

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54 Philippines, Anti-Terrorism Act of 2020, 3 July 2020, Section 13.
55 Philippines, Rule 4.14, The 2020 Implementing Rules and Regulations of Republic Act No.11479, otherwise known as the Anti-Terrorism Act of 2020.
56 Interviews conducted by the author between September 2020 and June 2021.
57 Swiss Penal Code, Art. 260ter para 1, https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en.
58 Kraehenmann, S. (2020), 'An exemption for humanitarian activities in the new Swiss counter-terrorism law; A much-needed safeguard and a welcome step protecting the humanitarian space', Geneva Call, 6 October 2020, https://www.genevacall.org/an-exemption-for-humanitarian-activities-in-the-new-swiss-counter-terrorism-law-a-much-needed-safeguard-and-a-welcome-step-protecting-the-humanitarian-space.

discussed below, engagement with parliament seems to be a key moment of dialogue – for highlighting concerns, but also for finding approaches that take into account the needs of humanitarian actors and the concerns of different parts of government.

A further series of exceptions for humanitarian action have been included in domestic measures to prevent and punish the travel of 'foreign fighters'. As noted earlier, SCR 2178 (2014) requires states to criminalize travel for the *purpose* of participation in various forms of support to acts of terrorism or terrorist groups. Because of the perceived difficulty of establishing this purpose, a small number of states – to date Australia, Denmark and the UK – have adopted a significantly broader approach that criminalizes travel or presence in particular areas under the control of terrorist groups without having to show this terrorist purpose. All these offences exclude travel or presence when this is to conduct humanitarian action. Precisely how they do so varies.

Engagement with parliament seems to be a key moment of dialogue – for highlighting concerns, but also for finding approaches that take into account the needs of humanitarian actors and the concerns of different parts of government.

Australia and the UK have done so by means of an exception to the offence. The offence of 'entering or remaining in declared areas' in the Australian Criminal Code includes an exception for when this is solely for 'legitimate reasons'. These include 'providing aid of a humanitarian nature'.[59] The UK's 2019 Counter-Terrorism and Border Security Act takes a similar approach. A person does not commit the offence of 'entering or remaining in a designated area' if s/he does so for a number of purposes, including 'providing aid of a humanitarian nature'.[60] In both cases, the exceptions were included during parliamentary review of the governments' bills, which included active involvement by humanitarian organizations.

Denmark has taken a different approach. In 2016 it enacted a new offence of entering or remaining in an area designated by the government as one where a terrorist group is a party to an armed conflict. The offence includes an exception for when such travel or presence is 'in the exercise of Danish, foreign or international public service or duties'. Additionally, it foresees the possibility of applying to the Ministry of Justice for authorization to travel or to remain in such areas 'for a recognisable purpose' including for 'a group of persons who are affiliated with a specific company or organization'.[61] Humanitarian organizations and their staff are thus required to seek prior authorization from the Minister of Justice.

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59 Australia, Criminal Code, Division 119.2(3)(a). Another legitimate ground is 'performing an official duty for the United Nations or an agency of the United Nations'. (Ibid.)
60 UK, Counter-Terrorism and Border Security Act 2019, Section 4(2). Another permissible ground is 'carrying out work for the United Nations or an agency of the United Nations'.
61 Denmark, Penal Code § 114(j).

While this approach might have the advantage of certainty – the authorized organizations would know they are acting lawfully – it is problematic in terms of humanitarian principles. Humanitarian action must be conducted in a manner that is impartial, i.e. non-discriminatory and prioritized exclusively on the basis of need. Humanitarian actors must also be neutral and independent – and be perceived as such. Requiring authorization from a third state to be able to respond to people in need undermines their capacity to operate in accordance with these principles, and risks depriving people in severe need of life-saving assistance.

Concerns have also been expressed about the practical feasibility of this approach, in view of the delays to which the authorization process may give rise. Although areas in Iraq and Syria have been designated, Danish humanitarian organizations were not active in either, so the measure has not been put to the test.[62]

A bill to criminalize 'staying in an area under the control of a terrorist group' is currently before the Netherlands parliament.[63] The draft that reached the Senate included a limited exception for people who are in such areas 'on behalf of the state or an inter-governmental organization, or if the person is a representative of the Dutch Red Cross or the International Committee of the Red Cross'. One of the remaining points of divergence was how to accommodate humanitarian action conducted by other organizations – whether by expanding the exception, or by a form of pre-approval, as in Denmark.

In May 2021 the Netherlands minister of justice and security announced that, following discussions with humanitarian organizations and the criticism received from UN Special Rapporteurs, he would submit a bill extending the exception to cover people present 'for the sole purpose of performing activities as an aid worker working for an independent humanitarian organisation'. The pre-approval procedure would be available to those who did not fall within the exceptions, or who wanted greater legal certainty.[64]

3.1.3.2.1 Reflections and recommendations at national level

The key actors in the development and implementation of the CT regulatory framework are now states, when they give effect to the Security Council's demands domestically or adopt additional measures. It is unlikely that new international conventions will be adopted in the near future. The Council's dynamism in the CT law-making arena is now coupled with binding demands to states to ensure that any measures they adopt comply with international law, including IHL. In view of this, efforts to avoid the tensions between CT measures and IHL at UN and EU level must be combined with a far greater engagement at the national level.

There is cause for cautious optimism as to the willingness of national institutions to find ways of safeguarding humanitarian action when adopting and implementing criminal CT measures. All the new laws that have been identified for the purpose of the present study have included some form of safeguard for humanitarian

62 Ministry of Justice Regulations BEK nr 1200 af 28/09/2016 and BEK nr 708 af 06/07/2019.
63 Paulussen and Gillard (2021), 'Staying in an Area Controlled by a Terrorist Organisation: Crime or Operational Necessity?'
64 The Netherlands, Eerste Kamer der Staten-Generaal (2021), Brief van de Minister van Justitie en Veiligheid, 12 May 2021, https://www.eerstekamer.nl/behandeling/20210512/verslag_van_een_schriftelijk.

action, and no instances have been found when efforts to include such measures were unsuccessful. This is positive, and all new laws should include such express safeguards.

Despite this, some problematic CT measures remain on statute books. They were adopted when their adverse impact on humanitarian action was not yet apparent. Such measures will continue to pose problems until they are amended, or courts interpret them in a manner that complies with IHL, as now expressly required by the Security Council.

While there have been very few prosecutions, including under laws that do not include adequate safeguards for humanitarian action, such as the US's Material Support Statute, these measures continue to cast a long shadow on humanitarian action because some states' funding agreements require compliance with them.

While there have been very few prosecutions, including under laws that do not include adequate safeguards for humanitarian action, these measures continue to cast a long shadow on humanitarian action because some states' funding agreements require compliance with them.

The notion of 'fungibility' is sometimes raised during discussions of offences of support to terrorism. It is important to understand its proper role in such offences. The theory of fungibility is that support provided to a terrorist group for activities that are not unlawful 'frees up' resources that would have been used for such lawful purposes, and allows them to be put to violent ends. Fungibility forms part of the legal rationale underpinning some of the domestic crimes that prohibit broader forms of support to a group, rather than just to the commission of a terrorist act, including, most notably, the US Material Support Statute.[65] It is important to bear in mind that fungibility is the rationale that *underlies* the offences. It does *not* play a role beyond this. Once the type of support that is criminalized has been set out in legislation, notions of fungibility do not operate implicitly to expand the crimes.

What lessons can be drawn from the engagement with governments and parliaments that has led to the adoption of safeguards in national legislation?

As far as governments are concerned, while there is an increasing awareness of the tensions between CT measures and humanitarian action, different ministries have different priorities in this area, and, consequently, differing degrees of willingness to find solutions. Ministries of foreign affairs and development departments are more likely to have a deeper understanding of the issues and familiarity with the humanitarian sector, so are likely to be looking for solutions. Other ministries, such as those of home affairs or of justice, come to the issue from a national security

65 See, for example, explanation of the notion by the US Supreme Court in *Holder v. Humanitarian Law Project*, U.S. 1 (2010), 130 S.Ct. 2705, Majority opinion, pp. 25–7.

perspective, and Treasuries may be concerned about compliance with FATF terrorist financing recommendations. Their positions may not all carry the same weight. Which part of government is in 'the lead' in the drafting of legislation also plays a significant role.

The most frequent concern among government departments and members of parliament is that safeguards will be abused. There are two aspects to this apprehension, which tend to be conflated. The first is uncertainty as to the criteria for determining what constitutes a 'humanitarian organization' that would benefit from any exception. The second are fears about abuse of this 'status'. Both can be addressed relatively easily. Indicative criteria to determine which organizations fall within the scope of an exception can be drawn up on the basis of IHL and humanitarian principles. These can inform the interpretation of relevant laws by means of explanatory statements.

Whether an exception has been abused in a particular circumstance is something that must be established as a matter of fact in each case. It is a concern that is frequently raised, not least because a number of the foreign fighters investigated upon their return from Syria claimed that they had been providing humanitarian assistance.[66] However, in none of the cases prosecuted to date were the defendants actually staff of humanitarian organizations. Nonetheless, these cases colour public perceptions. When advocating for the inclusion of exceptions it is essential that the significant measures taken by the humanitarian sector to ensure that their operations are not abused are highlighted. Humanitarian organizations can wrongly assume that interlocutors are familiar with their due diligence practices.[67]

Allaying reticence related to perceived non-compliance with FATF recommendations is more complicated. While ministries of foreign affairs may be willing to accept that some funds or other assets may reach designated groups if this is inevitable in order to carry out humanitarian operations, Treasuries may push for a 'zero-risk approach', in the belief that only this will meet FATF standards. This is not inevitably the case. In the Netherlands, for example, it has been the ministry of finance that has been the instigator of multi-stakeholder dialogues to find solutions.[68] FATF is instrumental in shaping perceptions. It is committed to finding ways of mitigating the unintended consequences of CT measures, as shown by the recent establishment of a work stream on this topic.[69]

In terms of process, while in most of the instances when states have included safeguards, these were included during parliamentary review of draft legislation, it would of course be preferable if the safeguards were already included by the government when it proposes legislation. This can avoid a more 'confrontational' engagement in parliament that could lead to the politicization of the issue. Contributing to draft legislation at an earlier stage of the process requires an ongoing dialogue between the different stakeholders within government

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66 See, for example, District Court of The Hague, *Prosecutor v. Imane B. et al.*, 10 December 2015, paras 16.8–16.11, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:16102.
67 Interviews conducted by the author between September 2020 and June 2021.
68 See van Broekhoven, L. and Goswami, S. (2021, forthcoming), 'Can Stakeholder Dialogues help solve financial access restrictions faced by nonprofit organizations that stem from countering terrorism financing standards and international sanctions?', *IRRC*.
69 Speech by FATF Executive Secretary at the Chatham House Illicit Financial Flows Conference, 1–2 March 2021, http://www.fatf-gafi.org/publications/fatfgeneral/documents/chatham-house-march-2021.html.

and outside. It also offers an opportunity for a more in-depth dialogue on the challenges faced by humanitarian actors and the due diligence measures they adopt on the one hand, and states' concerns on the other.

That said, if draft legislation proposed by government does not include safeguards, engagement with parliament is key. It was at this stage of the legislative process that exceptions were included in legislation in Australia, Switzerland and the UK, and where dynamic dialogue is currently taking place in the Netherlands. And it was the European Parliament that included the recital excluding humanitarian action from the scope of the EU 2017 CT directive. Opportunities to provide expert comment in the legislative process must be seized – both to enhance understanding of the legal framework and to share immediate operational experience.

Terrorism can be an emotive topic in parliaments. It should not be assumed that members of parliament understand the contexts and manner in which humanitarian operations are conducted, how CT measures can affect this, or the extensive measures that humanitarian actors take to avoid diversion and abuse.

There is an enduring need to enhance the familiarity of parliamentarians, prosecutors and members of the judiciary with IHL, including in particular those elements that interplay with the CT measures they are adopting and enforcing. Some resources already exist;[70] and these materials need to be coupled with dissemination initiatives.

Finally, in view of the frequency with which questions of IHL are coming before domestic courts, judicial studies courses should include modules on this topic.

3.2 Sanctions

A number of actors can impose sanctions, starting with the UN Security Council, which, acting under Chapter VII of the UN Charter, adopts sanctions that are binding on all states. Regional intergovernmental organizations, most notably the EU, may adopt 'autonomous' sanctions. These can build upon Security Council measures by adding restrictions or designating additional persons, or may apply in situations in relation to which the Security Council has not adopted sanctions – like the EU sanctions in relation to Syria, the Ukraine and Myanmar.

Security Council and EU sanctions are implemented by states. It is states that adopt the necessary laws and measures domestically, grant licences or authorizations where this is foreseen, and enforce the sanctions. States may also adopt autonomous sanctions in addition to those adopted by intergovernmental organizations binding on them. This section focuses on UN and EU sanctions, but includes a short subsection suggesting how states could give effect to these measures domestically.

70 International Commission of Jurists (2020), Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism, Geneva: International Commission of Jurists, https://www.icj.org/eu-guidance-on-judicial-application-of-the-eu-counter-terrorism-directive.

CT sanctions are imposed against groups designated as terrorist by the Security Council, relevant regional intergovernmental organizations or individual states. Among the various restrictions in sanctions, it is financial sanctions that cause tensions with humanitarian action, as they preclude making funds available directly or indirectly to such groups.

Similar challenges to humanitarian action may be raised by country-specific sanctions imposed for other objectives, such as ending conflicts or protecting civilians in relation to specific countries. Unilateral sanctions adopted by some states may be broader in scope and may preclude various forms of support to the government of the state in question, prohibiting the provision of assets and support to ministries and departments responsible for meeting basic needs, such as health and education, unless specifically authorized.

But if they do not include adequate safeguards for humanitarian action, sanctions can continue to have unintended consequences for the most vulnerable sectors of civilian populations: those reliant on humanitarian action.

The devastating impact of comprehensive economic sanctions on Iraq in the 1990s prompted the Security Council to introduce targeted sanctions directed at the leaders responsible for the policies the sanctions aimed to change, their supporters, and specific economic sectors that support those policies. Like the Security Council, the EU strives to impose targeted measures, that have minimum adverse consequences for those not responsible for the policies they seek to change.[71] This shift has significantly alleviated the indiscriminate effect of sanctions, but if they do not include adequate safeguards for humanitarian action, sanctions can continue to have unintended consequences for the most vulnerable sectors of civilian populations: those reliant on humanitarian action.

Sanctions pose a greater risk of liability than criminal CT measures for humanitarian actors. Sanctions are violated if, absent an exception or exemption, relevant assets are made available directly or indirectly to designated persons or groups. There is no need that they be used for the commission of a terrorist or otherwise illegal act. Moreover, the mental element required for a violation of sanctions is low. No intent to support the illegal activities of the listed entity is required; it is sufficient that a natural or legal person violates the relevant prohibitions.

Sanctions also adversely impact humanitarian action by their cascading effects. Banks, insurers and other service and commodity providers have curtailed the services they provide to humanitarian actors for fear of violating the prohibition on making assets or services available to designated groups *indirectly*. In addition, as highlighted by the US's fortunately short-lived designation of the Houthis in Yemen in early 2021, financial sanctions against groups that are in control

71 As far as the EU is concerned see Council of the European Union (2004), *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 7 June 2004, 10198/1/04, Rev 1, PESC 450, para 6.

of territory also pose a very live threat of *direct* liability for commercial actors. The Houthis control the main port of entry for Yemen's commercial imports in a country that imports 90 per cent of its food and where the population is on the brink of starvation. Fears on the part of commodity suppliers and other private actors involved in the supply chain of exposing themselves to the risk of liability would have led to a shortfall in the supply of food and other essential commodities that humanitarian action could not have made up for.[72]

Tensions between sanctions and humanitarian action can be reduced by the inclusion of safeguards. These can take the form of exceptions, with the effect that the prohibitions do not apply to particular humanitarian actors or activities from the outset; or exemptions – referred to as 'derogations' in EU measures – that permit the authorization of activities that would otherwise fall within the scope of the prohibitions.

3.2.1 CT sanctions

CT sanctions impose a number of restrictions on designated persons or groups, or on transactions with them. Typically, these include travel bans, prohibitions on transfers of weapons, and financial sanctions. In addition to freezing the assets of designated persons or groups, financial sanctions prohibit making funds, financial assets or economic resources available directly or indirectly to them. It is these prohibitions that pose the greatest risk of liability for humanitarian actors.

The Security Council has imposed CT financial sanctions in two ways: first, by establishing a specific sanctions regime on individuals and groups affiliated with ISIL (Da'esh)/Al-Qaeda, and, second, by requiring member states to impose similar sanctions on other terrorist groups.

3.2.1.1 ISIL (Da'esh)/Al-Qaeda sanctions[73]

This sanctions regime, established by SCR 1267 (1999), includes the standard prohibition on making funds, financial assets or economic resources available directly or indirectly to designated individuals or groups.[74] At present it does not include an express safeguard – exception or exemption – for humanitarian action. The problems that its absence pose to humanitarian action have been flagged, and possible options for resolving them discussed, including at meetings bringing together the different stakeholders.[75] To date, Council members have not proposed amending the regime to include such a safeguard, so it would be misleading to imply that such proposals have been rejected. Indeed, possibilities for amendments are currently being considered in view of the renewal of the 1267 sanctions regime at the end of 2021.

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72 UN Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator (2021), 'Briefing to the Security Council on humanitarian situation in Yemen, 14 January 2021', https://reliefweb.int/report/yemen/under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator-mark-35.
73 The Council initially imposed sanctions on the Taliban by SCR 1267 (1999). SCR 1390 (2002) added Al-Qaeda to this regime. In 2011 the Council divided this into two separate sanctions regimes, one focusing on the Taliban (SCR 1988), and the other on Al-Qaeda (SCR 1989). In 2015 SCR 2253 expanded the Al-Qaeda regime to include individuals and entities supporting ISIL (Da'esh).
74 Most recently, SCR 2368 (2017) OP 1(a).
75 Including a February 2021 IPI Roundtable on Safeguarding Humanitarian Action in the 1267 Regime.

Under the 1267 sanctions regime, it is the Security Council that designates individuals and groups on the basis of requests from member states. At present (June 2021) the list includes 261 individuals and 89 entities.[76] As far as humanitarian action is concerned, it is the designation of *groups* rather than individuals that causes problems, particularly when they control areas with populations in need of assistance. A number of such groups are currently designated under the 1267 sanctions, including Al-Qaeda in the Arabian Peninsula and Levant-Yemen in Yemen, ISIL affiliates in Syria and, until recently, Iraq, and Boko Haram in Nigeria. Problems can also arise when designated groups have significant presence, albeit without exercising control of territory, in areas where humanitarian actors conduct operations, as is the case for various Al-Qaeda affiliates in the Sahel, for example.

3.2.1.2 CT financial sanctions pursuant to SCR 1373

The second way the Security Council has imposed CT sanctions is more indirect. The first in the list of measures that SCR 1373 (2001) required states to take was to:

> [p]rohibit 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 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.[77]

Essentially this requires states to impose financial sanctions on persons or groups involved in the commission of terrorist acts. Unlike the SCR 1267 regime, SCR 1373 does not include a list of designated persons or groups. It is left to states and relevant regional intergovernmental organizations, such as the EU, to develop their own lists.

This has led to a challenging lack of uniformity as different states have designated different entities, or particular parts of groups. Hamas can be taken as an example relevant to humanitarian action, as it exercises control over two million people in need of humanitarian assistance in Gaza. The EU has designated Hamas, thus requiring all EU member states to designate Hamas in their national measures.[78] Other states, such as New Zealand, have designated only Hamas's military wing. Others still, such as Norway and Switzerland, have not designated either.

The lists of designated entities elaborated by states implementing SCR 1373 include a number of groups that exercise control over or have a significant presence in areas where humanitarian operations are being conducted. For example, the EU list includes Hamas, Hezbollah, the Kurdistan Workers' Party (PKK), and, until 2016, FARC, the Revolutionary Armed Forces of Colombia. In all these instances, there is a risk that incidental payments made or assets provided in the course of humanitarian activities fall within the scope of the prohibitions in the financial sanctions.

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76 UN Security Council (2021), 'Sanctions List Materials', last updated 17 June 2021, https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list.
77 SCR 1373 (2001), OP 1(d).
78 Council Decision (CFSP) 2021/142 of 5 February 2021.

As noted above, SCR 1373 did not include safeguards for humanitarian activities. But as the series of CT resolutions has evolved, so has the strength of the language with which the Security Council has called upon states to ensure that the measures they take to combat terrorism comply with their obligations under international law, including IHL. This includes the Council's binding demand in SCR 2462 (2019) that 'all measures taken to counter terrorism […] comply with [member states'] obligations under international law, including international humanitarian law [..]'.[79] The measures referred to also include the financial sanctions adopted by the Security Council and implemented by states.

3.2.2 Country-specific sanctions

Restrictions and prohibitions in country-specific sanctions also raise challenges for humanitarian action. Financial sanctions imposed against groups that control territory or have a significant presence in areas where humanitarian operations are being conducted raise precisely the same problems as do the CT sanctions. Examples in UN sanctions include the Allied Democratic Forces and the Forces Démocratiques de Liberation du Rwanda, both active in the Democratic Republic of the Congo (DRC). More significantly, the EU's sanctions in relation to Ukraine designate the 'Lugansk People's Republic' and the 'Donetsk People's Republic'.[80]

Financial sanctions imposed on commercial entities can also affect humanitarian action. The EU sanctions relating to Syria, for example, designate Syriatel, the only telecommunications company that provides reliable mobile phone coverage in remote parts of the country where humanitarian organizations operate. It also provides the most reliable internet coverage, which was necessary for online learning during recent lockdowns during the COVID-19 pandemic. Although they are not prohibited outright, transactions with Syriatel for the sole purpose of providing humanitarian relief or assistance to the civilian population in Syria must be authorized by EU member states.[81]

Other restrictions in sanctions can also affect humanitarian action. Restrictions on imports of dual-use items may cover items or materials needed for operations in areas such as water purification, agriculture and even medical response. Arms embargoes may include equipment used for humanitarian demining. Prohibitions on trade in particular commodities, like petroleum products in the EU Syria sanctions as originally adopted, pose very evident impediments to operations.

What is prohibited, what is permissible either pursuant to an exception or to a general or specific authorization, and which actors and activities can benefit from such safeguards vary from regime to regime. There is no consistency, even among sanctions adopted by the same body to achieve similar objectives in similar situations. For example, EU autonomous sanctions have not been consistent in the inclusion of exceptions or derogations for humanitarian action in financial sanctions adopted in relation to comparable contexts. While the Syria and Nicaragua measures include a derogation,[82] the Burundi, Guinea, Myanmar/Burma, and Venezuela

79 SCR 2462 (2019), OP 6.
80 Council Decision 2014/145/CFSP of 17 March 2014.
81 Council Decision (CFSP) 2016/2144 of 6 December 2016.
82 Council Regulation (EU) 2019/1716 of 14 October 2019, Article 6(1).

financial sanctions do not, even though humanitarian programmes are also being implemented there. The reasons for this are unclear, as the measures raise the same challenges for humanitarian action. Safeguards have been included – or not – apparently in an *ad hoc* manner, not guided by what is actually necessary in view of the nature of the restrictions.

What is prohibited, what is permissible either pursuant to an exception or to a general or specific authorization, and which actors and activities can benefit from such safeguards vary from regime to regime.

At present only one UN Security Council sanctions regime includes an express *exception* for humanitarian action: that for Somalia. Al-Shabaab was designated in April 2010, and SCR 1916 (2010) excluded from the scope of the financial sanctions: […] the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners.[83]

The sanctions regimes for the Democratic People's Republic of Korea (DPRK) and Yemen take a different approach. They foresee the possibility of applications being made to the Security Council for *exemptions* on a case-by-case basis from the relevant restrictions to conduct humanitarian action.[84] In both cases the number of organizations that would have to apply for exemptions is low: only a very small number are operating in the DPRK, and the individuals and groups designated under the Yemen sanctions do not have significant points of contact with humanitarian operations. In view of this, the system of requiring the Council to issue authorizations is workable, even though the significant delays that arise in considering applications for exemptions under the DPRK sanctions reveal its limitations. This approach would not be workable in relation to sanctions regimes where a greater number of humanitarian actors would be applying for exemptions.

As in the case of the CT measures discussed above in this section, in recent years humanitarian organizations have made important progress in raising awareness of the adverse impact of sanctions. This has led a number of elected members of the Security Council to champion the issue and push for solutions. Belgium and Germany did so during their 2019–2020 Council membership and Ireland, Mexico and Norway have assumed this role from 2021. In addition, France, a permanent Council member, has expressed its commitment to promote solutions to the issue.

83 SCR 1916 (2010), OP 5.
84 SCR 2397 (2017), OP 25, in the case of the DPRK, and SCR 2511 (2020), OP 3, most recently renewed in SCR 2564 (2021), OP 4, in the case of Yemen.

The endeavours of these Security Council members are beginning to bear fruit. The most recent renewals of country-specific sanctions by the Council have included demands that measures taken by member states to give effect to them comply with international law; they follow the binding demand in SCR 2462 (2019) on terrorist financing, discussed in Section 3.1.2.1 above.

Thus, in June 2021, in the resolution that renewed the DRC sanctions, adopted by unanimous vote, the Council included a binding operative paragraph

> [d]emand[ing] that States ensure that all measures taken by them to implement this resolution comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, as applicable.[85]

This was coupled with a preambular paragraph

> *[s]tressing* that the measures imposed by this resolution are not intended to have adverse humanitarian consequences for the civilian population of the DRC […].[86]

These paragraphs were replicated in the resolution adopted a month later renewing the Central African Republic (CAR) sanctions. On this occasion both were included as preambular paragraphs, but this was due to divergences of views among Council members – including the P5 – in relation to the scope of the arms embargo, that led the penholder to limit the 'reopening' of the operative parts of the resolution as much as possible.[87]

Although these are not express exceptions for humanitarian action, their inclusion is a significant development, and a strong nudge to member states for inclusion of relevant safeguards when giving effect to the UN sanctions domestically.

3.2.3 Reflections and recommendations

In recent years progress has been made in raising awareness of the challenges that sanctions pose to humanitarian action. The intergovernmental organizations that impose the sanctions – particularly the EU, but also some members of the Security Council – have acknowledged the need to minimize their adverse, or 'unintended', impact. And there have been some encouraging changes of practice at EU level, evidenced most clearly in the progressive modification of the restrictions on the purchase of petroleum products in the Syria sanctions.[88]

Despite this, current arrangements at global, regional and national level remain inadequate. Each step of the process for the adoption and implementation of sanctions must be improved, from ensuring that appropriate safeguards are included in the instruments imposing the restrictions, to rendering national licensing arrangements more efficient, when this is the approach for safeguarding humanitarian action.

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85 SCR 2582 (2021), OP 4.
86 SCR 2582 (2021), PP 7.
87 SCR 2588 (2021), PP 12 and 13. See summary record of vote, https://undocs.org/en/S/PV.8828.
88 For more detail, see the following subsection (3.2.3.1.) as well as the Annex to this paper.

Ideally, from the perspective of humanitarian actors, *all* sanctions restrictions would include express exceptions for humanitarian action. In parallel to striving for this, at the present stage of the debate it is likely that solutions will have to be sought in a more calibrated manner. Progress requires two things.

First, rather than looking for a single one-fits-all solution, the issue must be addressed on a restriction-by-restriction basis. Second, for this to happen, continuous dialogue is required between states and humanitarian actors at every step of the process.

3.2.3.1 A more granular analysis of the points of friction and more tailored solutions

To make progress, it is necessary to find an approach that addresses the objectives of both sets of stakeholders: humanitarian actors' desire to reduce the adverse impact of sanctions on humanitarian action, and states' objectives when imposing the sanctions as well as concerns about the abuse of safeguards.

The adverse impact of sanctions, in terms of numbers of affected humanitarian actors, and the extent of impact varies with the nature of the restriction. This, in turn, determines which type of safeguard is most appropriate. The points of friction between sanctions and humanitarian action must be considered sanctions regime by sanctions regime, restriction by restriction, and context by context. Precisely what do sanctions restrict, and how do the restrictions impact humanitarian action in a particular context?

By way of example, fewer humanitarian actors are likely to be adversely affected by restrictions on imports of dual-use items. These will impact only the small number of organizations that carry out activities requiring the restricted items, such as water treatment and purification activities. In such cases, an approach based on exemptions, whereby the actors that require such products apply for licences, may be a workable solution, provided national systems for issuing licences are efficient. There needs to be clarity about procedures, applications must be reviewed in a timely manner, and consideration must be given to modalities that would facilitate the granting of authorizations, such as general licences.

This said, there may be situations where restrictions on the import of dual-use items affect a broader number of humanitarian actors. For example, restrictions on imports of chemical substances that include disinfectants necessary for preventing the spread of the COVID-19 virus affect the entire humanitarian community. In such cases, safeguards based on exemptions would no longer be adequate, and would have to be replaced by exceptions – or at least general licences when these are a possibility.

In contrast, other types of commodity-related restrictions can affect the entire humanitarian community operating in a particular context, and in relation to these too, an approach based on exemptions would not be workable. This was the case, for example, with the prohibition on purchasing petroleum products in the EU sanctions relating to Syria. Requiring each organization to apply for an exemption was not a feasible approach, and the restrictions were progressively refined. The approach that was ultimately adopted in 2016 – which actors were excepted, and which

had to apply for exemptions from national authorities, as well as ways in which reassurance could be provided to the EU on how the exception was actually used – is set out in the Annex to this paper.

The most problematic restrictions are financial sanctions that prohibit making funds or other assets available directly or indirectly to designated groups. These affect the entire humanitarian community operating where such groups are present. In view of the number of affected actors, safeguarding humanitarian action by means of a licensing system is simply not a sufficiently swift and efficient approach. Moreover, some banks consider the fact humanitarian organizations have to obtain licences as an indication that the latter are operating at the 'margins of legality'. Rather than providing reassurance, licences have in fact increased banks' reservations about providing services to humanitarian actors.[89] In view of this, as far as financial sanctions are concerned, *exceptions* for humanitarian activities appear to be the only workable solution. As elaborated below, exceptions can be framed in a manner and coupled with oversight arrangements that can allay states' concerns about the risk of abuse.

The most problematic restrictions are financial sanctions that prohibit making funds or other assets available directly or indirectly to designated groups. These affect the entire humanitarian community operating where such groups are present.

In addition to the nature of the restriction, another key factor influencing the extent of the adverse impact on humanitarian action is the nature of the designated actors. Designation of groups is far more problematic than designation of individuals, even if these are the leaders of the group. And among groups, it is the designation of those that control territory or have a significant presence in areas where humanitarian operations are conducted that has the greatest adverse effect on humanitarian action.

This problem can be addressed in – at least – two ways. One is to encourage states not to impose financial sanctions on groups, and to designate their leadership instead. This is the approach the US took in relation to the designation of the Houthi in Yemen following the change in administration in 2021. The designation of the group was revoked and, since then, new designations have focused on its leaders.[90]

This approach may be an option when the designation of a group serves a political or symbolic purpose of expressing the international community's disapproval of its policies. In such cases, designation of leaders can have the same effect, coupled with other measures that limit the leaders' capacity to pursue their problematic policies, such as arms embargoes. However, in some sanctions regimes stemming

89 Gillard, E. (2017), *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*, Research Paper, London: Royal Institute of International Affairs, https://www.chathamhouse.org/2017/02/humanitarian-action-and-non-state-armed-groups-international-legal-framework.
90 https://www.state.gov/designation-of-two-ansarallah-leaders-in-yemen.

the flow of funds to *groups* plays a central role in reaching the policy objective for which sanctions have been imposed. This is particularly the case for CT sanctions; designating only their leaders would not be an option.

A second alternative is to adopt a more tailored approach to the restrictions and safeguards applicable to different designated persons or groups. At present, all persons or groups designated under a particular UN or EU sanctions regime are subject to the same restrictions, and the options for safeguarding humanitarian action are also the same *vis-à-vis* all designated persons or groups. There is no reason for not adopting more calibrated arrangements. While all designated persons or entities could be subject to the same restrictions, the safeguards for humanitarian action could vary depending on the nature of the group or person. Financial sanctions against groups that have a significant presence where humanitarian action is conducted could be coupled with *exceptions* for humanitarian action. While in respect of other designated actors – for example commercial companies or individuals or groups that do not have significant presence – the safeguard could take the form of an exemption.

This approach requires – and enhances – a better dialogue between humanitarian actors and the entities imposing sanctions. It would also contribute to rendering sanctions more dynamic and nimble – a long-standing call by experts, and an express objective of the EU's sanctions policy.[91]

3.2.3.2 Understanding and addressing states' concerns

To encourage resort to these more tailored approaches, safeguards must be coupled with measures that address states' concerns. Reservations have been expressed about the introduction of humanitarian safeguards for risk of 'abuse', but these concerns have not been articulated with any degree of precision, or substantiated by empirical evidence. Nor is it clear whether the concerns are the same in relation to all types of restrictions in all sanctions regimes. Moreover, there is not a single 'state position'. Indeed, ministries within the same state often have different views.

Some states demand greater empirical evidence on the adverse impact of sanctions. Progress needs to be made on this front.

Some states are not concerned. In their view, the need to conduct humanitarian operations justifies any incidental benefit that designated entities may draw from these operations, and they are sufficiently reassured by humanitarian actors' due diligence measures.

Other states are concerned that the safeguards will be used improperly and render the sanctions ineffective. This concern can be met in two ways: ring-fencing which activities and actors should benefit from the safeguards, and specifying measures to be taken to ensure that the actors that fall within safeguards are not abusing them.

91 Council of the European Union (2004), *Basic Principles on the Use of Restrictive Measures (Sanctions)*, para 8; '[t]he [European] Council aims to deploy all its [sanctions] instruments flexibly and in accordance with needs on a case-by-case basis'.

While the nature of states' concerns needs more research, it appears that they relate principally to *which* humanitarian actors should benefit from the safeguards. Practice to date suggests that finding ways of limiting the humanitarian actors covered by the safeguards provides reassurance and facilitates the inclusion of exceptions.

Useful insights can be drawn from three instances when states included exceptions in international sanctions: the UN flight ban into Taliban-controlled areas, in force from 2000 to 2002; the financial sanctions within the UN sanctions relating to Somalia, in force from 2010 to date; and the prohibition on purchasing oil in the EU's Syria sanctions, in force from 2012 to date. The Annex to this paper analyses these precedents, comparing the nature of the prohibitions, the actors and activities covered by the exceptions, and any oversight arrangements to ensure the exceptions operated as intended. Four preliminary conclusions can be drawn.

First, states have been willing to include exceptions in measures, such as financial sanctions or prohibitions on the purchase of petroleum products, which are likely to affect a significant number of humanitarian actors and/or significantly impede the humanitarian response in a particular context.

Second, states have adopted a broad and general definition of the activities that fall within exceptions. The Somalia sanctions refer to 'urgently needed humanitarian assistance', and the EU Syria sanctions to 'humanitarian relief' and 'humanitarian assistance'.

Third, in both the Somalia and Syria cases, the category of actors benefiting from the exceptions is restricted by reference to their source of funding. The EU example is particularly interesting: the *exception* is limited to actors that receive institutional funding – i.e. from the EU or member states. It is coupled with an *exemption* for all other actors carrying out humanitarian activities: this exemption can be granted by member states subject to the conditions that they consider fit. This suggests that the oversight conducted by states and intergovernmental organizations before funding humanitarian activities provides sufficient reassurance. Recognizing that many humanitarian actors, including significant ones like *Médécins sans Frontières*, do not receive institutional funding, alternative ways were sought for their operations to be safeguarded.

Fourth, reporting can be a further way of addressing concerns and providing reassurance that the exceptions are used as intended. The precise institutional arrangements for such reporting will vary depending on whether it relates to UN sanctions or EU measures. The Security Council can task the Humanitarian Coordinator or the UN mission leader in the context in question to submit the reports. If EU sanctions were to include a reporting requirement, corresponding arrangements would have to be established within the EU system.

So far, this section has focused on understanding and addressing *states'* concerns. It should be noted that humanitarian actors do not necessarily have a common position. While all believe that sanctions urgently need to be refined, some have expressed reservations about approaches that require them to apply for authorizations from the Security Council or individual states. They consider that

a system that is dependent on the authorization of humanitarian action by a third state is inconsistent with humanitarian principles of independence and impartiality. These organizations consider that exceptions are the only acceptable approach.[92]

3.2.3.3 A more systematic and transparent dialogue

A final conclusion drawn from the examples above is the crucial importance of dialogue and constructive engagement between humanitarian actors and states involved in the imposition and implementation of the sanctions. It was such a dialogue that led to the modification of the EU Syria oil sanctions to mitigate their adverse impact.

Dialogue must take place *vis-à-vis* all institutions involved in the adoption and implementation of sanctions: the Security Council, the EU and nationally. Although some states participate in both forums – as is the case with EU member states that are also permanent or elected Security Council members – it should not be assumed that discussions among state representatives in one setting are conveyed to their colleagues involved in sanctions discussions in another. Indeed, one of the challenges in advancing the discussions with and within government is the lack of connectivity within different parts of government working on sanctions. The discussions that take place in New York are not necessarily shared with government colleagues working on similar issues at EU level. The disconnect is even more marked when it comes to domestic implementation of sanctions. The dynamics of this dialogue on sanctions, and the actors involved, are different from those involved in the elaboration of criminal CT measures, and parliamentary involvement is extremely limited.

It is a dialogue that must occur at all stages of the process, starting *before* the adoption of sanctions and continuing throughout their implementation.

3.2.3.3.1 At Security Council level

While the authority for adopting sanctions lies with the Security Council, implementing them is a shared obligation of *all* member states. All, therefore, have an interest in understanding the problems that they may raise, and in seeing that they do not undermine humanitarian action.

Key to making progress is sharing information on possible problems. This is necessary at every stage: before sanctions are adopted; throughout their implementation; and before they are renewed. The High Level Review of UN Sanctions has recommended that when the Security Council is considering the imposition of sanctions, it should – in consultation with humanitarian agencies and organizations – conduct an assessment of their possible adverse impact on humanitarian action. Once it has imposed sanctions, it should require the panels of experts appointed for each sanctions regime to conduct and report on such impact assessments.[93] For the most part, panels of experts have not addressed this dimension. They tend to be cautious in interpreting their mandates and, unless expressly requested to address

92 See, for example, this speech by Peter Maurer, the ICRC President, at the Security Council open debate on the protection of objects indispensable to the survival of the civilian population, 27 April 2021, https://www.icrc.org/en/document/without-urgent-action-protect-essential-services-conflict-zones-we-face-vast-humanitarian.
93 UN Security Council (2015), *Compendium of the High-level Review of United Nations Sanctions* (2015), Recommendations 136 and 64.

a particular aspect of the relevant sanctions regime, are unlikely to do so on their own initiative. Moreover, not all panels of experts include humanitarian experts – for example, the monitoring team for the ISIL/Al-Qaeda sanctions does not.

In any event, information is best presented by a humanitarian actor rather than by sanctions panels of experts for a number of reasons, including greater familiarity with the topic; retaining control of *how* the issues are presented; and the reluctance of some humanitarian actors to provide information to an entity – the panel of experts – that they perceive as too closely associated with the Security Council.

In the past, the Security Council has required UN humanitarian agencies to carry out assessments and pre-assessments of the humanitarian impact of sanctions. It could task them to carry out such assessments of the narrower question of their impact on humanitarian action.

Alternative approaches should also be explored, including convening an informal forum where humanitarian actors can share information and concerns relating to the impact of sanctions in a manner that is systematic, coordinated and transparent.

Alternative approaches should also be explored, including convening an informal forum where humanitarian actors can share information and concerns relating to the impact of sanctions in a manner that is *systematic*, at every relevant moment of the process for adoption and review of sanctions, and in relation to every relevant sanctions regime; *coordinated*, in providing the input from the humanitarian community as a whole; and *transparent*, reaching all Council members that wish to attend.

Two elements in such a dialogue are key: one (or more) states, whether Council members or not, to 'champion' the issue, and host the informal briefings; and a representative of the humanitarian community, to gather all the relevant information and make the presentations. One obvious candidate for doing this is OCHA, the UN Office for the Coordination of Humanitarian Affairs.

Ways should be also sought for bringing information on the adverse impact of sanctions on humanitarian action to the attention of all UN member states more generally. As noted, while it is the Security Council that adopts sanctions, *all* member states must implement them. Greater awareness of the adverse consequences could lead the broader membership to encourage the Council to include appropriate safeguards for humanitarian action.

3.2.3.3.2 At EU level

A similar dialogue should also be established at EU level. The EU plays a significant role in implementing Security Council sanctions, but it also adopts autonomous sanctions that must be implemented by member states – many of which are key donors to humanitarian action and are therefore, presumably, both aware of and responsive to the challenges faced by humanitarian actors. As noted, recent EU practice in relation to country-specific sanctions and CT measures suggests that the EU is aware of the tensions and is willing to take measures to address them. In addition to establishing good practices for its member states, the EU's approach can serve as a positive example for the Security Council and non-member states.

Key to maintaining this positive momentum is finding or creating appropriate institutional arrangements within the EU system for dialogue.

The EU and its member states have expressed their commitment to ensuring that restrictive measures are targeted, and to minimizing the adverse consequences for those not responsible for the policies and actions that the measures seek to change.[94] The impact of restrictive measures on humanitarian action is precisely one such 'adverse consequence'. As part of the annual review that is required for EU autonomous sanctions,[95] their impact on humanitarian action should be one of the factors for consideration.

In January 2021 the European Commission issued a Communication affirming its intention to improve the design and implementation of EU sanctions, including their impact on humanitarian action. As part of this endeavour, it will establish a member state expert group to which NGOs may be invited as appropriate to ensure that humanitarian aspects are considered.[96]

EU member states, relevant parts of the European Commission, and humanitarian actors should explore ways for humanitarian actors to regularly brief RELEX[97] before the adoption of sanctions and during their implementation ahead of their renewal. And consideration should be given to the establishment of an informal arrangement along the lines of that discussed in relation to Security Council sanctions, to ensure systematic, coordinated and transparent provision of information of the impact of sanctions on humanitarian action to EU member states.

During the COVID-19 pandemic the European Commission issued a series of communications explaining, in question-and-answer format, how EU sanctions applied in various contexts. Some of the questions were collected during the informal dialogue between the Commission and humanitarian actors, and addressed the most pressing issues. This is extremely helpful guidance, and more should follow. A central question that would still benefit from clarification is how to interpret the prohibition on making funds or assets available *indirectly* to designated persons or entities.

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94 Council of the European Union (2018), *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, 4 May 2018, 5664/18, para 13.
95 Ibid., paras 31 *et seq*.
96 European Commission (2021), 'The European Economic and Financial System: Fostering Openness, Strength and Resilience', Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2021) 32 final, 19 January 2021, p. 17.
97 RELEX is the working party of EU member states' Foreign Relations Counsellors who deal with legal, financial and institutional issues of the Common Foreign and Security Policy (CFSP).

3.2.3.4 Domestic implementation of sanctions

It is beyond the scope of the present paper to consider how states have given effect to UN and EU sanctions domestically, or to analyse additional autonomous sanctions they may have imposed. Instead, the paper limits itself to considering how, when implementing UN and EU sanctions, states could safeguard humanitarian action.

Including such safeguards is a way to give effect to the understanding – implicit in UN sanctions and explicitly stated for EU measures[98] – that sanctions must comply with international law; and to the Security Council's demand that states ensure that the measures they take to implement UN sanctions comply with their obligations under international law, including IHL.

With regard to IHL and humanitarian action more specifically, the 2020 European Commission Guidance clarifying how EU sanctions apply to humanitarian action to respond to the COVID-19 pandemic expressly noted that '[…] in accordance with International Humanitarian Law, where no other option is available, the provision of humanitarian aid should not be prevented by EU restrictive measures'.[99]

States' own obligations under IHL are an additional argument in favour of implementing sanctions in a manner that in a way that does not conflict with IHL.

How can this be done in practice? Most clearly by including an express exception for humanitarian action in the national regulations giving effect to the international sanctions. Research for the present paper did not extend to a review of domestic measures for implementing sanctions, so it is not possible to comment on whether any states have done so. The letter of the Swiss Federal Act on the Implementation of International Sanctions seems at least to open the door to such an approach, but it does not appear to have been resorted to in practice.[100]

Alternatively, if this is possible under national law, a similar result could be achieved by issuing general licences for specific sanctions regimes, excluding conduct and transactions carried out in the course of humanitarian activities from the scope of any restrictions in sanctions. This is an avenue that the UK should explore as it is establishing its independent post-Brexit sanctions framework.

A further approach is more indirect: not investigating or taking other enforcement action with regard to behaviour that could amount to a violation of sanctions when it occurs in the course of humanitarian operations. This might in fact be the way in which many states have addressed the issue in practice. Such possible violations were simply not a focus of their sanctions enforcement activities.

While it means that humanitarian action is not penalized, this approach has a number of drawbacks. Support provided or transactions conducted in the course of humanitarian activities still violate the letter of the law, with significant reverberating effects. Banks and commercial actors will remain reluctant to provide services. It will also be irrelevant as far as requirements to comply with sanctions in funding agreements are concerned.

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98 Council of the European Union (2004), *Basic Principles on the Use of Restrictive Measures (Sanctions)*, Principle 3.
99 European Commission (2021), 'Commission Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures', Commission Notice of 13.08.2021, C(2021) 5944 final, 13 August 2021, p. 7; also pp. 9, 13, 17, 19, 31, 41, 47–48 and 51.
100 Switzerland (2002), Federal Act on the Implementation of International Sanctions, Article 2(1): 'The Federal Council has the authority to enact compulsory measures. It may stipulate exceptions in order to support humanitarian activities or to safeguard Swiss interests'. See https://www.fedlex.admin.ch/eli/cc/2002/564/en.

3.2.4 Interpreting the designation of entities that exercise governance functions

Sanctions designations raise additional issues when they target persons or groups that play a role in governance – either in formal government structures or as entities that exercise government-like functions or *de facto* control. At least three different scenarios need to be considered.

3.2.4.1 What is the effect of the designation of a minister or of the leader of a group?

This is the question that arises most frequently. There is a distinction between the individuals and the ministries they head. The prohibition on providing funds or other assets applies to the designated person. Issues would only arise if the designated minister appropriated funds provided to the ministry, either for their personal benefit or to undermine the policy objectives for which the sanctions were imposed. The effect of the misappropriation would not be to bring the ministry within the scope of the designation. Instead, the issue would have to be addressed from a *prevention of diversion* perspective.

By way of recent example, in late 2020 the EU designated a number of ministers on the ground that they share 'responsibility for the Syrian regime's violent repression against the civilian population'. Those designated have included both the Minister for Education and the Minister for Health.[101] There was no suggestion that these designations, and the consequent prohibitions on making funds or other assets available to the ministers, meant that it was no longer possible to provide support to the ministries they headed.

The same holds true when leaders of groups have been designated but the groups have not. In such circumstances, it is not prohibited to provide assets to the group or non-designated members. Due diligence should be exercised to ensure the designated leaders do not profit personally from such support.[102]

3.2.4.2 What is the effect of the designation of a political party?

This issue arises most prominently in relation to Hamas's role in Gaza. It is also relevant where other designated political parties play a role in government, like in the case of Hezbollah in Lebanon.

Taking the case of the designation of Hamas under EU CT sanctions as an example,[103] the starting point is that the designated entity is a political party, with an armed wing, which has been exercising executive authority over Gaza since 2007.

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101 Council Implementing Regulation (EU) 2020/1505 of 16 October 2020, and Council Implementing Regulation (EU) 2020/1649 of 6 November 2020.
102 See, for example, US Treasury, OFAC (2014), Guidance Related to the Provision of Humanitarian Assistance by Not-for-Profit Non-Governmental Organizations, 17 October 2014, para 4, https://home.treasury.gov/system/files/126/ngo_humanitarian.pdf.
103 Council Common Position 27 December 2001 on the Application of Specific Measures to Combat Terrorism (2001/931/CFSP) gives effect to SCR 1373 for the EU and its member states, including the financial sanctions. Council Decision of 27 December 2001 (2001/927/EC) established the list of designated persons and entities. This included 'Hamas-Izz al-Din al-Qassem (terrorist wing of Hamas)'. Council Common Position 2003/651/CFSP of 12 September 2003 broadened the designation to 'Hamas (including Hamas-Izz al-Din al-Qassem)'.

The restrictions in the EU sanctions prohibit making available funds and other relevant assets available to the *political party*. There is a distinction as a matter of constitutional and administrative law between a political party and civil administration structures such as ministries and departments. This distinction continues to exist even when a party becomes the 'governing party' or party in power. This difference has been blurred in relation to Hamas, including because of the tendency to refer to Hamas as the '*de facto* authorities in Gaza'. There is no basis in law for this expression, and it is misleading and counterproductive, as it can be interpreted as suggesting that Hamas *is* the civil administration structure. This is not the case. EU financial sanctions apply to Hamas the political party, *not* to the structures of administration in Gaza.

Equating Hamas with the civil administration of Gaza would turn targeted financial sanctions into measures that would have a far broader impact on an entire civilian population, similar to the overly broad comprehensive sanctions that the international community abandoned in the 1990s. The EU's *Basic Principles on the Use of Restrictive Measures* require sanctions to be 'targeted in a way that has maximum impact on those whose behaviour we want to influence. Targeting should reduce to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighbouring countries'.[104] Interpreting the designation of Hamas in a manner that precluded transactions with civil administration structures in Gaza would risk severely impeding humanitarian action.

The EU does not adopt comprehensive sanctions. Instead, it adopts measures prohibiting transactions with individuals or specific ministries that it considers particularly responsible for the behaviour the sanctions aim to end and/or whose activities the sanctions aim to impair. In Syria, for example, the EU has imposed sanctions against the Ministries of Defence and of the Interior, as 'government branch[es] directly involved in repression'.[105]

This indicates that the EU avoids broad designations of governments as a whole. The EU sanctions on Hamas should be interpreted so as not to apply to the entire civil administration of Gaza, but just to the political party.

Ministries, departments and other parts of the administration do not form part of Hamas and, consequently, do not fall within the scope of the sanctions. If it were demonstrated that funds or other assets were transferred from civil administration structures to Hamas, this would have to be addressed from a *risk of diversion* perspective.

Another example is Hezbollah in Lebanon. EU CT sanctions designate only 'Hizballah Military Wing'.[106] However, in recent years a number of EU member states, including Latvia, Slovenia and the UK when it still was in the EU,[107] have expanded the scope of their national designations to Hezbollah more generally.

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104 Council of the European Union (2004), *Basic Principles on the Use of Restrictive Measures (Sanctions)*, para 6.
105 Listings in Annex I to Council Decision 2013/255/CFSP of 31 May 2013.
106 Council Decision (CFSP) 2020/1132 of 30 July 2020.
107 In 2001 the UK proscribed Hezbollah's External Security Organisation. In 2008, this was extended to include the whole of Hezbollah's military apparatus. In 2019 the designation was extended to 'Hizballah (Party of God)'. See https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2.

This is the case even though, as expressly noted in the UK's listing instrument, 'Hizballah, as a political entity in Lebanon has won votes in legitimate elections and forms part of the Lebanese Government'.[108] At present, there are two Hezbollah-appointed minsters in the Lebanese government, one of whom heads the Health Ministry.[109] There is no suggestion that the designation of Hezbollah should preclude transactions with or support to the government of Lebanon and its ministries. Indeed, the UK (for example) is currently funding various projects that support the Lebanese government, including one with a Hezbollah-headed ministry.

Similarly, the US designated Hezbollah as a whole as a Foreign Terrorist Organization in 1997. Despite this, the US Agency for International Development (USAID) and the Bureaux of Population, Refugees, and Migration (PRM) and for Humanitarian Assistance (BHA) fund various projects that provide support to the Lebanese government,[110] including the Hezbollah-led Ministry of Health.

These practices provide further support for an approach that draws a distinction between the designated political party and structures of civil administration.

3.2.4.3 Designation of groups exercising government-like functions or de facto control

The preceding paragraphs considered the effect of designation of a party that plays a role in the formal structures of government. Situations may also arise where a designated group controls an area and exercises government-like functions therein. This was the case, for example, with the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, and most recently, the 'Lugansk People's Republic' and the 'Donetsk People's Republic', both in Eastern Ukraine.[111]

How should prohibitions in financial sanctions on making funds or assets available directly or indirectly to such groups be interpreted? Ideally, such measures should be accompanied by broad exceptions covering humanitarian action, like those issued by the US during the very brief period when the Houthis were designated in January 2021.[112]

Absent such express safeguards, and so as to minimize the effect of sanctions on the populations under the group's control, the restrictions should not be interpreted so as to prevent the group from providing basic services such as healthcare and education to the population under its control, or preventing humanitarian action to assist it in these areas.

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108 Ibid.
109 https://en.wikipedia.org/wiki/Cabinet_of_Hassan_Diab (accessed 22 Jun. 2021).
110 USAID (2021), 'Lebanon – Complex Emergency', 30 March 2021, https://www.usaid.gov/sites/default/files/documents/03.30.2021_-_USG_Lebanon_Complex_Emergency_Fact_Sheet_2.pdf
111 Both are designated under EU sanctions. Council Decision 2014/145/CFSP of 17 March 2014, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.
112 https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210119.

04 Funding agreements – some current challenges

Donors to humanitarian action frequently include provisions in their grants requiring recipients to comply with the CT measures and sanctions adopted by the donor. These restrictions and requirements raise additional challenges.

Institutional donors to humanitarian action frequently include restrictions and requirements in their funding agreements that aim to ensure that recipients of the funding comply with the CT measures and sanctions adopted by or binding on the donor. This is a way for the donor to comply with its own obligations. A particular focus of the restrictions is ensuring that funded activities do not benefit persons or entities designated under CT measures or country-specific sanctions. Requirements in funding agreements are an additional and 'indirect' way in which the CT measures adopted by a particular state may become applicable to a humanitarian actor.

The requirements are by no means uniform. They vary from donor to donor, context to context and, frequently, also according to the recipient of the funding, depending on their status – for example, whether they are UN agencies, other international organizations or NGOs – and also because donors may impose more restrictive obligations on organizations they are less familiar with, or because a particular

recipient has successfully negotiated less restrictive measures. The nature of the funded activities is also a consideration, with programmes that entail the provision of cash being more tightly regulated.[113]

States are not under a legal obligation to fund humanitarian programmes, but to the extent that they do, they must not include provisions that are incompatible with IHL, or that prevent the recipient organization from operating in accordance with humanitarian principles or medical ethics.

States are not under a legal obligation to fund humanitarian programmes, but to the extent that they do, they must not include provisions that are incompatible with IHL.

In addition to being recipients of funding, certain humanitarian actors are themselves donors or enter into subcontracts. This aspect has received less attention, but can raise additional challenges. For example, paradoxically some UN agencies have pushed back against problematic requirements from state donors, only to then include such measures – including exclusion of final beneficiaries – in the agreements *they* conclude with implementing partners.

This chapter addresses three contemporary challenges raised by requirements in funding agreements. It concludes with some recommendations that are relevant to all donors to humanitarian action: states, intergovernmental organizations and humanitarian actors that in turn fund or subcontract other humanitarian organizations.

4.1 Asking the impossible?

Frequently, funding agreements require the recipient to comply with the sanctions and CT measures adopted by the donor state. If the recipient organization is of a different nationality to the donor – i.e., if it is not registered in the donor state – this requirement renders the sanctions and CT measures applicable to the recipient 'indirectly' as a contractual obligation.[114]

However, this can be an imperfect fit. Funded activities may include transactions that would be permissible pursuant to specific licences issued by the departments implementing the relevant sanctions. For example, US sanctions require specific Office of Foreign Assets Control (OFAC) authorization for operations that could make funds or other assets available – directly or indirectly – to designated

113 For a thorough and still relevant analysis, see Harvard Law School–Brookings Project on Law and Security (2014), *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts*, Project on Counterterrorism and Humanitarian Engagement Research and Policy Paper Series.
114 This problem does not arise with all donors. Some, like the EU, require recipients of funding to be registered in an EU member state. This means that the sanctions are already directly applicable and, consequently, that the recipients can apply for licences.

groups.[115] However, if the parties to the funding agreement are not 'US persons' – i.e. registered in the US – the sanctions are not directly applicable to them and so as a matter of sanctions regulations they cannot apply for such licences. On the other hand, if they operate without the licences, they may be violating grant requirements.

This problem does not arise from the sanctions or CT measures *per se*, but because of misaligned requirements in grants agreements and licensing regulations.

In some cases, the donor agencies have been willing to resolve this issue by themselves applying for relevant licences for the programmes they fund on behalf of the recipients. But this does not appear to be standard practice. An alternative approach would be to amend the implementing sanctions regulations to allow recipients of funding from the state that has imposed the measures to apply for specific licences necessary for the funded programme.

4.2 Screening of final beneficiaries of humanitarian programmes

One of the most common requirements in funding agreements is taking measures to avoid funds or other assets provided under the grant being made available directly or indirectly to designated persons or entities.

4.2.1 The nature of the obligation

Donors formulate the precise nature of this duty in different ways. Some donors impose what has been described as an 'obligation of result': recipients must *ensure* that assistance does not reach designated persons or entities. This is a high standard – probably unrealistically high – and many humanitarian actors are uncomfortable accepting it. A preferable approach is that adopted by donors which frame this as an 'obligation of means', requiring recipients to take 'reasonable measures' or 'use their best endeavours' in this regard.[116]

Some funding agreements specify the measures that must be taken to comply with this requirement. At other times it is left to recipients to choose the modalities for doing so. Most frequently, this is done by 'screening' a range of actors involved in the funded programmes to ensure they are not included in lists of individuals or entities designated under relevant sanctions or CT measures.

115 Problems do not arise if the activities fall within the scope of *general* licences, as there is no need to apply for these. It is sufficient that the activities fall within their scope.
116 See Harvard Law School–Brookings Project on Law and Security (2014), *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts*, p. 24; and Mackintosh, K. and Duplat, P. (2013), *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Norwegian Refugee Council and Office for the Coordination of Humanitarian Affairs, pp. 47–71. (While dated, these give examples of the different approaches.)

4.2.2 'Screening' and 'vetting'

Although the terms are frequently used interchangeably, screening must be distinguished from vetting. Screening is carried out by humanitarian actors themselves. They check that entities and persons are not designated under UN, EU or other sanctions, or under CT measures. Various commercial programmes exist for doing this.

Vetting requires humanitarian actors to provide the identity information of relevant persons and entities to the donor, which will carry out the checks itself. Only a small minority of donors require vetting, and even those only in relation to grants for certain contexts. Applications for certain US government funding for operations in certain contexts require *partner* vetting – i.e. the provision of personal information relating to certain 'key individuals' in the organization applying for funds, including principal officers of its governing board, directors, officers and other staff members with significant responsibilities for the management of the funded programme.[117] In some contexts, this has also included the vetting of final beneficiaries who receive more than a prescribed amount of assistance in cash or in kind or who participate in training activities.

Vetting raises additional concerns to screening, including in terms of data protection and privacy in relation to the personal information provided to the donor. Vetting can also undermine perceptions of the independence of humanitarian actors providing such information from the state donors requiring it. If the donor is a party to an armed conflict, the provision of information can also affect the perceived neutrality of humanitarian actors.

4.2.3 Problems with screening of final beneficiaries

Screening is not problematic *per se*. It is a tool for identifying whether someone is on a list of designated persons. Screening of a range of persons and entities involved in the delivery of humanitarian programmes, including staff, sub-grantees, and contractors is an acceptable way of ensuring that funds or other assets are not provided to designated persons or entities in the course of operations.

Screening can become problematic if it leads to the exclusion of someone from humanitarian assistance that they have been determined as requiring. Once someone has been determined as requiring humanitarian assistance on the basis of eligibility criteria developed by a humanitarian actor – which are frequently shared with the donor – depriving that person of this assistance would go further than the underlying sanctions require, and would also be incompatible with IHL and humanitarian principles.

117 USAID (2021), *Automated Directives System, Chapter 319, Partner Vetting*, revised January 2021, https://www.usaid.gov/sites/default/files/documents/319.pdf. As of March 2021, USAID Partner Vetting was required for Afghanistan, Iraq, Lebanon, Pakistan, Syria, Yemen and the West Bank and Gaza. USAID can also impose additional vetting requirements. For example, in relation to Gaza it requires recipients of funds to provide information on beneficiaries who receive more than a specified amount of assistance or who participate in training.

The purpose of screening requirements is to ensure compliance with sanctions and CT measures. But these very sanctions include exemptions allowing designated persons to access basic services, such as medical care, food and accommodation.[118] This is a clear indication that sanctions should not deprive designated persons of essential services and goods.

The same holds true also when these basic goods and services are provided in the form of humanitarian relief. A 2020 European Commission Guidance Note on EU sanctions expressly restated the well-established and consistent position that EU sanctions do not prohibit the provision of humanitarian assistance to those who have been determined to be in need thereof:

> [a]ccording to International Humanitarian Law, Article 214(2) of the Treaty on the Functioning of the European Union and the humanitarian principles of humanity, impartiality, independence and neutrality, humanitarian aid must be provided without discrimination. The identification as an individual in need must be made by the Humanitarian Operators on the basis of these principles. Once this identification has been made, no vetting of the final beneficiaries is required.[119]

Moreover, sanctions and most CT measures prohibit making funds or assets available to designated persons. They do not cover training.[120] Requirements to screen and thus potentially exclude participants in training programmes also go beyond the underlying sanctions.

Under IHL everyone who is wounded and sick – civilians and fighters[121] – is entitled to the medical care required by their condition, with no discrimination other than on medical grounds. Everyone deprived of their liberty – civilians and fighters – is entitled to food, water and clothing. Even when not deprived of their liberty, civilians are entitled to objects indispensable to their survival, including food, water, medical items, clothing and bedding. If the belligerent with control of civilians is unable or unwilling to provide these basic goods and services, they may be provided by humanitarian relief operations.

For all these entitlements, once a person has been determined as being in need of the particular type of assistance, the humanitarian principle of impartiality requires it to be provided with no discrimination other than on the basis of greatest need. Depriving people of the assistance to which they are entitled, because they are designated under sanctions or CT measures, would violate IHL and humanitarian principles.

The position is different for fighters who are not *hors de combat*. They do not have the same entitlement as civilians to other objects indispensable to their survival, such as food. But people can be designated for a broad range of reasons, most of which would not affect their status as civilians under IHL. There is thus no equivalence between being a fighter, and thus not entitled to benefit from

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118 See, for example, Security Council ISIL/Al-Qaeda sanctions, SCR 2368 (2017), OP 81(a).
119 European Commission (2021), 'Commission Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures', pp. 13, 24, 33, 45 and 51.
120 Training falls within the scope of prohibited support under the US Material Support Statute.
121 The definition of 'wounded and sick' requires fighters to be refraining from acts of hostility. ICRC (2016), *Commentary on the First Geneva Convention*, 2nd edition, (hereafter *ICRC Commentary*), para 1345.

certain types of humanitarian relief, and being designated. In this case, too, screening risks depriving people of the humanitarian relief to which they are entitled under IHL.

More operationally, the eligibility criteria developed by humanitarian actors and their implementation in practice go a long way towards ensuring that humanitarian assistance – other than medical assistance – is not provided to fighters.

4.2.4 The state of play

While humanitarian organizations have been willing to screen staff, sub-grantees, contractors and vendors, they have drawn a 'red line' at screening final beneficiaries. On the whole, this red line has been accepted by donors to humanitarian action, including the EU, the US and other key donors, but it is being challenged by a number of developments.

While humanitarian organizations have been willing to screen staff, sub-grantees, contractors and vendors, they have drawn a 'red line' at screening final beneficiaries.

Although the US has stated that it does not require screening of final beneficiaries of the programmes it funds, in practice its approach is not quite so clear-cut. For example, the CT certification that applicants for USAID funding must sign does not apply to the provision of USAID funds or assistance 'to the ultimate beneficiaries of USAID-funded humanitarian or development assistance […] *unless* the applicant knew or had reason to believe that one or more of these beneficiaries was subject to U.S. or U.N. terrorism-related sanctions'.[122] (Emphasis added.)

In contexts subject to enhanced partner vetting, recipients of USAID funding must vet – i.e. provide USAID with the personal information of – individual participants in training programmes funded with the grant, and recipients of cash payments of more than a specified amount.

More problematically, in recent years funding agreements concluded with certain humanitarian actors in contexts where groups designated as terrorist by the US are operative, including Boko Haram in Nigeria and ISIL in Syria and Iraq, have required recipients of funding to seek prior authorization from USAID before providing assistance to individuals whom the recipient 'affirmatively knows' to have been 'formerly affiliated' with these groups 'as combatants or non-combatants'.

122 USAID (2020), *Certifications, Assurances, Representations, and Other Statements of the Recipient: A Mandatory Reference for ADS Chapter 303*, Partial revision 18/05/2020, Certification Regarding Terrorist Financing, Implementing Executive Order 13224, https://www.usaid.gov/sites/default/files/documents/1868/303mav.pdf.

This requirement raises numerous concerns. USAID has not provided definitions or guidance of what amounts to having been 'formerly affiliated' with a designated group. But this is likely to be a larger group of people than those who are designated, so people who are not even designated could potentially be excluded from humanitarian programmes.

This pre-authorization requirement means recipients must identify – by whatever means they choose – and thus potentially exclude from humanitarian action an even broader category of people than those who are actually designated. This exacerbates the problems underlying the screening of final beneficiaries.

Admittedly, the requirement neither requires recipients of funding to provide USAID with the personal data of the persons in question, nor does it automatically preclude assistance from being provided. It is for USAID to decide what the consequences of any notification are. Nonetheless a very real risk exists that this requirement may exclude people from life-saving assistance, including measures to treat and reduce the spread of the COVID-19 virus. Not providing medical assistance – even just pending authorization – would violate IHL and be contrary to medical ethics.

There have also been problematic developments at EU level. Since 2018 new grant agreements concluded by parts of the European Commission other than the department known as ECHO (European Civil Protection and Humanitarian Aid Operations) have started requiring the screening of final beneficiaries of funded programmes.

The source of the funding within an organization does not affect the position outlined above, and in fact expressly recognized by the European Commission itself. What is determinative is the *context* in which the funded activities are being conducted. Is it one where IHL applies, or to which humanitarian principles are otherwise relevant? The same holds true for the nature of the funded activities. Both must be determined on the basis of the facts on the ground and not the institutional identity of the donor.

There has been significant pushback to the inclusion of this requirement, most particularly in relation to activities that are being conducted in conflict settings, such as Syria. Some NGOs terminated a grant that included it, returning the funds. Others successfully argued that the requirement should only apply to the parts of the grant that related to cash-based activities, as only these were covered by the EU sanctions: they returned that element of the grant, and carried out the other activities without screening final beneficiaries. Adopting these principled positions is essential to maintaining the red line. It is nonetheless regrettable that it was necessary to return the funds, as this left people without the assistance they had been determined to need.

4.3 False Claims Act litigation in the US

The False Claims Act (FCA) is a US federal statute that allows third parties to bring whistle-blower proceedings 'on behalf' of the US Government for alleged fraudulent use of government funds.[123] In recent years FCA proceedings have been brought against humanitarian and peacebuilding actors on the basis of certification that applicants for USAID funding must sign. The version of the certification signed by the defendants required an applicant to certify that:

> to the best of its current knowledge, [it] did not provide, within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide, material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates or participates in terrorist acts or has committed, attempted to commit, facilitated, or participated in terrorist acts.[124]

The three cases that have been made public to date were strategic litigation brought by the same plaintiff, the Zionist Advocacy Center. The plaintiff claimed that the recipients of USAID funding had violated the certification and, thus, defrauded the US Government.[125] None of these cases reached the merits stage before a court: the first settled, and the courts accepted the US Department of Justice's motion to dismiss in the other two.[126]

The problem is not the FCA *per se*, but the USAID certification that formed the basis of the claims. It is problematic because of the breadth of the prohibited support; the lack of clarity as to who should not be receiving the support; the period it covers; and the source of the funds with which support must not be provided.

In the wake of the litigation, the certification was amended, and some of the more problematic aspects were modified. In particular, the 'look back' period was shortened from 10 to three years; and the vague and overly broad reference to the persons to whom funds should not be made available was replaced by a reference to people or groups designated under US CT sanctions and UN sanctions.[127]

What remains extremely broad is the source of funds from which the material support must not be provided. This is not expressly addressed in the certification clause, but the one case that was settled suggested that the certification applies to support provided with the funds received from *any* donor, not just from the US government. This means that a humanitarian organization that, in the three years prior to signing the USAID certification, carried out an activity funded by a different donor that did not include similarly broad restrictions, or that had

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123 31 U.S.C. §§ 3729 to 3733.
124 USAID (2018), *Certifications, Assurances, Representations, and Other Statements of the Recipient: A Mandatory Reference for ADS Chapter 303*, Partial Revision 06/07/2018, Certification Regarding Terrorist Financing, Implementing Executive Order 13224.
125 Parker, B. (2018), 'A Q&A with the pro-Israel lawyer rattling NGOs on counter-terror compliance', 25 September 2018, The New Humanitarian, https://www.thenewhumanitarian.org/2018/09/25/qa-pro-israel-us-lawyer-rattling-ngos-counter-terror-compliance.
126 Association of International Development Agencies (2019), *AIDA Quarterly Bulletin on Humanitarian Relief Obstruction, Defamation of Civil Society Organizations, Human Rights and Humanitarian Actors, Quarter IV 2019*, https://drive.google.com/file/d/1oy8gIlcdQJ6vqrpmH7V893ODVCFQhX6J/view.
127 USAID (2020), *Certifications, Assurances, Representations, and Other Statements of the Recipient*, Partial Revision 05/18/2020, Part I.4.

a different list of designated entities from those of the US, could, by virtue of these entirely permissible activities, nonetheless be violating the USAID certification and exposing itself to the risk of FCA claims.

This line of litigation significantly changes the dynamics relating to restrictions in funding agreements. Any leeway that recipients of funding may have been (implicitly) granted by USAID in the past has been removed. If FCA claims are brought, the US Government is obliged to investigate them. The pecuniary risks of litigation are very significant: US courts are entitled to award punitive damages of three times the amount received from the respondent organization from the relevant US government agency. One-third of these costs are awarded to the whistle-blower. While the cases brought so far had a clear political dimension, and there are no further cases with that particular plaintiff, the risk exists that similar claims may be brought in the future.

4.4 Recommendations

- Funding agreements for humanitarian action should not impose restrictions that go beyond those in the CT measures or country-specific sanctions with which they aim to promote compliance.
- Such agreements should impose 'obligations of means', requiring recipients to take all feasible measures to avoid making funds and assets available to designated groups. They should not include requirements that could lead to the exclusion of final beneficiaries or that could otherwise impair a principled humanitarian response.
- The Good Humanitarian Donorship initiative is an informal donor forum and network that facilitates collective advancement of good donorship principles and practices. CT measures have been on its agenda since 2018.[128] This workstream should continue, and lead to the elaboration of good practices.
- Humanitarian organizations should develop common red lines and 'bargaining' positions, and adhere to them. They should also share good practices that meet donors' concerns but do not impede principled action.

128 Good Humanitarian Donorship Initiative (2018), High Level Meeting, 24 October 2018, Geneva, Switzerland, Co-chairs' summary, https://www.ghdinitiative.org/assets/files/GHD%20Reports%20%26%20Updates/Co-Chairs-Summary-GHD-HLM-24-October-2018.pdf.

05 Engagement with designated persons and groups

Engagement with non-state armed groups is necessary for humanitarian work. It is not prohibited, even when the groups are designated, but misunderstandings have led to unwarranted self-restriction by humanitarian organizations.

Engagement with non-state armed groups for humanitarian purposes is necessary for all aspects of the work of humanitarian actors: negotiating access, conducting relief operations, re-establishing family links, promoting compliance with IHL, and developing action plans for the release of children recruited or used by such groups.

Where such groups or their members have been designated as terrorist or are under other sanctions, the question arises whether contact with them is permissible.

This chapter discusses relevant legal and policy restrictions. It seeks to clarify misunderstandings that have arisen across contexts and are leading to unwarranted *self*-restriction by humanitarian actors, and reticence by governments and other entities that provide funding. Is there any reason based in law why there should be no engagement between humanitarian actors and designated organizations, or has a 'no contact' practice arisen from a misunderstanding of the legal position?

5.1 Legal restrictions

5.1.1 International measures

It can be said quite categorically that there is no prohibition on contact as a matter of law. Such a prohibition would be inconsistent with IHL. Common Article 3 of the Geneva Conventions expressly foresees the possibility for humanitarian actors to offer their services to both sides in non-international armed conflicts – states and organized armed groups. This implicitly recognizes the possibility of liaising with such groups, as do other rules regulating humanitarian operations in non-international armed conflicts.[129]

It can be said quite categorically that there is no prohibition on contact as a matter of law. Such a prohibition would be inconsistent with IHL.

None of the CT conventions or Security Council resolutions address contact – let alone restrict it. Nor do sanctions prohibit contact with designated groups or persons. Financial sanctions prohibit making funds or other assets available directly or indirectly to designated persons and groups, but do not preclude contact.

The absence of a 'no contact' rule was expressly noted in relation to EU sanctions in the 2020 European Commission Guidance clarifying the application of sanctions to various aspects of COVID-19 response, in the following terms.

> Are Humanitarian Operators allowed to liaise with designated persons if this is needed to provide humanitarian assistance to the civilian population […] in the context of COVID-19 pandemic?
>
> Yes. Humanitarian Operators may liaise with designated persons if this is needed in order to organise the provision of humanitarian aid in a safe and efficient manner.
>
> Therefore, if a designated person intervenes in a humanitarian transaction, this does not automatically mean that the transaction must be abandoned. Insofar as no funds or economic resources are made available to a designated person, [EU sanctions] do not prohibit liaising with the former.[130]

5.1.2 Domestic measures

It has not been possible to find any domestic CT legislation that prohibits contact with terrorist groups, whether in purported implementation of international obligations or as a state's own policy.

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129 IHL requires organized armed groups to allow and facilitate rapid and unimpeded passage of relief consignment and entitles them to impose measures of control on such passage. These obligations cannot be discharged without dialogue with humanitarian actors. *Oxford Guidance*, Section F. See also *ICRC Commentary*, para 804 '[…] an offer of services and its implementation may not be prohibited or criminalized, by virtue of legislative or other regulatory acts'.
130 European Commission (2021), 'Commission Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures', pp. 8, 18, 27, 35 and 47.

The legislation of two states – Australia and Nigeria – includes crimes that relate to meeting with terrorist groups, but neither prohibits such meetings when they are for the purpose of discussing humanitarian action. Australia's Criminal Code includes an offence of 'associating with terrorist organizations'. This includes an exception if such association is only for the purpose of providing aid of a humanitarian nature.[131]

Nigeria's Terrorism (Prevention) (Amendment) Act 2013 includes the offence of 'terrorist meetings'.[132] The language of the offence is broad: it covers meetings connected with a terrorist 'act' and also those connected with a 'terrorist group' more generally. As there are no express exceptions, this provision has given rise to concern that it might include engagement for purely humanitarian purposes. In interviews conducted for the purpose of the present paper, prosecutors from the unit responsible for enforcing the Act explained that, despite its broad wording, the offence related to meetings to plan or facilitate the commission of terrorist *acts*. Meetings to discuss humanitarian operations were not what was contemplated, nor are they the focus of investigations.

That said, the Act also authorizes the army to gather intelligence and investigate offences under the Act, and grants it the power to arrest people for these purposes.[133] Staff of some humanitarian organizations, operating in the areas most affected by the conflict with Boko Haram, note that the army has frequently threatened them with prosecutions or the closure of their offices if they tried to engage with the group.[134] Staff have been detained by the army and, although this has not led to any prosecutions to date, it nonetheless has a significant intimidatory and constraining effect.

The UK's Terrorism Act 2000 includes the offence of 'arrang[ing], manag[ing] or assist[ing] in arranging or managing a meeting' which a person knows is to support a proscribed organization; to further the activities of a proscribed organization; or to be addressed by a person who belongs or professes to belong to a proscribed organization.[135] In 2015 a note was issued by the relevant government department explaining that this provision 'permit[s] the arranging of genuinely benign meetings'.[136]

At present, the only legal prohibition on contact with a designated group appears in the funding agreements of *one* donor – USAID – in relation to operations in one context: Gaza.[137] Unlike other restrictions in USAID funding agreements, this

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131 Australia, Criminal Code, Division 102.8(4)(c).
132 Nigeria, Terrorism (Prevention) (Amendment) Act 2013, Section 4.
133 Ibid., Sections 2(5) and 19.
134 The army has ordered the closures of NGO offices on allegations of 'aiding and abetting terrorism', by supplying food and medicines. This is different to mere contact. Lamble, L. (2019), 'Nigerian army orders closure of aid agency for "aiding terrorism"', *Guardian*, 20 September 2019, https://www.theguardian.com/global-development/2019/sep/20/nigerian-army-orders-closure-of-aid-agency-for-aiding-terrorism.
135 UK, Terrorism Act 2000, Section 12(2).
136 The November 2015 Note stated that a 'genuinely benign' meeting is one at which the terrorist activities of the group are not promoted or encouraged, for example, 'a meeting designed to encourage a designated group to engage in a peace process or facilitate delivery of humanitarian aid where this does not involve knowingly transferring assets to a proscribed organisation'. The guidance was temporarily removed from the gov.uk website in June 2021 for updating purposes. See UK Home Office and Office of Financial Sanctions Implementation (2021), 'Guidance: Operating within counter-terrorism legislation', last updated 24 June 2021, https://www.gov.uk/government/publications/operating-within-counter-terrorism-legislation.
137 USAID West Bank/Gaza (2006), 'Contact Policy for the Palestinian Authority', Notice No. 2006-WBG-17, 26 April 2006.

restriction does not serve CT objectives: it only applies to Hamas and not to other groups designated by the US operative in Gaza. Its objective is political in nature: avoiding giving any legitimacy or visibility to Hamas as an authority in Gaza that could undermine or be to the detriment of the Palestinian Authority.

5.2 Humanitarian organizations' policies

This is the position under the law or under bilateral agreements that humanitarian actors may have concluded. But the law is not the sole consideration. It sets minimum standards. Humanitarian organizations may wish to restrict their operations more than required as a matter of law for other reasons, including, as far as contact with designated groups is concerned, for reputational reasons.

Humanitarian actors operating in contexts where designated groups are active frequently have internal guidelines addressing different aspects of their contact with members of the groups, including visibility at public events, use of their logos, media use of images and a requirement that engagement be at technical level.

While this is understandable and important in the often extremely politicized contexts where such groups operate, it is fundamental that there be clarity as to the reasons for these measures. The right balance must be struck between reducing potentially problematic 'optics' and the adverse impact of limited contact on humanitarian operations.

5.3 The position of state representatives

It is not only the staff of humanitarian organizations who are confused. State representatives frequently conflate legal and policy restrictions that *they* may be subject to with legal restrictions that the humanitarian organizations they fund must comply with. While donor staff negotiating funding agreements in capitals are usually well aware that that contact is not restricted, staff at field level overseeing the implementation of the funding agreements are often less clear on point and more likely to hold humanitarian organizations to restrictions that are not included in the funding agreements.

As far as restrictions on *state* representatives are concerned, it is contacts with Hamas in Gaza that are most regulated. The only legally binding prohibition is the US's Palestinian Anti-Terrorism Act. This prohibits *US Government* officers and employees from negotiating or having substantive contacts with members or official representatives of Hamas and other designated Palestinian organizations.[138] This is a notable exception where a *legal* prohibition exists: however, it is addressed to US government staff, and not the staff of humanitarian organizations that the US may fund.

138 76 H.R. 4681 (109th): *Palestinian Anti-Terrorism Act of 2006*, Section 10, https://www.govtrack.us/congress/bills/109/hr4681/text.

Policy restrictions, rather than legal restrictions, are more common, and cause the greatest confusion – possibly precisely because they are not based on a clear and easily accessible legal instrument. This is the case, for example, for the UN's guidelines on contact: it is very difficult even for senior UN staff to obtain copies. Despite this, there seems to be a degree of clarity among staff that technical-level contact with Hamas, in particular in the areas of humanitarian action, early recovery and human rights, is permitted.

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Far greater confusion and a greater lack of transparency surround the position of the EU and its member states, not least because the 2006 policy on 'Contacts with the New Palestinian Government' is set out, not in a formal and binding EU Council Conclusion, but in a political agreement by EU ministers, containing guidelines based on a non-paper proposed by the Benelux countries.[139] The 'informality' of this document means that it is not easily accessible, and this contributes to the confusion as to the nature of the restrictions: who must comply with the policy, and what is prohibited.

The policy is addressed to representatives of EU institutions and EU member states,[140] not to humanitarian organizations whose operations the EU and its member states may fund. Even for EU and member states' staff, it does not prohibit outright all contacts with Hamas. Contacts may take place at the 'technical or administrative civil servants level', including when these are 'necessary to implement an EU mission or an agreed EU objective, an aid program'.[141] Contact in relation to humanitarian programmes is thus expressly excluded from the restrictions. The permissibility of other kinds of contacts is less clear. What, beyond this, can be considered an EU 'mission' or 'objective' is open to interpretation. The current EU Representative for the Palestinian Territories considers that there are three key areas where the EU must implement policy objectives in Gaza: humanitarian action, development and peacebuilding.

The 'informality' of the EU position means that there is no evident process for reviewing and amending the policy, even though it expressly notes that the guidelines are temporary and 'will be subjected to permanent re-evaluation'. This apparent problem may also be an opportunity. The policy has a political

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139 Benelux non-paper, 'Contacts with the New Palestinian Government', April 2006, 'EU Internal Guidelines on Contacts and Visa Policy with Hamas and the Palestinian Government', 23 June 2006. Documents on file with author.
140 Since 1 January 2021 the EU position is no longer applicable to the UK, but it has continued to apply a no-contact policy for government staff.
141 Benelux non-paper, 'Contacts with the New Palestinian Government', April 2006, 'EU Internal Guidelines on Contacts and Visa Policy with Hamas and the Palestinian Government', 23 June 2006. Documents on file with author.

objective – not giving Hamas any visibility or legitimacy – and is not linked to binding CT measures. There are no legal constraints on revising the position. Member states can call for its re-evaluation – as indeed the document itself expressly foresees.

5.4 Recommendations

- The mistaken belief that CT measures or country-specific sanctions restrict contact with designated persons or groups is the greatest source of unwarranted self-restraint by humanitarian actors. These organizations must be more scrupulous in analysing the relevant measures.
- Prohibitions on contact with parties to armed conflict for humanitarian purposes would be incompatible with IHL. States must continue not to criminalize or otherwise prohibit such engagement, including in funding agreements.
- Humanitarian actors should adopt common positions opposing any emerging legal or practical measures that restrict contact.
- In view of the confusion, states and other relevant actors should consider issuing clarification that contact is not precluded. This should be addressed to recipients of funding but also to donors' own staff responsible for overseeing the implementation of funding agreements.

06 Conclusions

The legal framework is complex and constantly evolving. Although legal proceedings against humanitarian actors are rare, the cascading effects of CT measures and sanctions are significant.

Although the actual impact of sanctions and CT measures on humanitarian action remains challenging to quantify, the problems they pose to humanitarian actors' capacity to respond to need, in accordance with humanitarian principles and as foreseen by IHL, are very real. Legal proceedings against humanitarian actors for violations of CT measures or sanctions remain rare, but the cascading effects of those measures become ever more significant, particularly as manifested in restrictions in funding agreements and in the reluctance of commercial actors to provide goods and services.

In many contexts it is funding agreements that cause the greatest problems; they have led some humanitarian organizations to avoid conducting operations in areas where designated groups are active, despite significant needs. Funding agreements can impose more onerous restrictions than the very sanctions and CT measures with which they purport to promote compliance. Even if prosecutors and sanctions enforcement bodies do not focus on humanitarian operations, the constricting effect remains once the measures are translated into contractual obligations.

The COVID-19 pandemic has not changed the situation. UN and EU restrictions and designations have not changed; and the US only adopted General Licences authorizing certain transactions and activities for COVID-19 prevention, diagnosis or treatment in July 2021 – more than a year into the pandemic.[142] The need to respond to the emergency has led to increased scrutiny of the impact of sanctions. The EU has taken some useful steps to clarify the law and to engage with humanitarian actors.

142 U.S. Department of the Treasury (2021), 'Issuance of Syria General License 21, Venezuela General License 39, and Iran General License N, "Authorizing Certain Activities to Respond to the Coronavirus Disease 2019 (COVID-19) Pandemic" and Associated Frequently Asked Questions', 17 June 2021, https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210617.

The recommendations set out in the different chapters of this research paper will not be repeated here. There are, however, a few themes that they have in common.

The legal framework is complex and constantly evolving. There is a lack of clarity as to precisely how the law applies to humanitarian action, and this both gives rise to some myths and also lies at the heart of 'overcompliance' by humanitarian organizations, donors, and the commercial sector.

Express safeguards for humanitarian action provide clarity and reassurance. They are the preferable approach in both international and domestic measures. National legislators must ensure that they comply with requirements in international measures to respect IHL. As outlined in this paper, there are good grounds for arguing that, even in the absence of express safeguards, CT measures and sanctions can be interpreted to avoid conflict with IHL, including the rules regulating humanitarian relief operations and medical assistance.

States have an interest in safeguarding humanitarian action and in ensuring that the funds they provide to humanitarian actors are used efficiently, to assist the neediest and in accordance with humanitarian principles. They also have an interest in preventing and suppressing terrorism. These interests should not be regarded as being in conflict with each other. But to ensure that each of these interests is properly represented, more attention needs to be given to procedures and institutional arrangements that will lead to governments operating in a coherent manner. The same goes for intergovernmental organizations.

At national level, departments responsible for administering foreign aid should be participating in government discussions on the adoption of international sanctions and CT measures to ensure the inclusion of adequate safeguards. The same applies to the domestic implementation of these measures. These departments should also ensure that the agreements they conclude with humanitarian actors reflect the safeguard clauses and do not include provisions that preclude a principled response.

In the forums where international sanctions and CT measures are adopted the same approach should be followed. In the UN, a key challenge is the number of different bodies that have a role to play in elaborating the CT regulatory framework. The institutional architecture is complex, and the various bodies operate in a siloed manner. The positions that are developed are not necessarily consistent. Even within the Security Council, sanctions bodies are apparently of the view that binding Security Council decisions in the field of CT are not relevant to sanctions. These siloes are often replicated within states' missions, between missions and capital, and between teams working on similar topics at the UN and the EU.

This regrettable situation prevents the development of coherent approaches and leads to loss of institutional memory, making progress difficult. It is exacerbated by the technical nature of discussions, and the fact that subject-matter experts are often in capitals rather than in the permanent missions.

This can be contrasted with the FATF, where it has been possible to make significant progress in refining recommendations to avoid unwarranted impact on humanitarian action. One reason for this is FATF's simple architecture: a single secretariat and the fact that member states' subject-matter experts are directly involved in its work.

The EU has repeatedly demonstrated its willingness to find ways to address the adverse impact on humanitarian action of the sanctions and criminal CT measures that it adopts. The EU can play an important role in developing workable solutions for its institutions and 27 member states that can also serve as precedents for the UN.

To make progress, dialogue among the key stakeholders is crucial, at every stage prior to the adoption of international measures and domestic legislation, and throughout their implementation. Humanitarian organizations have a significant role in highlighting problems and pushing for solutions, and their sustained engagement is essential. Few such organizations, however, have dedicated staff to engage in policy discussions in a systematic manner.

Commercial actors should be engaged. At present there are no incentives – regulatory or other – to balance the risk of providing services to them against the public policy interest in doing so. A small number of states have established informal tripartite dialogues between government, humanitarian actors and banks, but their work still has to bear fruit. While important, as far as the banking sector is concerned international solutions must be sought. Dialogue with other sectors has still to start.

Finally, now the UK has left the EU and is setting its own sanctions strategy, it must recognize the importance of IHL and humanitarian principles as it shapes the processes for adopting sanctions policies and develops the regulatory framework. Various government departments have a role, but those entrusted with the implementation of sanctions are not necessarily those which should be responsible for setting the underlying policies. Government lawyers must be involved, to ensure compliance with international law, including IHL: so must government humanitarian experts. The merger of the Foreign and Commonwealth Office and the Department for International Development into the Foreign, Commonwealth and Development Office (FCDO) in September 2020 is an opportunity for better injection of the humanitarian perspective into the government's decision-making process, and for establishing a framework for dialogue with humanitarian actors. This is also an opportunity for exploring new ways of addressing the adverse impact of sanctions, context by context, whether by the introduction of exceptions, or by means of general licences for humanitarian action.

The impact of CT measures and country-specific sanctions on humanitarian action has been with us for too long. It has been highlighted again by the COVID-19 pandemic. There are ways in which it can be addressed, and progress is overdue.

Annex

Three examples of sanctions regimes with safeguards for humanitarian action

This Annex compares three instances when exceptions for humanitarian action were included in international sanctions regimes:

- the UN flight ban into Taliban-controlled areas of Afghanistan;
- the financial sanctions in the UN Somalia sanctions; and
- the prohibition on purchasing oil in the EU Syria sanctions.

For each example consideration is given to the nature of the prohibition; the activities and actors falling within the scope of the exception; and any oversight arrangements to ensure the exception operated as intended.

1. UN flight ban to Taliban-controlled areas, December 2000–January 2002

In December 2000 the UN Security Council imposed a ban on flights from or to Taliban-controlled areas but excluded 'organizations and governmental relief agencies which are providing humanitarian assistance to Afghanistan, including the United Nations and its agencies, governmental relief agencies providing humanitarian assistance, the International Committee of the Red Cross and non-governmental organizations as appropriate' on a list maintained by the Taliban Sanctions Committee.[143] The Committee was tasked with keeping the list under regular review, adding new organizations and governmental relief agencies as appropriate, and removing them if it decided that they were operating, or were likely to operate, flights for other than humanitarian purposes.

During the year the flight ban was in force, some fifty organizations were included on the list – the vast majority of which did not actually operate flights to Taliban-controlled areas. Only a small number of humanitarian actors operated regular flights: the UN, the ICRC, and PACTEC. The Sanctions Committee reviewed the applications on a 'no objection basis': all that was required was the provision of identification information and a brief description of the operations in Afghanistan.

143 SCR 1333 (2000), OPs 11 and 12. The prohibition was not renewed when the sanctions were revised by SCR 1390 (2002).

In twelve months, the Committee appears to have rejected applications or removed organizations from the list only on a handful of occasions, and always because the operations of the organizations were conducted by land and not by air.[144]

This is sometimes referred to as successful use of a 'white list' of exempted actors. However, its precedential value is limited. It related to an extremely narrow prohibition – operating flights – that only affected a very small number of humanitarian actors, and that was in force for just one year. The fact that the system 'worked' on this occasion cannot be taken as an indication that 'white lists' are appropriate in other contexts. The specific circumstances of this case meant that some of the concerns expressed about 'white lists' simply did not arise. These include:

- that a 'white list' necessarily implies a 'black list';
- that the criteria for inclusion on the 'white list' require those responsible for screening applicants to make subjective judgments on, for example, their compliance with humanitarian principles; and
- that inclusion on a 'white list' adversely impacts perceptions of the neutrality of the listed humanitarian actors, associating them with the political entities that impose the sanctions, and thus putting their operations and beneficiaries at risk.

In this case, the number of humanitarian actors that fell within the scope of the flight ban was small, and the criterion for inclusion on the list was factual: did they operate humanitarian flights to or from Taliban-controlled areas? This meant that there was no implicit 'black list', and that the Sanctions Committee was not exercising a subjective assessment of whether their activities complied with humanitarian principles. Moreover, as the criterion for inclusion on the list was factual, the risk that the actors on the list could be perceived as privileged or favoured by the body imposing the sanctions, and thus as being associated with its political agenda, were very slight.

2. UN Somalia financial sanctions, 2010 to date

At present, financial sanctions in the UN sanctions regime relating to Somalia are the only UN measures to include an express exception for humanitarian action. SCR 1844 (2008) imposed the sanctions, which included a prohibition on making funds, financial assets or economic resources to or for the benefit of designated individuals or entities. The al-Shabaab group was designated in April 2010. The exception was introduced by SCR 1916 (2010), which excluded from the scope of the prohibition '[…] the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners […]'.[145]

144 Reports of the Secretary-General on the humanitarian implications of the measures imposed by SCR 1267 (1999) and SCR 1333 (2000) on Afghanistan.
145 SCR 1916 (2010), OP 5.

The exception has been retained on every renewal of the sanctions. Its terms have changed slightly over the years to reflect the changes in the name of the UN funding mechanism for Somalia.[146]

Of the two criteria mentioned in the exception, no guidance is provided as to what constitutes 'urgently needed humanitarian assistance in Somalia'. It is possible to factually determine which organizations participate in the UN funding mechanism. The alterative criterion, of UN General Assembly observer status, was included essentially in order to bring the ICRC, which does not participate in UN funding mechanisms, within the scope of the exception. Direct or indirect participation as an implementing partner in UN funding mechanisms can provide the Security Council with the necessary reassurance that the exception will not undermine the purpose of the sanctions. Questions of reliability, a track record of operating in a principled manner and the existence of non-diversion measures are criteria that are applied when reviewing applicants for funding.

A light reporting requirement is associated with the exception. SCR 1916 required the UN Humanitarian Aid Coordinator for Somalia to report to the Security Council every 120 days on 'politicization, misuse, and misappropriation of humanitarian assistance by armed groups', the implementation of the exception, and on any impediments to the delivery of humanitarian assistance in Somalia.[147]

This obligation was retained in later resolutions, but amended in two significant ways: first, and, most importantly, SCR 1916 required reporting on interference with humanitarian assistance by just *one side* to the conflict: the armed groups. This one-sided reporting could have undermined perceptions of neutrality of the UN's most senior humanitarian representative in-country. Later resolutions required reporting on this issue without referring to any sides.[148] Second, later resolutions tasked the Emergency Relief Coordinator rather than the Somalia-based Humanitarian Coordinator with submitting the reports. Information was still going to come from the field, but 'elevating' the reporting requirement to UN headquarters meant that the report could be more analytical, and also shielded the Humanitarian Aid Coordinator from any resentments that might arise at field level.

3. EU Syria oil sanctions, 2012 to date

As originally adopted in 2012, the EU Syria oil sanctions contained an absolute prohibition on the purchase and transport of crude oil or petroleum products originating in Syria.[149]

In May 2013 the measures were amended '[w]ith a view to helping the Syrian civilian population, in particular to meeting humanitarian concerns, restoring normal life, upholding basic services, reconstruction, and restoring normal economic

146 SCR 2060 (2012) added the words 'including bilaterally or multilaterally funded NGOs participating in the United Nations Consolidated Appeal for Somalia'. SCR 2317 (2016) replaced 'Consolidated Appeal for Somalia' with 'Humanitarian Response Plan for Somalia'.
147 SCR 1916 (2010), OP 11.
148 SCR 1972 (2011), OP 5, SCR 2060 (2012), OP 8. From SCR 2111 (2013) onwards resolutions have required reporting on the delivery of humanitarian assistance and any impediments – without expressly mentioning the exception. A further change was the reporting period. Initially it was every 120 days, but the November 2019 renewal requested an annual report. SCR 2498 (2019), OP 34.
149 Council Regulation (EU) No 878/2011 of 2 September 2011, Article 1(2).

activity or other civilian purposes […].' Member states could issue derogations, provided the Syrian National Coalition for Opposition and Revolutionary Forces was consulted in advance.[150] However, these arrangements proved 'not sufficiently practical',[151] and in December 2016 the measures were modified further 'to provide for an authorisation scheme that better reflects operational conditions'.[152] The revised measures include both an exception and a simplified derogation compared to that of 2013.

The exception allows the purchase or transport in Syria of petroleum products 'by public bodies, or by legal persons or entities which *receive public funding from the Union or Member States* to provide humanitarian relief in Syria or to provide assistance to the civilian population in Syria, where such products are purchased or transported for the sole purposes of providing humanitarian relief in Syria or to provide assistance to the civilian population in Syria'.[153] (Emphasis added.)

The derogation covers actors that do not fall within the exception, allowing member states' competent authorities to authorize, on the general or specific terms and conditions they deem appropriate, the purchase or transport in Syria of petroleum products, provided the activities concerned are 'for the sole purpose of providing humanitarian relief in Syria or assistance to the civilian population in Syria'.[154]

The same activities are exempted from the ban – either via the exception or the derogation – namely, the purchase or transport of oil products 'for the sole purposes of providing humanitarian relief in Syria or to provide assistance to the civilian population in Syria'. No guidance is provided of what constitutes 'humanitarian relief' or 'providing assistance'. What differs are the actors. Those receiving public funding from the EU or its member states benefit from the exception, while other actors must apply for a derogation from member states. Individual member states decide what form this may take, in terms of duration, generality and whether to include conditions.

150 Council Decision (CFSP) 2013/255/CFSP of 31 May 2013, Article 6.
151 Council Decision (CFSP) 2016/2144 of 6 December 2016, PP 2: '[i]n view of the continuing humanitarian crisis in Syria and the critical role of Union actors in addressing the humanitarian needs of the Syrian people, it is important that humanitarian and civilian assistance activities continue inside Syria. The purchase of fuel is an operational requirement for the provision of humanitarian relief or assistance to the civilian population in Syria. Developments in the operational situation in Syria have shown that the current system for the licencing of the purchase of fuel in Syria is not sufficiently practical'.
152 Ibid., PP 3.
153 Ibid., Article 1(1), implemented by Council Regulation (EU) 2016/2137 of 6 December 2016, Article 6a(1). See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2144&from=LV.
154 Council Decision (CFSP) 2016/2144 of 6 December 2016, Article 1(2), implemented by Council Regulation (EU) 2016/2137 of 6 December 2016, Article 6a(2).

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Cover image: A wide view of the Security Council chamber with curtains open during the meeting on the situation in Mali.
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