

Research Paper

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Humanitarian Action and Non-state Armed Groups The International Legal Framework



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Summary

- Humanitarian operations for civilians under the effective control of non-state armed groups (NSAGs) have in recent years faced an additional hurdle: sanctions and counterterrorism measures requiring states to ensure that funds and other assets do not directly or indirectly benefit groups designated under such instruments. Frequently, these same groups are the NSAG parties to armed conflict that exercise control over civilian populations.
- The prohibitions on providing any support to designated groups are framed extremely broadly, and can potentially include relief supplies that are diverted to such groups or that otherwise benefit them; payments that humanitarian actors must make to such groups to be able to operate; and even the provision of medical assistance to wounded and sick members of the groups. Violations of these prohibitions are criminalized. Restrictions with similar effects are also frequently included in states' funding agreements with humanitarian actors.
- Banks must comply with the same sanctions and counterterrorism restrictions. To minimize the risk of liability, they have imposed restrictions on the services they offer to humanitarian actors operating in 'high-risk' countries. Overlooked until fairly recently, these restrictions, as well as increased costs for financial services, are having a significant impact on the capacity of humanitarian actors to carry out activities in certain contexts.
- Sanctions and counterterrorism measures also raise questions of compatibility with three areas of international humanitarian law (IHL): the entitlement of impartial humanitarian actors to offer their services to parties to an armed conflict; the rules regulating humanitarian relief operations; and the rules protecting the wounded and sick and those providing medical assistance. The measures may also prevent humanitarian actors from operating in accordance with humanitarian principles.
- The inclusion of exemption clauses for humanitarian action in sanctions regimes, and of exceptions in counterterrorism measures and relevant national laws are the most effective way of ensuring that humanitarian operations for civilians under the effective control of NSAGs do not violate international or national law. At present, only one conflict-related UN Security Council sanctions regime includes a humanitarian exemption.
- The Security Council should be encouraged to include such clauses systematically, as this is the best way of ensuring they are replicated in national law. Exemptions to this effect should be introduced in all relevant national measures. In addition, care should be taken in the formulation of terrorism-related offences in domestic legislation, to ensure that it is only support intended to advance the terrorist purposes of the group that is criminalized, and not humanitarian activities expressly foreseen and, in the case of medical care, protected by IHL.

Introduction

A significant number of current conflicts involve non-state armed groups (NSAGs) that exercise control over territory and civilians. Often these civilians are in need of assistance. International humanitarian law (IHL) provides that if the party to an armed conflict with control of civilians is unable or unwilling to meet their 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 must allow and facilitate rapid and unimpeded passage of humanitarian relief operations.

In responding, humanitarian actors must overcome numerous challenges, including insecurity arising from active hostilities or a breakdown in law and order, or bureaucratic constraints imposed by the parties to the conflict. In recent years humanitarian operations for civilians under the effective control of NSAGs have been faced with an additional hurdle: sanctions and counterterrorism measures requiring states to ensure that funds and other assets do not directly or indirectly benefit groups designated under such instruments. Frequently, these same groups are the NSAG parties to armed conflict that exercise control over civilian populations. The prohibitions on providing any support to designated groups are framed extremely broadly, and can potentially include relief supplies that are diverted to such groups or that otherwise benefit them; payments that humanitarian actors must make to such groups to be able to operate; and even the provision of medical assistance to wounded and sick members of the groups. Violations of these prohibitions are criminalized. Restrictions with similar effects are also frequently included in states' funding agreements with humanitarian actors.

Private actors, including the banking sector, must comply with the same sanctions and counterterrorism restrictions. To minimize the risk of liability, they have imposed restrictions on the services they offer to humanitarian actors operating in 'high-risk' countries. Overlooked until fairly recently, these restrictions, as well as increased costs for financial services, are having a significant impact on the capacity of humanitarian actors to operate in accordance with humanitarian principles in certain contexts.¹

All these measures are significantly affecting humanitarian actors' capacity to carry out essential humanitarian activities in accordance with humanitarian principles.

This paper presents the international law framework pertaining to this issue. An important body of literature on the topic already exists, but it is a complex area of law and a degree of confusion remains, including among stakeholders. This paper sets out the key elements of the law in a manner that is accessible to policymakers. It starts by outlining UN Security Council sanctions regimes and relevant international counterterrorism measures, and how they have been implemented into national law, respectively. It then describes two further sources of restrictions for humanitarian actors – funding agreements and measures adopted by the banking sector – before discussing the interplay of these measures with IHL. The conclusion sets out some suggestions for addressing the tensions between these different bodies of law.

¹ See Metcalfe-Hough, V., Keatinge, T. and Pantuliano, S. (2015), 'UK Humanitarian Aid in the Age of Counter-terrorism: Perceptions and Reality', Working Paper, Humanitarian Policy Group.

UN Security Council sanctions

Sanctions against parties to armed conflicts

A number of UN Security Council sanctions regimes authorize the imposition of targeted sanctions against NSAGs parties to armed conflicts in various contexts.² These include Somalia, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR).³ The Security Council has currently designated five NSAGs under these sanctions regimes: al-Shabaab in Somalia; the Allied Democratic Forces, the Forces Démocratiques de Libération du Rwanda, and M23 in the DRC; and the Lord's Resistance Army in relation to the CAR.⁴

These sanctions require UN member states to impose various restrictions on designated entities. Of particular relevance to humanitarian action are asset freezes. These usually consist of two elements. The first requires member states to freeze all funds, other financial assets and economic resources owned or controlled, directly or indirectly, by designated entities. The second requires member states to ensure that funds, financial assets or economic resources are prevented from being made available to or for the benefit of designated entities.

It is this second element that can be problematic for humanitarian action. The risk exists that such an obligation will be interpreted as including payments that must be made to such groups for humanitarian relief to reach civilians in need, such as tolls or other fees levied by groups that have effective control of the civilians or of the territory that relief operations must cross to reach them. It could also be interpreted as covering humanitarian goods or equipment that have been diverted to the groups or that otherwise benefit them, directly or indirectly.

At present, the Somalia sanctions regime is the only one relating to a situation of armed conflict that recognizes this risk. It addresses it by means of an exemption adopted in 2010 in response to the situation of famine in many parts of the country, including those under al-Shabaab control. The most recent formulation provides that the asset freeze:

shall not apply to 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, and their implementing partners including bilaterally or multilaterally funded non-governmental organizations participating in the United Nations Humanitarian Response Plan for Somalia.⁵

Although the same risks exist under the other armed conflict-related sanctions regimes, they do not currently include a similar exemption.⁶ The only comparable one is in the Democratic People's Republic of Korea (DPRK) sanctions regime. Although this is not a situation of armed conflict, humanitarian needs are severe. In 2016 the Security Council significantly expanded its weapons

² For an explanation of the bases for the imposition of sanctions and the procedures for listing, see Security Council Report (2013), *Special Research Report: UN Sanctions*, New York: Security Council Report, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/special_research_report_sanctions_2013.pdf.

³ In Somalia, pursuant to SCR 1844 (2008); the DRC, pursuant to SCR 1596 (2005) as subsequently amended including, most notably, by SCR 1807 (2008); Libya pursuant to SCR 1970 (2011); the CAR, pursuant to SCR 2134 (2015); Yemen, pursuant to SCR 2140 (2014); and South Sudan pursuant to SCR 2206 (2015).

⁴ See <https://www.un.org/sc/suborg/en/sanctions/751/materials/summaries>; <https://www.un.org/sc/suborg/en/sanctions/1533/materials/summaries-0>; and <https://www.un.org/sc/suborg/en/sanctions/2127/sanctions-list-materials/summaries>.

⁵ SCR 2317 (2016), OP 28. First introduced by SCR 1916 (2010), OP 5.

⁶ Most sanctions regimes include exemptions that are sometimes misleadingly referred to as 'humanitarian exemptions'. Their objective is different. They allow states to lift restrictions, such as travel bans or asset freezes, for the benefit of designated individuals or entities, not for civilian populations in need. See for example SCR 2206 (2015), OP 13(a).

embargo but excluded food or medicine, and items used exclusively for humanitarian or livelihood purposes.⁷ This shows its awareness that humanitarian activities may fall within the restrictions imposed by sanctions, and of the need to exempt them in situations of severe civilian need.

Sanctions against specific terrorist groups

The UN Security Council has established two further sanctions regimes that can have a direct impact on humanitarian action, referred to as the ISIL (Da'esh)/Al-Qaida sanctions and the Taliban sanctions.⁸ They include asset freezes similar to those discussed above.

Although the sanctions regimes are framed in terms of counterterrorism, some of the designated entities are NSAG parties to armed conflict, so the asset freezes raise the same problems for humanitarian actors. By way of example, 75 entities are currently listed on the ISIL (Da'esh) and Al-Qaida Sanctions List, including the Al-Nusrah Front for the People of the Levant, and Al-Qaida in Iraq,⁹ NSAGs that control territory in Syria and Iraq where there are civilians in need of humanitarian assistance, or that otherwise control access to such persons. Any payment made by humanitarian actors to such groups as part of their operations, and any relief goods or equipment that are diverted from their intended beneficiaries and that benefit such groups, could fall within the asset freeze. Neither sanctions regime includes an exemption for humanitarian action.

Counterterrorism measures

States have assumed numerous obligations under international conventions or pursuant to binding UN Security Council decisions to prevent and suppress acts of terrorism. While sharing the same ultimate objective, these obligations are not necessarily coterminous: activities that are not prohibited by the counterterrorism conventions may nevertheless violate sanctions. Moreover, when giving effect to these obligations in domestic law, states have adopted different approaches and sometimes more restrictive measures that go beyond what their international obligations require.

Counterterrorism conventions

States have concluded 19 sectoral conventions that require them to criminalize particular acts of terrorism, establish jurisdiction over such crimes and prosecute or extradite persons suspected of having committed them.¹⁰

Of particular relevance to humanitarian action is the 1999 International Convention for the Suppression of the Financing of Terrorism. Under this treaty it is 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.¹¹

⁷ SCR 2270 (2016), OP 8(a).

⁸ SRC 1267 (1999) established a sanctions regime exclusively addressing the Taliban. SCR 1390 (2002) expanded it to include Al-Qaida. In 2011 SCRs 1988 and 1989 separated them into two sanctions regimes focusing on the Taliban and Al-Qaida respectively. In 2015 SCR 2253 expanded the Al-Qaida regime to include individuals and entities supporting ISIL (Da'esh). *Note that renderings of names of entities in this paper follow usage in current UN sanctions documentation and may differ from those in other papers in the series.*

⁹ As updated on 12 December 2016; the full list is available at https://www.un.org/sc/suborg/en/sanctions/1267/daq_sanctions_list.

¹⁰ United Nations Action to Counter Terrorism: International Legal Instruments, International Legal Instruments, <http://www.un.org/en/counterterrorism/legal-instruments.shtml> (accessed 20 Jan. 2017).

¹¹ 1999 International Convention for the Suppression of the Financing of Terrorism, Article 2.

The convention does not include any exemptions for humanitarian action. However, the mental element required to commit an offence is high: a person must have provided or collected funds with the intention or knowledge that they would be used to commit an act of terrorism.

UN Security Council Resolution 1373

Resolution 1373 (2001) requires member states to take a number of measures to enhance their legal and institutional ability to prevent and criminalize terrorist activities. This was the first in a series of thematic resolutions aimed at strengthening the international community's counterterrorism response.¹²

Of particular relevance to humanitarian action, Resolution 1373 required states to prevent and suppress the financing of terrorist acts, including by:

(b) Criminaliz[ing] 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;

[...] and:

(d) Prohibit[ing] 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.¹³

These measures are essentially identical to the asset freezes in the country-specific sanctions regimes discussed above. However, unlike those regimes, that established by Resolution 1373 does not include a list of designated persons or entities. It is left to states to establish their own lists. The resolution also does not include any exemptions for humanitarian activities. This shortcoming has, for the most part, been carried through to the measures that states have adopted to implement the resolution at national level.

The EU dimension

For EU member states, the EU Council Framework Decision on Combating Terrorism¹⁴ is a further source of obligation. It requires them to criminalize a number of acts, among them 'participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group'.¹⁵

The Framework Decision does not include any exemptions for humanitarian activities. While the offence is potentially broad, its scope is narrowed as it only covers instances where there is knowledge that doing so will contribute to the criminal activities of the group.

¹² Security Council Counter-terrorism Committee, <https://www.un.org/sc/ctc/>.

¹³ SCR 1373 (2001), OP 1.

¹⁴ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, amended by Council Framework Decision 2008/919/JHA of 28 November 2008.

¹⁵ Article 2b, Council Framework Decision 2002/475/JHA.

Implementation into domestic law

Implementation of UN Security Council sanctions

Security Council resolutions establishing sanctions do not specify how member states are to give effect to them at national level.¹⁶ Moreover, key elements are frequently not defined.¹⁷ Doing so is left to national instruments implementing the sanctions regimes. This inevitably gives rise to a lack of consistency.

Security Council resolutions are a baseline. In addition to giving effect to them in national law, states can also develop them, for example by adding designated entities. They can also impose additional restrictive measures by means of their own ‘autonomous’ sanctions, as can relevant regional organizations. The EU, for instance, has imposed sanctions in contexts such as Syria, where the Security Council has been unable to reach agreement.¹⁸

Exemptions and licences

Domestic implementing legislation should include any humanitarian exemptions provided for in the UN sanctions, but this is not always the case. For example, with regard to the Somalia sanctions, while most states have replicated the exemption in their national measures, the US and some others have not done so.

Most national systems foresee the possibility of obtaining licences authorizing otherwise proscribed dealings.¹⁹ While the ultimate effect of licences is the same as that of exemptions – humanitarian actors can conduct operations without facing the risk of violating asset freezes – they are a far more complex, time-consuming and unpredictable way of achieving this result. Moreover, unlike exemptions, licences are frequently limited in scope – whether in terms of which actors may benefit from them, the location of the permitted operations, or their duration. A further significant disadvantage is that separate licences will be required from every state that has a connection with a relief operation: the states of registration of the humanitarian organization and of nationality of its staff; the states through which the relief goods must transit and where the operations will be conducted; and even, in some cases, the states of origin of elements of equipment and technology.

Mental element

Sanctions violations are usually strict liability offences. No intent to support the listed entity is required; it is sufficient that a natural or legal person violates the relevant prohibitions, for example by making funds available, directly or indirectly, to a designated entity.

Extraterritorial jurisdiction

Legislation frequently gives courts jurisdiction over suspected violations committed by the implementing state’s nationals not just at home but also abroad, further extending the reach of sanctions measures.

¹⁶ On the approach adopted by the UK, see Jones, K. (forthcoming, 2017), *Humanitarian Engagement with Non-state Armed Groups: The UK Regulatory Environment*, Research Paper, London: Royal Institute of International Affairs.

¹⁷ Only very occasionally do sanctions committees provide guidance on key terms. See for example the Al-Qaida Sanctions Committee Explanation of Terms, https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/eot_assets_freeze_-_english.pdf.

¹⁸ Starting from Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria.

¹⁹ For a review of the various approaches adopted see Mackintosh, K. and Duplat, P. (2013), *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, pp. 19–44.

Implementation of international counterterrorism obligations

States must also give effect under national law to their obligations under international counterterrorism conventions and pursuant to relevant binding UN Security Council decisions such as Resolution 1373. As is the case for country-specific sanctions, in doing so they can adopt more restrictive measures or nuance their application by including exemptions.

In establishing crimes of support to terrorism, states have adopted different approaches to what is prohibited. Some states follow the language of the 1999 Terrorist Financing Convention more closely and criminalize the provision of resources with the knowledge or intent that they will be used to commit an act of terrorism.²⁰ Others take a broader approach and criminalize support to a terrorist group more generally.²¹ This second approach is more problematic for humanitarian actors, as the offences are defined broadly enough to capture payments made to terrorist groups in order to operate, or diverted relief supplies.

Occasionally, legislation criminalizes material support both for terrorist acts and to designated groups.²² A broad definition of ‘material support’, the absence of meaningful exceptions, the fact that the offence merely requires knowledge that the recipient of the support is a designated terrorist organization or that it has engaged or engages in terrorist activity, means that liability under the US legislation is potentially extremely broad.²³ It is broadened further by the fact that, in addition to criminal prosecutions, civil actions may be brought by those injured by an act of terrorism. US courts have found that the provision of material support may amount to such an act of terrorism and a number of civil suits have been brought on this basis.²⁴

Exceptions

Exceptions to offences of providing support to designated entities are extremely rare. The Australian Criminal Code includes an exception to the offence of associating with terrorist organizations when this is only for the purpose of providing aid of a humanitarian nature.²⁵ However, the related offences of receiving funds from or making funds available to a terrorist organization, and providing support to a terrorist organization do not include similar exceptions.²⁶ A further terrorism-related offence in the Australian Criminal Code includes an exception. Division 119.2(1) criminalizes entering or remaining in a ‘declared area’ – i.e. an area declared by the foreign minister as one where a listed foreign entity is engaging in hostile activity. Examples include the provinces of Ninewa in Iraq and Al Raqqa in Syria – both areas where humanitarian needs are severe. The offence is not committed if a person enters, or remains in, the area solely for legitimate purposes, including for providing aid of a humanitarian nature.²⁷

²⁰ See for example France, Code pénal, 421-2-2; Germany, 1993 Money Laundering Act; and the Netherlands, Article 4 Criminal Code, discussed in Mackintosh and Duplat, *supra*, pp. 29–32.

²¹ See for example Australia, Criminal Code Division 102.6 and 102.7; and Denmark, Section 114 Criminal Code, discussed in Mackintosh and Duplat, *supra*, pp. 23–25 and 28.

²² USA, 18 USC paras 2339A and 2339 B respectively. Subsequent legislative amendments developed the list of prohibited forms of support. See Charles Doyle, *Terrorist Material Support: An Overview of 18 USC 2339A and 2339B*, July 2010, CRS Report for Congress, <https://www.fas.org/sgp/crs/natsec/R41333.pdf>.

²³ See Doyle, *supra*, and Modirzadeh, N.K. Lewis, D.A. and Bruderlein, C. (2011), ‘Humanitarian Engagement under counter-terrorism: a conflict of norms and the emerging policy landscape’, *International Review of the Red Cross*, 93(833), p. 623.

²⁴ Doyle, *supra*, pp. 14 and 22.

²⁵ Australia, Criminal Code Division 102.8. The precise scope of this exemption is unclear. See Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, ‘Legislating against humanitarian principles: a case study on the humanitarian implications of Australian counterterrorism legislation’, 97 *IRRC* 2016, p. 235.

²⁶ Australia, Criminal Code Division 102.6 and 102.7.

²⁷ Australia, Criminal Code Division 119.2(3)(a).

The 1994 US legislation establishing the crime of providing material support or resources to terrorist acts excluded the provision of humanitarian assistance to persons not directly involved in such acts from the scope of ‘material support’.²⁸ However, in 1996 the exception was narrowed to exclude only the provision of medicine or religious material.²⁹

Mental element

The mental element required for the commission of these crimes may reduce the risk that payments to designed groups, or diverted relief supplies, would fall within the scope of the offences, depending on the formulation of the crime in national law. In some cases, the offence requires intent or knowledge that the resources will be used for the commission of a terrorist act.³⁰ Payments by humanitarian actors are unlikely to fall within the offence. In others, the offence requires intent or knowledge that the resources will support a terrorist group; or, even more basically, mere knowledge that the organization benefiting directly or indirectly is terrorist, or recklessness as to this.³¹ These are clearly more likely to raise problems for humanitarian actors.

Extraterritorial jurisdiction

The legislation of a number of states also gives their courts jurisdiction over alleged crimes committed by their nationals abroad. Some states also foresee the possibility, in special circumstances, of trying alleged offences committed by foreigners abroad.³²

General comments

Although bound by the same international obligations under UN Security Council sanctions and counterterrorism instruments, the approach adopted by states in giving effect to them is by no means uniform. Some states have broadened the scope of the offences, or designated additional persons and entities to those identified in Security Council sanctions. Support to a group that may be permissible under the legal framework of one state may be criminal under that of another which has designated that group.

Moreover, humanitarian organizations and their staff may face liability under the laws of a number of states: states parties to the armed conflict; the states of registration of the organization or of nationality of its staff; donor states; and other states whose laws have an extensive extraterritorial reach.

This lack of consistency is extremely challenging for humanitarian organizations, as it requires familiarity with the approaches adopted by numerous states – something that smaller organizations may simply lack the capacity to ensure. While proceedings against humanitarian organizations and their staff have not been numerous, the potential thereof has had a significant adverse impact on their capacity to operate in certain contexts, and to do so in compliance with the humanitarian principle of impartiality.

²⁸ USA, 18 USC para 2339A.

²⁹ USA, 1994, Violent Crime Control and Law Enforcement Act, Section 120005, Providing Material Support to Terrorists, 120005(a), definitions.

³⁰ For example, the Netherlands, Article 4 Criminal Code.

³¹ For example, Australia, Denmark and the US. See Mackintosh and Duplat, *supra*, pp. 23 and 28.

³² For example, in Australia the consent of the Attorney-General must be obtained, Criminal Code, Division 16.1.

Restrictive policies

Two further elements of the regulatory framework within which humanitarian actors operate give rise to additional obligations and constraints: requirements in funding agreements, and restrictions imposed by the financial sector.

Requirements in funding agreements

The adoption of laws is one way in which states can give effect to their obligations to prevent financial and other material support reaching designated entities. Another way that may also have an impact on humanitarian action is the inclusion of provisions in funding agreements³³ to ensure designated entities do not receive funds directly or indirectly via the projects they fund.

Humanitarian organizations and their staff are bound by national legislation prohibiting material support to designated entities or imposing asset freezes. Violation thereof may lead to criminal liability. Requirements in funding agreements are a separate and additional source of obligation. Failure to comply with them may lead to a termination of the contract, not to criminal liability. This is still significant, however, as it might make it extremely difficult for a humanitarian organization to obtain funding in future.

Types of restrictions

While some donors have systematically included such clauses in funding agreements, this practice is by no means uniform. Some important donors to the humanitarian system have not done so to date.³⁴ Instead, they try to prevent funds and other resources reaching designated entities by other means, including humanitarian actors' risk-management procedures.

Those states, including Australia, Canada, the UK and the US, that do include sanctions- or counterterrorism-related requirements in funding agreements adopt a variety of approaches. Some only include such clauses in agreements for contexts where the risk of funds reaching designated entities is considered particularly high.³⁵ Others impose different requirements depending on the recipients of funding – e.g. UN agency or non-governmental organization (NGO) – presumably on the basis of the donor's assessment of the risk that the funds will reach a designed entity.³⁶

The obligations imposed on recipients of funding also vary significantly. The most basic require them to 'use their best endeavours'³⁷ to ensure that funding is not used to provide direct or indirect support to organizations or persons associated with terrorism. More demanding clauses require recipients to ensure that individuals or organizations implementing operations funded by the grant are in no way associated directly or indirectly with individuals or entities associated with terrorism.

³³ While attention has focused principally on states' funding agreements, some private-sector donors have included similar clauses in funding agreements. See for example Harvard Law School/Brookings Project on Law and Security, Counterterrorism and Humanitarian Engagement Project (2014), *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts*, pp. 20 and 35.

³⁴ These include Denmark, the Netherlands, Norway, Switzerland and the European Commission's Directorate-General for Humanitarian Aid and Civil Protection (ECHO). See Mackintosh and Duplat, *supra*, pp. 53, 55 and 57, and Counterterrorism and Humanitarian Engagement Project (2014), *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts*, p. 35.

³⁵ Mackintosh and Duplat, *supra*, p. 62.

³⁶ See for example the practice of Australia outlined in Mackintosh and Duplat, *supra*, pp. 47–48.

³⁷ The contracts concluded by some states impose an apparently absolute obligation to not make funds available directly or indirectly to or for the benefit of people or groups 'associated with' terrorism. Other states adopt more nuanced language requiring recipients to 'use their best endeavours' or 'take appropriate steps' to ensure this does not happen. Mackintosh and Duplat, *supra*, pp. 62 and 69. See also Counterterrorism and Humanitarian Engagement Project, *supra*, p. 33.

Recipients of funding are usually required to inform the donor if they become aware of instances of funds reaching designated persons or entities, or of any ‘association’ therewith.

At present, the US imposes the most onerous requirements.³⁸ In addition to obligations similar to those just discussed, recipients of funding may have to provide details of subcontractors. Moreover, the controversial Partner Vetting System, imposed on certain recipients of funding in particular contexts, requires vetting of all persons benefiting from this funding, at times down to beneficiary level, to be screened against classified US databases.³⁹

While there have been references to ‘no-contact’ policies in funding agreements precluding recipients from engaging with members of specific designated entities, to date this appears only to have occurred with regard to Hamas in Gaza.⁴⁰ Even this is not an absolute prohibition on any contact with Hamas officials, but a requirement that when contact is necessary, including to implement programmes, it take place at a technical and at the lowest possible level. This can nevertheless impair the effectiveness of planning and implementation of humanitarian programmes, as well as their impartiality.

Adverse consequences of restrictions

Donor states’ desire and indeed obligation to exercise oversight to ensure their funding does not support designated entities is understandable. However, the inclusion of these provisions has raised a number of concerns for humanitarian actors.

First, complying with reporting and other requirements is administratively onerous in terms of times and costs. Smaller NGOs in particular have struggled to meet this additional burden.

Second, some of the more intrusive measures, most notably vetting but also the obligation to notify donors if recipients become aware of any ‘association’ with designated individuals or entities, may give the impression that humanitarian actors are gathering intelligence. More generally, such measures may be perceived as co-opting them into donor states’ broader counterterrorism strategies. This may have an impact on perceptions of the neutrality of humanitarian actors, with adverse consequences for their operations and security, all the more so if donor states are parties to conflicts where the humanitarian operations are being implemented.

Finally, and possibly most problematically, these measures can have direct repercussions on operations. The potential breadth of who may be considered as ‘associated with terrorism’ in contexts where designated entities are parties to armed conflict, and of the obligation not to provide such persons any direct or indirect assistance, may mean that compliance is unrealistic in situations where designated entities control territory and/or access to civilians. Complying with these obligations may preclude humanitarian actors from conducting activities in certain areas, despite needs, because it would not be possible to do so without providing the prohibited support. Terminating or planning operations so as to avoid violating the agreements may prevent humanitarian actors from operating in accordance with humanitarian principles – particularly the principle of impartiality, which requires relief to be provided without adverse distinction and to be prioritized solely on the basis of need.⁴¹ It may also mean that people most in need do not receive assistance they require.

³⁸ See Mackintosh and Duplat, *supra*, pp. 64–69.

³⁹ See Charity and Security Network (2015), Partner Vetting System (PVS) Overview, <http://www.charityandsecurity.org/taxonomy/term/15> (accessed 20 Jan. 2017).

⁴⁰ See discussion in Mackintosh and Duplat, *supra*, p. 90 *et seq.*

⁴¹ For an explanation of humanitarian principles and their application in practice, see for example https://docs.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf.

Banking-sector policies and restrictions

Like humanitarian actors, banks must comply with counterterrorism measures and sanctions legislation. They must refrain from making any funds, financial assets, 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. The measures adopted by the banking sector to comply with these obligations have limited humanitarian organizations' access to banking services.⁴²

The Financial Action Task Force (FATF) – an intergovernmental body originally established to develop measures to combat money-laundering – has played an important role in increasing banks' reluctance to provide services to clients perceived as 'high-risk'. In 2001 the FATF's mandate was expanded to include terrorist financing.⁴³ It has developed a series of recommendations to promote effective implementation of measures to combat both money-laundering and terrorist financing. Although these recommendations are not legally binding, and the FATF cannot impose sanctions, compliance by member states and their banking systems is peer-reviewed, and a poor review can be damaging for a country's financial sector.

Of particular relevance to humanitarian actors is Recommendation 8, which focuses on ensuring that non-profit organizations are not misused to finance terrorism. It provides that:

countries should review the adequacy of laws and regulations that relate to non-profit organizations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organizations to protect them from terrorist financing abuse, including:

- (a) by terrorist organizations posing as legitimate entities;
- (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and
- (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organizations.⁴⁴

The current formulation of this recommendation was adopted in June 2016, in response to the concerns expressed by non-profit organizations that the previous language, which referred to non-profit organizations generally as being 'particularly vulnerable' to terrorist abuse, had led to overregulation and inappropriate restrictions, thus hampering their operations.⁴⁵

Sanctions and counterterrorism-related legal obligations, FATF policies and the reality that humanitarian organizations are rarely profitable clients have all combined to make banks more reluctant to provide services to such organizations in relation to contexts where designated entities operate.⁴⁶ Many organizations are experiencing difficulties in accessing financial services crucial to their capacity to fundraise, disburse funds and operate. They have been unable to open accounts, receive or transfer funds, have experienced delays or significantly increased charges, or have had their accounts closed.

⁴² Metcalfe-Hough et al., *supra*; Mackintosh and Duplat, *supra*, pp. 104–106; and Keatinge, T. and Keen, F. (forthcoming, 2017), *Humanitarian Action and Non-state Armed Groups: The Impact of UK Banking Restrictions on NGOs*, Research Paper, London: Royal Institute of International Affairs.

⁴³ See <http://www.fatf-gafi.org>.

⁴⁴ See http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf, p. 13.

⁴⁵ See for example <http://www.charityandsecurity.org/system/files/2016%2006%20NPOs%20applaud%20important%20changes%20in%20Financial%20Action%20Task%20Force%20%28FATF%29%20policy.pdf>.

⁴⁶ Metcalfe-Hough et al., *supra*, p. 14.

The constructive engagement of non-profit organizations with the FATF that led to the revision of Recommendation 8 is positive, and must be replicated and built on at national level, between humanitarian and other non-profit organizations, relevant parts of government, and the banking sector.

Interplay with international humanitarian law

Consideration must also be given to the interplay between IHL and sanctions and counter-terrorism measures. The compatibility of these measures with three areas of IHL warrants closer scrutiny: the entitlement of impartial humanitarian actors to offer their services to parties to an armed conflict; the rules regulating humanitarian relief operations; and the rules protecting the wounded and sick and those providing medical assistance. The measures may also prevent humanitarian actors from operating in accordance with humanitarian principles.

Offers of services

Common Article 3(2) of the 1949 Geneva Conventions (GCs) establishes the entitlement of impartial humanitarian bodies to offer their services to parties to international and non-international armed conflicts. Parties to the latter may include NSAGs designated under sanctions regimes or counterterrorism legislation. Measures that would criminalize offers of services by humanitarian actors to such groups would be incompatible with Common Article 3(2) GCs.⁴⁷

Very few of the existing measures go this far. None of the UN Security Council sanctions regimes or the counterterrorism conventions preclude humanitarian organizations from offering services. At the national level, Australia's crime of associating with terrorist organizations appears to preclude making offers of services in such circumstances, but an exception covers situations where the association is only for the purpose of providing aid of a humanitarian nature.⁴⁸

It is the 'no-contact' policies adopted by some donors that are the closest to being incompatible with common Article 3(2) GCs. As already noted, at present these appear to exist only in relation to Hamas in Gaza, and even then, despite their broad names, they do not preclude all contact but require it to take place at a technical and the lowest possible level. While this may undermine proper planning and implementation of programmes,⁴⁹ it does not preclude humanitarian actors from offering their services to parties to a conflict.

Rules regulating humanitarian relief operations

The basic rules of IHL regulating humanitarian relief operations are essentially the same in international and non-international conflicts: primary responsibility for meeting the needs of civilians lies with the party to the conflict under whose effective control they find themselves. 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 and conducted without any adverse distinction. The consent of affected states is required but may not be arbitrarily withheld.

⁴⁷ See for example *Commentary to First Geneva Convention*, 2nd edition, 2016, para 804.

⁴⁸ Australia, Criminal Code Division 102.8(1) and 102.8(4)(c) respectively. On the scope of the exemption see Wynn-Pope et al., *supra*, p. 246.

⁴⁹ See Mackintosh and Duplat, *supra*, pp. 94–102.

Once consent has been obtained, parties to an armed conflict must allow and facilitate rapid and unimpeded passage of supplies, equipment and personnel involved in the humanitarian relief operations. They may prescribe technical arrangements under which such passage is permitted.⁵⁰

Tensions may arise between these rules and restrictions in sanctions and counterterrorism measures, particularly in non-international armed conflicts when designated entities control territory where civilians in need find themselves, or otherwise control humanitarian actors' access to them. The precise interplay between the two sets of norms varies depending on whether the party imposing the sanctions or counterterrorism-related restrictions is a party to the armed conflict or not.

The consent of states parties to an armed conflict in whose territory humanitarian relief operations will be conducted is required but may not be arbitrarily withheld. Withholding consent merely because the party in control of the territory where civilians find themselves is a designated group would be arbitrary. It would violate that party's obligations with respect to that civilian population. If civilians are facing starvation, it would violate the prohibition of starvation as a method of warfare; if the relief operations include medical supplies, it would violate their entitlement to receive medical care. More generally, it would violate the prohibition on discrimination and could be considered a form of collective punishment. However, states are entitled to prescribe technical arrangements for the passage of the relief operations, including, for example, requiring humanitarian actors to adopt measures to ensure that relief is not diverted from the intended beneficiaries.

This said, absent a humanitarian exemption, humanitarian relief operations may still be incompatible with asset freezes under sanctions and counterterrorism measures: relief goods might still reach members of designated groups rather than civilians; fees might still have to be paid to such groups; and medical care might be provided to wounded and sick fighters. In view of this, the consent of the state to the relief operations would essentially be meaningless, as the organizations implementing the relief operations and their staff would still be exposed to the risk of liability under national law.⁵¹

The position is similar for states parties to an armed conflict and non-belligerents through whose territory relief operations must transit. Under IHL their consent is required but may not be arbitrarily withheld. The same tensions would arise with sanctions and counterterrorism measures, which could render the consent of these states meaningless in practice.

IHL does not address the position of other states, including the states of registration of humanitarian organizations or of nationality of their staff. As a matter of IHL, their consent to the relief operations is not required. However, as outlined above, many states' sanctions and counterterrorism measures criminalize humanitarian operations that provide material support to designated groups, even when this occurs abroad. In the absence of a humanitarian exemption, this can give rise to a situation where, despite having obtained the consent of parties required by IHL, such organizations and their staff are nonetheless exposed to liability under national law. Criminalizing operations that are lawful under IHL runs against the spirit of this body of law.

⁵⁰ See Akande, D. and Gillard, E. (eds) (2016), *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, University of Oxford and UN Office for the Coordination of Humanitarian Affairs.

⁵¹ UN agencies and their staff have immunities from proceedings before domestic courts, as do a small number of humanitarian organizations and their staff pursuant to headquarters agreements. Most NGOs and their staff do not enjoy similar immunities.

Protection of the wounded and sick

The entitlement of wounded and sick civilians and fighters who are hors de combat to receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition is a foundational principle of IHL. Medical reasons are the only permissible basis for treating the wounded and sick differently.⁵² Equally foundational is the rule protecting those providing medical assistance from being harmed, prosecuted or otherwise punished for having provided medical care, regardless of the nationality, religion, status or affiliation with a party to the conflict of the person receiving such care.⁵³

Recent conflicts have seen severe and repeated violations of these protections. While attention has focused on attacks against healthcare facilities, a number of less evident measures suggest a rejection of the foundational principles just outlined, at least when the medical care is connected to NSAGs, and particularly when these have been designated as terrorist. These measures have taken two principal forms: denial of access of medical relief operations; and the criminalization of the provision of medical care to members of designated groups.

In some contexts, Syria being the most documented,⁵⁴ parties to armed conflict have refused to allow the passage of medical relief supplies and equipment, because these could be used to treat enemy fighters. Such refusal violates the principle that the wounded and sick – including enemy combatants – must receive the medical care required by their condition. Moreover, the same medical supplies are also likely to be necessary for the civilian population, which would also be denied the medical relief to which it is entitled.

In a small but notable number of cases, people providing medical assistance have been listed in sanctions regimes, and in some instances prosecuted, for having provided medical assistance to members of designated groups. At the international level, while the provision of medical assistance is not per se a basis for designation under the UN Security Council ISIL (Da'esh)/Al-Qaida sanctions, the Sanctions Committee has listed two people and two entities for, among other things, having provided medical care to members of designated groups.⁵⁵ This suggests that it considered the provision of medical care a prohibited form of assistance to Al-Qaida, even though this is expressly foreseen and protected by IHL. The Sanctions Committee's designations have been included in states' own sanctions lists, perpetuating the regrettable precedent.

At the national level, there have been a small number of prosecutions for having provided medical assistance to designated groups. For example, a doctor was convicted in the US of conspiring to provide medical care to wounded members of Al-Qaida, a form of criminal material support.⁵⁶ In an Australian case, a judge considered that the provision of paediatric training to members of the Liberation Tigers of Tamil Eelam – then a proscribed organization – would fall within the scope of the crime of training a terrorist organization.⁵⁷

⁵² Article 12 GC I and GC II; Article 10 AP I; and Article 7 AP II.

⁵³ Article 18 GC I; Articles 16(1) and 17(1) AP I; and Article 10(1) AP II.

⁵⁴ See for example UN Human Rights Council (2015), Report of the independent international committee of inquiry on the Syrian Arab Republic, UN Doc A/HRC/28/69 Annex II, para 264.

⁵⁵ See Lewis, D. A., Modirzadeh, N. K., and Blum, G. (2015), *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, Harvard Law School Program on International Law and Armed Conflict, pp. 110–111.

⁵⁶ See the prosecution of Dr Sabir, discussed in Lewis et al., *supra*, at p. 124 *et seq.* While medical materials are excluded from the definition of material support, medical services are not. In this case medical care was considered as amounting to providing 'personal and expert assistance' – a prohibited form of material support. See also the Warsame prosecution where the defendant was found guilty of having provided material support to Al-Qaida in the form of 'training' by having assisted nurses who treated wounded Al-Qaida fighters to read English-language labels on medicines. Lewis et al., *supra*, pp. 135–137.

⁵⁷ Supreme Court of Victoria, *R v. Vinayagamoorthy*, VSC 148, 31 March 2010, discussed in Wynn-Pope et al., *supra*, p. 251.

Compliance with humanitarian principles

States' sanctions and counterterrorism measures and related requirements in funding agreements can also have an impact on humanitarian actors' capacity to operate in accordance with humanitarian principles.⁵⁸ Most pertinent for present purposes is the principle of impartiality, which requires relief to be provided without adverse distinction and to be prioritized solely on the basis of need.

States are not bound by humanitarian principles, which guide how humanitarian actors should conduct their operations. The role of states is to uphold humanitarian principles and not prevent humanitarian action from being conducted in a principled manner.⁵⁹ Measures that impede humanitarian actors' capacity to operate in accordance with such principles may render it impossible for them to discharge their mandates. More fundamentally, it means that states and humanitarian actors are failing in their commitment to provide relief to people most in need.

Conclusion

If humanitarian actors are to be able to respond to the needs of civilians in the effective control of NSAGs in a principled manner, ways must be found to ensure that operations conducted as foreseen by IHL do not violate international or national law. Finding a workable solution requires the commitment and goodwill of all relevant actors: states when adopting international obligations or the domestic regulatory framework or entering into funding agreements, as well as humanitarian actors and the banking sector.

This issue has received considerable attention in recent years, particularly since the US Supreme Court's decision in *Holder v. Humanitarian Law Project*⁶⁰ and the challenges faced by those seeking to respond to the famine in al-Shabaab-held areas in 2010. It has been addressed in numerous academic and policy publications and discussions, which have led to valuable engagement between key stakeholders – humanitarian actors and states in their various capacities. These are essential steps in raising awareness of the problem and establishing channels of communication. The conversation is now sufficiently well informed and mature to proceed to the next stage: finding solutions.

The inclusion of exemption clauses in international sanctions regimes, and exceptions in counterterrorism measures and relevant national laws appears to be the most effective way of doing so. At present, only one conflict-related UN Security Council sanctions regime includes a humanitarian exemption. The Security Council should be encouraged to include such clauses systematically, as this is the best way of ensuring they are replicated in national law. Efforts should also be made to include such clauses in all EU sanctions and counterterrorism measures.⁶¹ Exemptions to this effect should be introduced in all relevant national measures. In addition, care should be taken in the formulation of terrorism-related offences in domestic legislation, to ensure that it is only support intended to advance the terrorist purposes of the group that is criminalized, and not humanitarian activities expressly foreseen and, in the case of medical care, protected by IHL.

⁵⁸ See Wynn-Pope et al., *supra*.

⁵⁹ See for example EU Consensus on Humanitarian Aid, para 10.

⁶⁰ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705.

⁶¹ This was one of the recommendations of the 2015 High Level Review of UN Sanctions; see http://www.hlr-unsanctions.org/HLR_Compilium_2015.pdf, Recommendation 66.

Humanitarian actors, for their part, must enhance measures to reduce the risk of diversion of supplies and other ways in which their operations could be abused – an endeavour that is already part of their operational policies and practices.⁶² Larger organizations are likely to have valuable experience to share. Robust risk-management measures play an important role in reassuring those adopting exemption clauses and donors that humanitarian actors are taking all feasible measures to minimize support to designated entities.

These steps may alleviate some of the banking sector's concerns, but it is likely to take time for their effects to filter down. In the interim, confidence-building dialogue should continue between humanitarian actors, relevant parts of government and the banking sector, both at the international level – under the auspices of the FATF – and nationally.

⁶² See Counterterrorism and Humanitarian Engagement Project (2014), *An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations*. The Norwegian Refugee Council's Risk management toolkit in relation to counterterrorism measures (2015) is a valuable compilation of existing good practices.

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About the Chatham House Humanitarian Engagement with Non-state Armed Groups project

Chatham House has undertaken a study of certain factors that contribute to facilitating engagement with non-state armed groups (NSAGs) for humanitarian purposes. The initiative is intended to generate both political support and practical policy options in order to increase the effectiveness of humanitarian action in areas of conflict through improving engagement and interaction with NSAGs.

This paper is one in a series of three that consider different aspects of the regulatory framework relevant to humanitarian action and NSAGs:

- *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*
- *Humanitarian Action and Non-state Armed Groups: The UK Regulatory Environment*
- *Humanitarian Action and Non-state Armed Groups: The Impact of UK Banking Restrictions on NGOs*

In 2016 Chatham House published a series of five papers as part of this study.

- *Towards a Principled Approach to Engagement with Non-state Armed Groups for Humanitarian Purposes*, Michael Keating and Patricia Lewis
- *Engaging Non-state Armed Groups for Humanitarian Purposes: Experience, Constraints and Ways Forward*, Andrew MacLeod
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Image: Internally displaced Pakistani children whose families fled a military operation against Taliban militants in the North Waziristan tribal agency queue at a food distribution point near a camp for IDPs in Bannu, near the North Waziristan border, on 6 September 2014.
KARIM ULLAH/AFP/Getty Images

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