Research Paper

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Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action

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Contents

Summary

- Civilians in need frequently find themselves in the effective control of non-state armed groups (NSAGs) that are designated under sanctions and counterterrorism measures, including in contexts identified as at risk of famine. The prohibitions in these instruments on providing funds or other assets directly or indirectly to such groups are framed extremely broadly, and can potentially include incidental payments that humanitarian actions may need to make in order to operate or relief supplies that are diverted to such groups or that otherwise benefit them.
- The inclusion of exemption clauses for humanitarian action in sanctions regimes is the most effective way of ensuring that humanitarian operations do not violate such prohibitions. At present, however, only one conflict-related UN Security Council sanctions regime includes such an exemption. Enhancing awareness of the problem is key. A series of steps is suggested in this paper for systematically gathering information on the adverse impact of sanctions on humanitarian action and bringing it to the attention of Security Council members as well as the broader UN membership.
- Similarly, the inclusion of exceptions for humanitarian action would be the most effective solution with regard to prohibitions on providing material support in counterterrorism measures. It is unlikely that international instruments such as the 1999 International Convention for the Suppression of the Financing of Terrorism, or UN Security Council Resolution 1373 will be amended in this way. Progress is more likely to occur at the national level.
- Recently, some autonomous EU sanctions and counterterrorism measures have been adjusted to exclude humanitarian action from the scope of the prohibitions. The EU's approach to this issue has received less attention than that of the Security Council but warrants further research, and constructive engagement between member states, the EU and humanitarian actors should continue.
- Banks must comply with the same prohibitions. To minimize the risk of liability, many have significantly limited the services they offer to humanitarian actors operating in contexts perceived as 'high risk'. The impact of these restrictions is so significant that some humanitarian actors have noted that banks are effectively dictating where they can operate. For the restrictions to be reduced, humanitarian organizations should invest the time to build their relationships with their banks to assist them to develop specialist knowledge of the humanitarian sector, its business model and its approach to risk mitigation.
- States must also play a far more active role in relation to banking sector restrictions at the national and international level. In their capacity as donors, they could engage directly with the banking sector to explain the programmes they fund, and the requirements they include in funding agreements to reduce the risk of diversion or abuse. States with an interest in humanitarian action and with influence in the financial world should initiate a discussion among peers to consider creative cooperative solutions, such as approved 'safe channels', recognized by a number of states, for transmitting funds.

1. Introduction

The problem

In 2010 famine was looming in parts of southern Somalia, including in areas under al-Shabaab control. Despite the severity of the civilian population's needs, some humanitarian organizations were concerned that while providing life-saving assistance they might violate the prohibition on providing funds and other assets imposed against al-Shabaab in UN Security Council sanctions and US law. Eventually, the Security Council adopted an exemption clarifying that the prohibition did not extend to support that may be provided in the course of humanitarian assistance operations.[1]

This was an extreme example of the problems that can arise when civilians in need find themselves under the effective control of a non-state armed group (NSAG) designated under sanctions or counterterrorism measures that prohibit funds and other assets from directly or indirectly benefiting such groups.

These prohibitions are framed extremely broadly, and can potentially include relief supplies that are diverted to such groups or that otherwise benefit them; and incidental payments that humanitarian actors must make to be able to operate. Restrictions with similar effects are also frequently included in states' funding agreements. Private actors, including the banking sector, must also comply with the sanctions and counterterrorism measures. To minimize the risk of liability, banks have imposed restrictions on the services they offer to humanitarian actors for operations in countries perceived as 'high risk'. Overlooked until fairly recently, these restrictions are having a significant impact on the capacity of humanitarian actors to operate in certain contexts.

At present, civilians in need find themselves under the control of designated NSAGs in numerous situations, including ISIL in Syria and Iraq, Hamas in Gaza, Al-Qaeda in the Arabian Peninsula in Yemen, and Boko Haram in Nigeria – these last two countries also being identified as at risk of famine. Seven years after the problem came to the fore in Somalia, sanctions and counterterrorism measures continue to affect humanitarian actors' capacity to conduct operations in accordance with humanitarian principles.

[1] See, De Waal, A, 'The Nazis Used It, We Use It' (2017), *London Review of Books*, 39(12), pp. 9–12, https://www.lrb.co.uk/v39/n12/alex-de-waal/the-nazis-used-it-we-use-it?utm_source=LRB+icymi&utm_medium=email&utm_campaign=20170702+icymi&utm_content=ukrw_nonsubs (accessed 14 Jul. 2017).

In 2016, as part of a joint project on Humanitarian Engagement with Non-state Armed Groups between Chatham House's International Security Department and International Law Programme,[2] three research papers were commissioned to explore, respectively, the international regulatory framework, that of the UK, and the impact on UK-based humanitarian organizations of banking-sector restrictions.[3] This paper now distils key points that emerged from the three papers already published, and from a series of workshops and consultations convened by Chatham House, and makes a number of recommendations for advancing the debate.[4]

This is not a new issue; the international regulatory framework in particular has received considerable attention in recent years. It has been addressed in numerous academic and policy publications and discussions.[5] This has led to valuable engagement between key stakeholders: states, in their capacity as donors to humanitarian organizations, but also as adopters and implementers of sanctions and counterterrorism measures; humanitarian organizations; and, more recently, the banking sector. These are essential steps in raising awareness of the problem and in establishing channels of communication, as finding solutions requires the commitment and goodwill of all stakeholders. But it is now necessary to progress to the next stage: identifying concrete ways of addressing the tensions between sanctions, counterterrorism measures and humanitarian action.

The topic is sensitive and complex, and a degree of confusion remains, even among those who have been involved in the discussions.[6] There is a need to broaden awareness of the issues beyond the relatively small circle of experts currently familiar with them within governments, and international and humanitarian organizations.

[2] For the first phase of the project see Lewis, P. and Keating, M. (2016), *Towards a Principled Approach to Engagement with Non-state Armed Groups for Humanitarian Purposes,* Briefing, London: Royal Institute of International Affairs, https://www.chathamhouse.org/publication/towards-principled-approach-engagement-non-state-armed-groups-humanitarian-purposes; and MacLeod, A., Hofmann, C., Saul, B., Webb, J. and Hogg, C. L. (2016), *Humanitarian Engagement with Non-state Armed Groups*, Research Paper, London: Royal Institute of International Affairs, https://www.chathamhouse.org/about/structure/international-security-department/humanitarian-engagement-non-state-armed-groups-project.
[3] Gillard, E.-C. (2017), *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*, Research Paper, London: Royal Institute of International Affairs, https://www.chathamhouse.org/publication/humanitarian-action-and-non-state-armed-groups-international-legal-framework; Jones, K. (2017), *Humanitarian Action and Non-state Armed Groups: The UK Regulatory Environment*, London: Royal Institute of International Affairs, https://www.chathamhouse.org/publication/humanitarian-action-and-non-state-armed-groups-uk-regulatory-environment; and Keatinge, T. and Keen, F. (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, London: Royal Institute of International Affairs, https://www.chathamhouse.org/publication/humanitarian-action-and-non-state-armed-groups-impact-banking-restrictions-uk-ngos (all accessed 14 July 2017).
[4] Although the present project focuses on humanitarian action, peacebuilding and development efforts are also affected. See for example Chatham House, International Law Programme and International Security Department (2015), 'UN Counterterrorism Legislation: Impact on Humanitarian, Peacebuilding and Development Action', roundtable summary, https://www.chathamhouse.org/sites/files/chathamhouse/UK-Counterterrorism-Legislation111115.pdf; and Dumasy, T. and Haspeslagh, S. (2016), *Proscribing peace: the impact of terrorist listing on peacebuilding organisations*, Briefing paper, Conciliation Resources, http://www.c-r.org/resources/proscribing-peace.
[5] See for example Harvard Program on Humanitarian Policy and Conflict Research (2011), 'Humanitarian Action under Scrutiny: Criminalizing Humanitarian Engagement', HPCR Working Paper, http://www.hpcrresearch.org/research/criminalizing-humanitarian-engagement; Pantuliano, S., Mackintosh, K. and Elhawary, S. with Metcalfe, V. (2011), *Counter-terrorism and humanitarian action: Tensions, impact and ways forward,* HPG Policy Brief 43; 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; Mackintosh, K. and Duplat, P. (2013), *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*; Metcalfe-Hough, V., Keatinge, T. and Pantuliano, S. (2015), *UK Humanitarian Aid in the Age of Counter-terrorism: Perceptions and Reality*, HPG Working Paper, London: Overseas Development Institute; Phoebe Wynn-Pope, P., Zegenhagen, Y. and Kurnadi, F. (2016), 'Legislating against humanitarian principles: a case study on the humanitarian implications of Australian counterterrorism legislation', *International Review of the Red Cross*, 97(897/898), p. 235. The UN Human Rights Council's Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also devoted a report to this issue: United Nations General Assembly (2015), A/70/371, 18 September 2015.
[6] The degree of confusion that remains about the regulatory framework was highlighted in the pilot empirical survey conducted in 2016 by the Harvard Law School Program on International Law and Armed Conflict: Burniske, J. S. and Modirzadeh, N. K. (2017), *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, http://blogs.harvard.edu/pilac/files/2017/02/Pilot-Empirical-Survey-Study-and-Comment-2017.pdf (accessed 14 Jul. 2017).

No one, single solution

As matter of law, the adverse impact of sanctions and counterterrorism measures on humanitarian action is essentially the same: exposure to the risk of criminal or civil liability. However, states' sensitivities are more acute in relation to the latter, and the ways of resolving the problems are different. There is no one, single approach to alleviating the tensions. What is best suited – and feasible – in relation to sanctions is not necessarily the same in relation to counterterrorism measures.

This said, the issues – and the solutions – are interconnected. One reason why states include restrictive clauses in funding agreements is to give effect to their obligations under sanctions and counterterrorism measures. If it were made clear that these measures do not cover humanitarian action, states might be amenable to including less onerous requirements in their funding agreements. The same goes for banks. While a number of factors contribute to their reluctance to provide financial services to humanitarian organizations operating in contexts perceived as 'high risk' – including the fact these are not high-profit clients – if the regulatory framework made it clear that humanitarian operations do not fall within sanctions or counterterrorism offences, banks might redirect their risk assessments to focus on genuine risks of abuse rather than on all humanitarian activities.

Ideally, the tensions should be addressed at the international level, by the adoption of exemptions in UN or EU sanctions, or of exceptions in counterterrorism measures, as this would lead to their global replication at the national level. But change can also occur at the domestic level. This will have immediate effect nationally, and can progressively influence the approaches of other states and intergovernmental organizations.

This paper discusses three principal sources of tension with and restriction of humanitarian action,[7] and makes recommendations for reducing them, with a particular focus on the role of states.[8] It starts by addressing sanctions and counterterrorism measures. It then sets out how these have been implemented by the EU, before considering banking-sector restrictions. The paper concludes with some general considerations on what is necessary to advance the discussions, and a summary of the recommendations made throughout the paper.

[7] Funding agreements also impose significant restrictions, but were beyond the scope of the Chatham House project. On such restrictions, see for example Mackintosh and Duplat (2013), *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, pp. 47ff.; and 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*.

[8] If progress is to be achieved, it is also incumbent on humanitarian organizations to take steps to address the concerns of states and the banking sector. Although largely beyond the scope of this paper, the three preceding research papers from the Chatham House project also include recommendations addressed to humanitarian organizations. See for example Gillard (2017), *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*, p. 15; and Keatinge and Keen (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, p. 24; and also Mackintosh and Duplat (2013), *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, p. 119; and Burniske and Modirzadeh (2017), *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, pp. 78–80.

2. Sanctions

The problem

A number of UN Security Council sanctions regimes authorize the imposition of targeted sanctions against NSAG parties to armed conflicts. Of particular relevance to humanitarian action are financial sanctions: asset freezes that, among other things, require member states to ensure that funds, financial assets or economic resources are not made available to, or for the benefit of, designated entities.

These asset freezes can be problematic for humanitarian action. The risk exists that the obligation not to make assets available to designated groups will be interpreted as covering incidental payments that must be made to such groups for humanitarian relief to reach civilians in need – for example, 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.

The scope of potential liability for violating asset freezes is very broad. No intent or knowledge is required: it suffices that assets are made available directly or indirectly to a designated entity.

While it is asset freezes that are most likely to have an adverse impact on humanitarian action and that, consequently, have received the greatest attention, other forms of sanction can have a similar impact. A recent example of another problematic measure was the prohibition on the purchase of crude oil or petroleum products in the EU's Syria sanctions, a restriction that significantly impeded humanitarian organizations' operations.[9] Less disruptive, but challenging nonetheless, are the situations where autonomous US export bans require licences from the US Commerce Department for the export of goods and technology with more than 10 per cent US content value, even if they are foreign-produced items. Such licences can take months to secure, if they are issued at all, and the legal costs of obtaining one can outweigh the value of the goods in question.[10]

The most effective solution: exemptions for humanitarian action

Exemptions in sanctions are the most effective way to ensure that restrictions do not apply to humanitarian action. The principal alternative to exemptions are licences issued by individual member states, but exemptions are preferable for a number of reasons. First, they make it clear from the outset that humanitarian activities do not fall within the scope of the sanctions, and that operations can be conducted wherever there are needs, in accordance with the humanitarian principle of impartiality. Second, obtaining licences is time-consuming and expensive – even licensing authorities recognize this.[11] Third, separate licences are necessary from every state that has a connection with

[9] Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 Art 6(b). As discussed below, in December 2016 the prohibition was revoked for humanitarian actors that receive public funding from the EU or its member states to provide humanitarian relief to civilians in Syria: Council Regulation (EU) 2016/2137 of 6 December 2016 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria.
[10] Keatinge and Keen (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, p. 19.
[11] For example, on the delays in the UK licensing system see http://www.exportlawblog.com/archives/8027.

a relief operation, including the state of nationality of the humanitarian organization and those through which the relief goods must transit and where the operations will be conducted. Fourth, and paradoxically, as far as the banking sector is concerned, licences have proved counterproductive. Some banks have interpreted the fact that humanitarians have obtained a licence to operate as an indication that their activities are 'on the edge' of legality. Instead of reassuring banks, licences are a red flag in their risk assessments. Finally, some humanitarian organizations consider that the process of requesting and obtaining licences puts them in too close a relationship with the states that issue them, undermining their neutrality and perceptions thereof – and, possibly, their capacity to operate in an impartial manner, responding solely on the basis of need, if the state refuses to issue licences for operations in areas under the control of designated groups. Despite this, and until a greater number of sanctions regimes include exemptions, licences have been the principal way in which states have excluded payments made in the course of certain humanitarian operations from the scope of asset freezes. In view of this, the arrangements for obtaining licences and, in the case of regional organizations such as the EU, the possibility for mutual recognition, warrant further research.

At present, only one UN Security Council sanctions regime – relating to Somalia – includes an express exemption for humanitarian assistance. This was adopted in 2010, at the time of the famine in areas controlled by al-Shaabab – an NSAG subject to an asset freeze under the sanctions.[12] The existence of the exemption shows that the Security Council is aware of the risk that humanitarian activities may fall within the scope of sanctions, and also of how to avoid this problem.

In view of this, why have similar exemptions not been adopted in other contexts where the same risk exists? The systematic adoption of exemptions for humanitarian action was one of the recommendations of the recent High Level Review of United Nations Sanctions.[13]

The Somalia exemption was adopted after a focused and public push by humanitarian actors unable to provide assistance to populations faced with famine. Since then, there has not been a similar concerted effort to persuade the Security Council to adopt an exemption in other contexts. The Security Council is an extremely cautious body, and will not adopt an exemption of its own accord. It needs to be actively pushed into doing so.

[12] First introduced by UN Security Council Resolution [henceforth SCR] 1916 (2010), OP 5, and most recently reiterated in SCR 2317 (2016), OP 28. In 2010 there was opposition to the inclusion of the exemption, including from within the UN Secretariat, on the grounds that *all* asset freezes included implicit exemptions for humanitarian action – as a minimum when conducted by UN agencies, funds and programmes and their implementing partners. Opponents were concerned that the inclusion of the exemption in the Somalia sanctions could be interpreted *a contrario* as indicating that, in the absence of a similar exemption, assets transferred in the course of humanitarian action could fall within the scope of asset freezes in other sanction regimes. They insisted that the exemption be prefaced by the words 'without prejudice to humanitarian assistance programmes conducted elsewhere'. Paradoxically and regrettably, these words appear to have been interpreted to mean the precise opposite. Author interviews, New York, October 2016.

[13] 2015 High Level Review [henceforth HLR] of UN Sanctions, http://www.hlr-unsanctions.org/HLR_Compendium_2015.pdf, Recommendation 25 and discussion at p. 55. See also Working Group III, UN Sanctions: Humanitarian Aspects and Emerging Challenges, Chairpersons' Report, 19 January 2015.

Raising awareness and gathering information: the need for a systematic approach

Somalia was an extreme situation, in which the UN eventually declared a famine.[14] The Security Council will have to be persuaded of the need for exemptions for humanitarian action in other contexts, where the needs are perceived as less severe. Experience in other areas has shown that in order to advance a relatively new issue, it must be brought to the attention of the Security Council in a systematic way. Change requires consistency and time.

If progress is to occur, *all* UN member states' awareness of the adverse impact of sanctions on humanitarian action must be raised. While authority for adopting sanctions lies with the Security Council, implementing them is a shared obligation of all member states. All therefore have an important role to play in highlighting the problem and in putting pressure on the Security Council to act. Until now, the issue has not been taken up by the UK, the Security Council member with the lead on the thematic agenda item relating to the protection of civilians, or by France, the frequent champion of humanitarian initiatives. In any event, elected members of the Security Council are frequently more successful than permanent members in advancing thematic issues. Raising awareness of the problem among the broader UN membership may enable future elected Security Council members to champion a solution.

A prerequisite for raising awareness is collecting information on the adverse impact of sanctions on humanitarian action. This is necessary at various stages: before sanctions are adopted; throughout their implementation; and before they are renewed. When the Security Council is considering the imposition of financial sanctions, it should – in consultation with humanitarian agencies and organizations – conduct an assessment of their possible adverse impact on humanitarian action.[15] Once it has imposed sanctions, it should require panels of experts to conduct and report on such impact assessments.[16]

In order to gather the necessary information, the dialogue between the Security Council as a whole, sanctions committees and their panels of experts, and humanitarian organizations should be enhanced and systematized. At present, humanitarian actors informally brief Security Council members on protection issues ahead of the establishment and/or renewal of peacekeeping operations, by means of the informal expert group on the protection of civilians.[17] Ways of establishing a similar systematic dialogue on the country-specific impact of sanctions on humanitarian action should be explored. A first possible step to highlight the issue could be for the informal expert group to hold a thematic meeting on it.

[14] 'UN declares famine in another three areas of Somalia', 3 August 2011, http://www.un.org/apps/news/story.asp?NewsID=39225#.WZGd59Pyu7N. In fact, one of the political goals of the declaration of famine was to put pressure on the US to find a workaround for the provisions of its counterterrorism legislation that exposed humanitarian actors responding to the famine to criminal liability. See de Waal, A. (2017), 'On the Significance of the Declaration of Famine in South Sudan', World Peace Foundation *Reinventing Peace* blog, 28 February 2017, http://sites.tufts.edu/reinventingpeace/2017/02/28/on-the-significance-of-the-declaration-of-famine-in-south-sudan/ (accessed 14 July 2017).
[15] HLR Recommendation 136.
[16] HLR Recommendation 64.
[17] On the Informal Expert Group on the Protection of Civilians, see Gillard, E.-C. and Piacibello, J. (2015), 'The Role of the Security Council in Enhancing the Protection of Civilians in Armed Conflicts', in Instituto Diplomático/Ministério dos Negócios Estrangeiros (eds) (2015), *A Participação de Portugal no Conselho de Segurança: 2011–2012*.

This said, some permanent Security Council members consider that all aspects of sanctions fall under the Council's exclusive mandate, including gathering information on their impact, a role entrusted to the panels of experts that it appoints. In the past, however, the Security Council has tasked UN humanitarian agencies with conducting assessments and pre-assessments of the humanitarian impact of sanctions more broadly, and nothing precludes it from doing so again in relation to the narrower question of their impact on humanitarian action.[18] In view of this, arrangements should be established for sanctions committees and panels of experts to systematically consult humanitarian actors.[19]

On their side, humanitarians will have to find ways of sharing information on the adverse impact of sanctions on their operations in a manner that addresses some actors' reservations about engaging too closely with a political body such as the Security Council and its subsidiary bodies.

Once this information has been gathered, numerous possible avenues exist for raising awareness. For example, the Security Council could request sanctions committee panels of experts to include such information in their reports as a matter of course. If special representatives of the Secretary-General have been appointed for the contexts where relevant sanctions have been imposed, the Security Council could request them to provide information on any adverse impact of sanctions on humanitarian action in their periodic reports. The final versions of the both types of reports are public documents, and so can therefore reach a broader audience than the Security Council members alone.

One of challenges of raising awareness is the 'siloed' nature of the UN – both within formal bodies, such as the sanctions committees, and also frequently in terms of responsibilities within permanent missions. State representatives participating in sanctions committees are sanctions experts, or possibly 'geographic' experts, who are – regrettably – unlikely to engage with their colleagues responsible for humanitarian affairs. However, the question of the impact of sanctions on humanitarian action falls across all these portfolios. As is the case within governments in capital, states should ensure that all relevant experts within their permanent missions are aware of the issue and contribute to the elaboration of a coherent position that balances humanitarian needs with political and security concerns.

Modalities for adopting exemptions

In terms of modalities for adopting exemptions for humanitarian action, the possibility of an '*omnibus*' or 'comprehensive' exemption has been advanced. This would be a self-standing resolution where the Security Council would undertake to systematically include exemptions for humanitarian action in sanctions. This is a good and simple option in theory, but it is questionable whether this approach is the most likely to succeed. Admittedly, the Security Council has adopted a small number of thematic resolutions, recommending that a range of actors take particular measures to address a specific issue.[20] It could take a similar approach with regard to sanctions. A thematic resolution could include a number of the good practices just mentioned in terms of raising awareness, as well as the undertaking to systematically include exemptions for humanitarian action.

However, given its extreme caution generally, Security Council sensitivities in relation to sanctions run particularly high. It also tends to be reluctant to commit itself to systematically taking a particular course of action. In view of this, at present, making the case for humanitarian exemptions on

[18] HLR, p. 83.
[19] HLR Recommendation 65.
[20] See for example SCR 1894 (2009), 11 November 2009, on the protection of civilians in armed conflict.

a case-by-case basis is preferable. This allows the Security Council to retain greater control of decisions, as well as the capacity to tailor its approach as appropriate to each circumstance. Its confidence in exemptions for humanitarian action needs to be built gradually, including by showing that these are effective and are not abused.[21]

The Security Council has imposed asset freezes against NSAG parties to armed conflicts in the country-specific sanctions regimes relating to Somalia, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR).[22] It has also done so against ISIL (Da'esh)/Al-Qaida and the Taliban in sanctions regimes framed in terms of counterterrorism.[23] Security Council members are likely to be more open to adopting exemptions for humanitarian action in country-specific sanctions rather than in counterterrorism ones, where sensitivities are more acute and concerns about abuse are more serious. Progress is therefore more likely to be achievable in relation to country-specific sanctions in the first instance. Positive practices developed in this area could encourage the subsequent adoption of similar measures in relation to counterterrorism-related sanctions.

This said, it is the ISIL (Da'esh)/Al-Qaida sanctions panel of experts that has taken the initiative in proactively engaging with humanitarians, asking for information on the adverse impact of the sanctions. The panel has also indicated its concern that asset freezes, and banks' consequent restriction of services to humanitarian organizations with operations in areas where designated entities are based, have led some organizations to resort to informal and unregulated channels to transfer the funds necessary to operate. This makes it more difficult to monitor such funds, and increases the risk of the very abuse the sanctions are trying to prevent.[24] Humanitarian organizations may have found an unexpected ally in the ISIL (Da'esh)/Al-Qaida panel of experts in advocating for exemption for humanitarian action to be included in the asset freeze.

Some humanitarian organizations' reservations about exemptions

As noted earlier, the Security Council is unlikely to adopt exemptions for humanitarian action unless it is pushed to do so. In 2010 humanitarian organizations that found themselves unable to operate in Somalia for fear of violating the asset freeze were the driving force behind the adoption of the exemption. Since then, there has not been a similar concerted effort in relation to other contexts, in part because humanitarian organizations do not have a common position on exemptions. While there is general agreement that licences – the principal alternative to exemptions – are ineffective for the reasons given above, some humanitarian organizations have reservations about exemptions, for a variety of reasons.[25]

[21] Feedback from those monitoring sanctions in Somalia, the only context in relation to which the Security Council has adopted an exemption for humanitarian action, notes that while Somalia remains a context where it is impossible to expect zero diversion – something all stakeholders acknowledge – the exemption has not increased the problem. On the contrary, its existence has opened a space for humanitarian actors and state donors to discuss constructive ways of reducing such risks. Author interviews, Rome, March–April 2017.
[22] 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).
[23] 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.
[24] Author interviews, New York, Geneva and Rome, October 2016–May 2017.
[25] Some humanitarian actors' reservations are set out in Burniske and Modirzadeh (2017), *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*.

Some are simply insufficiently familiar with the issue to feel comfortable in taking a position. Others confuse the restrictions arising from sanctions with those in donor agreements, and believe that asset freezes do not concern them as long as they do not accept funding from states. Others still benefit from privileges and immunities, and so are not directly concerned by the risk of prosecutions for violating sanctions.[26]

A further concern is that the inclusion of exemption clauses may actually limit rather than expand humanitarian actors' capacity to operate. States are concerned about the risk of abuse of exemptions, so they have limited their application to organizations that they trust. The exemption in the Somalia sanctions is framed broadly, and effectively covers all key international humanitarian actors,[27] but this is not necessarily always the case. The exemption in the EU's Syria oil sanctions, for example, only applies to 'legal persons, entities or bodies which receive public funding from the Union or Member States to provide humanitarian relief or assistance to the civilian population in Syria'.[28] In view of this, some humanitarian organizations consider that exemptions may be counterproductive, as they could be interpreted as prohibiting the activities of organizations that do not fall within their scope. Moreover, if exemptions are not included in all sanctions regimes, their absence in certain ones could be interpreted as indicating that humanitarian activities do fall within the scope of the sanctions. In view of this, some organizations prefer the ambiguity of sanctions that do not expressly address humanitarian action.

Other reservations relate to the conditions that the Security Council may attach to exemptions, in particular that these may be inappropriate or may put humanitarian organizations in too close a relationship with a political body. This concern is based on the Somalia sanctions, when, in 2010, in addition to granting an exemption for humanitarian action, the Security Council also requested the UN Humanitarian Aid Coordinator for Somalia to report periodically on measures taken to mitigate the 'politicization, misuse, and misappropriation of humanitarian assistance by armed groups'.[29] As the Security Council only focused on the practices of one side in the conflict – the armed groups – the arrangement was seen as having co-opted humanitarians into advancing its political agenda. The reporting requirement has since been amended, and now relates to *any* impediments to the delivery of humanitarian assistance in Somalia – not just those imposed by armed groups. Despite this, some humanitarian organizations remain wary that the quid pro quo for exemptions will be a requirement to contribute to further the Security Council's political objectives. They consider this would affect perceptions of their neutrality and, consequently, their capacity to conduct operations in a manner that is safe for staff and beneficiaries.

Whatever the merits of the various reservations, there is a need for a focused discussion on exemptions among humanitarian organizations to see whether their concerns can be addressed and to explore realistic options for doing so.

[26] Humanitarian organizations may benefit from privileges and immunities from domestic proceedings under multilateral conventions like the 1946 Convention on the Privileges and Immunities of the United Nations, and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, or under bilateral agreements with the states where they operate.
[27] SCR 2317, 10 November 2016: under OP 28 the asset freeze does 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'. While the principal international humanitarian organizations have observer status, many local ones do not.
[28] Council Regulation (EU) 2016/2137 of 6 December 2016, Article 1(2).
[29] SCR 1916, 19 March 2010, OPs 4 and 11.

If it adopts exemptions for humanitarian action, the Security Council is also likely to require humanitarian organizations to take specific measures to minimize the risk of diversion – even though this has not been the case to date in either the Security Council's Somalia sanctions or the EU's Syria ones. Such measures are already an integral part of humanitarian actors' due diligence practice in all contexts, but if they do not engage with the Security Council or the EU to discuss an approach they consider acceptable, it will be the Security Council or the EU that sets the conditions.

The national level

Many of the recommendations just made in relation to the adoption and implementation of sanctions at the multinational level are equally relevant at the national level. States that are involved in the adoption of sanctions at the multilateral level – for example, Security Council members or EU member states – should, in advance of their adoption, consult humanitarian organizations on the possible adverse impact of the sanctions on operations. All states should do so once the sanctions are implemented nationally. Consultations should continue throughout the implementation of the sanctions, so that any adverse consequences can be identified and brought to the attention of the international bodies responsible for the sanctions. This constructive interaction between states and humanitarian organizations is what led to the adoption of the exemption for humanitarian actors in the EU's Syria oil sanctions.

While states may adopt more onerous autonomous measures when implementing UN sanctions in national legislation, it is unclear whether there is any latitude for them to insert exemptions for humanitarian action in national legislation if UN sanctions do not include them. This question, as well as the domestic implementation of UN and EU sanctions, warrants further research.

In the absence of exceptions for humanitarian action in domestic legislation, it has been suggested that guidance could be issued to prosecutors and made public, indicating that humanitarian action is not the intended focus of prosecutions. This is the approach adopted in the US by the Office of Foreign Assets Control (OFAC), the body responsible for implementing and enforcing sanctions.[30] In practice, however, such guidance does not appear to have allayed the reservations of banks, which remain wary of providing services to humanitarian organizations for operations in 'high-risk' contexts.

[30] The October 2014 OFAC 'Guidance related to the provision of humanitarian assistance by not-for-profit non-governmental organizations' notes that 'some humanitarian assistance may unwittingly end up in the hands of members of a designated group. Such incidental benefits are not a focus for OFAC sanctions enforcement'. The Guidance also emphasizes that it is intended for informational purposes and does not have the force of law. See www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ngo_humanitarian.pdf.

3. Counterterrorism Measures

The problem

Stemming the flow of funds to organizations designated as terrorist is a core component of the international community's counterterrorism strategy. At the international level, the 1999 International Convention for the Suppression of the Financing of Terrorism[31] and UN Security Council Resolution 1373 (2001)[32] require states to criminalize the provision or collection of funds or other assets or making them available for the commission of acts of terrorism. These prohibitions can potentially capture humanitarian relief supplies that are diverted to such organizations or that otherwise benefit them, as well as incidental payments that humanitarian actors must make to them to be able to operate.

Potential liability under these instruments is more narrowly defined than in relation to sanctions. Offences are only committed if assets are collected or provided with the intent or in the knowledge that they will be used for the commission of acts of terrorism.

Possible solutions

As is the case for sanctions, the most effective way of ensuring that funds or other assets that reach designated entities in the course of humanitarian operations do not fall within the scope of counterterrorism measures would be for this to be noted expressly in the relevant international instruments. However, neither the 1999 Convention nor Resolution 1373 refers to humanitarian action. This is not surprising, as both instruments were adopted before the potential adverse impact of such measures on humanitarian action had been identified. In fact, it was as a result of the implementation of instruments such as these that the problem became apparent.

At the international level

States have started highlighting the potential adverse impact of counterterrorism measures on humanitarian action at the international level. The UN General Assembly has recently done

[31] Article 2 of the Convention makes 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. Funds are defined in Article 1 very broadly to refer to 'assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit'.

[32] OP 1 of SCR 1373 (2001) requires states to:

[a] Prevent and suppress the financing of terrorist acts;

[b] Criminalize 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;

...

[d] Prohibit 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.

OP 2 (e) builds upon this by requiring states to:

[e] Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the terrorist acts[.]

so on two occasions. In December 2015, in its annual resolution on the protection of human rights and fundamental freedoms while countering terrorism, it urged states, 'while undertaking counter-terrorism activities, to respect their international obligations regarding humanitarian actors and to recognize the key role played by humanitarian organizations in areas where terrorist groups are active'.[33]

Similarly, in its July 2016 resolution on the UN Global Counter-Terrorism Strategy, the General Assembly urged states 'to ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law'.[34]

The inclusion of these provisions in General Assembly resolutions is a positive development that shows states' increasing awareness of the potential adverse impact of counterterrorism measures, and suggests a willingness to begin to address these tensions. However, the resolutions are not binding. They will not lead to an amendment of the 1999 Terrorist Financing Convention, and it is improbable that the Security Council will adopt a binding resolution requiring states to exclude humanitarian action from counterterrorism measures. At present, change is more likely to occur at the national level as discussed below.

As is the case for sanctions, in order to advance the discussion – at the international and national level – it is necessary to systematically raise awareness of the issue. While the references to the tensions in the General Assembly resolutions do not of themselves solve the problem, they are a positive step. They should be retained and be built upon in future resolutions.

Other ways should also be found for enhancing awareness of the problem and finding ways of reconciling tensions. One possible avenue is the Counter-Terrorism Implementation Task Force (CTITF), the entity responsible for strengthening the coordination of the UN system's counterterrorism efforts. Its Working Group on Promoting and Protecting Human Rights while Countering Terrorism played an important role in highlighting human rights concerns. The adverse impact of counterterrorism on humanitarian action has received less attention. The Working Group on Countering the Financing of Terrorism brings together UN entities and international organizations to discuss how to counter the financing of terrorism and implement international standards, including the 1999 Terrorist Financing Convention and the recommendations of the Financial Action Task Force (FATF).[35] In 2009 the working group issued a report that touched on terrorist financing and the non-profit sector, principally by flagging the risk of abuse.[36] It should revisit the topic to reflect developments in the debates since then, and make recommendations that are relevant to the current situation. The extent to which humanitarian concerns have been raised in its activities is unclear. UN agencies, funds and programmes engaged in humanitarian action should endeavour to participate in the Working Group to inject this dimension into the discussions.

[33] General Assembly Resolution A/RES/70/148, 17 December 2015, OP 7.
[34] General Assembly Resolution A/RES/70/291, 1 July 2016, OP 22.
[35] The FATF – an intergovernmental body originally established to develop measures to combat money laundering whose mandate was expanded in 2001 to include terrorist financing – has played an important role in increasing banks' reluctance to provide services to clients perceived as 'high risk'. It has developed a series of recommendations to promote effective implementation of measures to combat terrorist financing.
[36] United Nations Counter-Terrorism Implementation Task Force (2009), *Tackling the Financing of Terrorism*, CTITF Working Group Report, pp. 16–18, http://www.un.org/en/terrorism/ctitf/pdfs/ctitf_financing_eng_final.pdf.

At the national level

At present, change is more likely to occur when states adopt legislation implementing their international obligations in domestic law. The tension between counterterrorism legislation and humanitarian action can be addressed in a number of ways. The clearest is for states to include an express exception for humanitarian action in offences of providing support to designated entities. Such exceptions are rare; in one such instance, 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.[37] A second terrorism-related offence, 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 – is not committed if a person enters, or remains in, the area solely for legitimate purposes, including the provision of aid of a humanitarian nature.[38] The 1994 US legislation establishing the crime of providing material support or resources to terrorist acts originally excluded the provision of humanitarian assistance to persons not directly involved in such acts.[39] In 1996 the exception was narrowed to exclude only the provision of medicine or religious material.[40]

One of the reasons for the scarcity of exceptions is that many states adopted legislation implementing the 1999 Terrorist Financing Convention and Security Council Resolution 1373 before the extent of the potential adverse impact of counterterrorism measures on humanitarian action was identified, so they did not address the issue. While understandable, this is unfortunate, because amending existing legislation is much more difficult than is including exceptions from the outset.

The UK is a case in point: in 2015 a parliamentary committee recommended that the government consider introducing exceptions to counterterrorism legislation for humanitarian activities. The Home Office and Treasury Office of Financial Sanctions Implementation responded: 'We assess that introducing a specific exemption for humanitarian and/or conflict resolution work would create a loophole that could be exploited by unscrupulous individuals and leave NGOs vulnerable to abuse'.[41] No explanation was given of the basis for this assessment, nor was it explained why the risk of exploitation could not be reduced by inclusion of a suitably worded intention requirement.[42]

States have a further opportunity to insert exclusions in existing counterterrorism legislation when revising it to give effect to new international obligations such as those under Security Council Resolution 2178 on foreign terrorist fighters. At this juncture, they could either insert a general exception for humanitarian action, or, as a minimum, include one in relation to the new offences. This said, if exceptions are only included in new offences, the risk exists that their absence with regard to existing offences could be interpreted as meaning that humanitarian action *could* fall within their scope.

A second option for reducing tensions is for states to frame counterterrorism offences narrowly to make it less likely that they would cover support provided in the course of humanitarian action. States have taken different approaches in giving effect to the 1999 Terrorist Financing Convention and Security Council Resolution 1373 in national law. Some have followed the language of the

[37] Australia, Criminal Code Division 102.8.
[38] Australia, Criminal Code Division 119.2(3)(a). So-called 'declared areas' currently include the provinces of Ninewa in Iraq and Al Raqqa in Syria – both areas where humanitarian needs are severe.
[39] USA, 18 USC, para. 2339A.
[40] USA, 1994, Violent Crime Control and Law Enforcement Act, Section 120005, Providing Material Support to Terrorists, 120005(a), definitions.
[41] Jones (2017), *Humanitarian Action and Non-state Armed Groups: The UK Regulatory Environment*, p. 13; and Joint Committee on the Draft Protection of Charities Bill, *Draft Protection of Charities Bill*, HL Paper 108, HC 103, February 2015, para. 186.
[42] Jones (2017), *Humanitarian Action and Non-state Armed Groups: The UK Regulatory Environment*, p. 13.

1999 Convention more closely, criminalizing the provision of funds with the *knowledge or intent* that they will be used to commit an *act* of terrorism.[43] Others have taken a broader approach, criminalizing support to a terrorist group more generally.[44] This second approach is more problematic for humanitarian actors, as the offences are defined broadly enough to capture payments made to designated groups in order to operate, or diverted relief supplies.

A small number of states have established positions to exercise independent oversight over the application of counterterrorism measures; the precise modalities for their creation and their mandates differ.[45] In the UK, for instance, the Independent Reviewer of Terrorism Legislation has played a crucial role in critically reviewing counterterrorism legislation at regular intervals on the basis of extensive engagement with key government departments as well as with a broad range of other stakeholders, highlighting concerns and making recommendations for improving the counterterrorism framework.[46] Other states should consider establishing similar positions.

Possibly paradoxically, while it is the fear of proceedings for violating sanctions and counterterrorism measures that is leading humanitarian organizations to curtail their operations – frequently by over-complying with the law – and banks to adopt restrictions, a court decision could in fact clarify the scope of the law. Decisions are only binding in the state where they are handed down; but, in the same way that the US Supreme Court's decision in *Holder v. Humanitarian Law Project* drew global attention to the problem, they could nonetheless shed useful light more generally.[47] Clarity can of course cut both ways, and the risk exists that a court would interpret the regulatory framework in a more restrictive manner than that in which it had previously been applied in practice. This goes to the heart of the debate as to whether it is preferable to have greater clarity, or more grey areas and thus margin for manoeuvre.

[43] 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 (2013), *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, pp. 29–32.
[44] See for example Australia, Criminal Code Division 102.6 and 102.7; and Denmark, Section 114 Criminal Code, discussed in Mackintosh and Duplat (2013), *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, pp. 23–25 and 28.
[45] The closest equivalent to the UK Independent Reviewer is Australia's Independent National Security Legislation Monitor. See Blackbourn, J. (2014), 'Independent reviewers as alternative: an empirical study from Australia and the United Kingdom', in Davis, F. F. and de Londras, F. (eds) (2014), *Critical Debates on Counter-Terrorism Judicial Review*, Cambridge: Cambridge University Press. On the proposals to establish a similar position in Canada, see Forcese, C. and Roach, K. (2016), *Bridging the National Security Accountability Gap: A Three-Part System to Modernize Canada's Inadequate Review of National Security,* Ottawa Faculty of Law Working Paper No. 2016-05. Although their mandates are different, the Défenseur des Droits Publics in France and the Privacy and Civil Liberties Oversight Board in the US have carried out similar reviews of counterterrorism legislation.
[46] Anderson, D. (2014), 'The Independent Review of Terrorism Laws', *Public Law* (2014), 403.
[47] *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705. In this decision, the US Supreme Court upheld the constitutionality of the federal Material Support Statute that prohibits knowingly providing 'material support or resources' to designated 'foreign terrorist organizations'. For the purposes of the statute, 'material support or resources' includes any property, tangible or intangible, or service, including lodging, training, expert advance or assistance. The petitioners wanted to train members of the Kurdistan Worker's Party (PKK) to use international law to resolve disputes; teach PKK members how to petition UN bodies; and engage in political advocacy on behalf of Kurds living in Turkey or Tamils living in Sri Lanka, but refrained from doing so for fear of prosecution under the Material Support Statute. The Supreme Court upheld the constitutionality of the statute, and found that the proposed activities, even though they focused on training, were prohibited. In doing so it relied on a broad conception of 'fungibility', which led it to conclude that even though some foreign terrorist organizations engage in political and humanitarian activities, they 'are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct'. For a detailed discussion of the litigation, see Modirzadeh et al (2011), 'Humanitarian Engagement under counter-terrorism', pp. 629ff.; and Doyle, C. (2016), *Terrorist Material Support: An Overview of 18 U.S.C §2339A and §2339B*, Congressional Research Service, https://www.fas.org/sgp/crs/natsec/R41333.pdf.

4. The EU Dimension

For EU member states, measures adopted by the EU are an additional source of obligation. As far as sanctions are concerned, UN Security Council sanctions are given effect in EU member states by means of EU regulations. The EU may additionally adopt autonomous sanctions – either expanding Security Council sanctions or imposing them in relation to additional contexts, such as Syria or Ukraine, where the Security Council was unable to reach agreement.[48]

The EU's approach to exemptions for humanitarian action in sanctions is not uniform. Where it is simply implementing UN sanctions, it follows the approach of the Security Council. There is thus an exemption in the Somalia sanctions but not in the others.[49] When it imposes autonomous sanctions, it sometimes includes exemptions and at other times foresees the possibility for member states to issue licences.

As stated, asset freezes are not the only form of restriction that may have an adverse impact on humanitarian action. Until recently, for example, the EU's Syria sanctions included a prohibition on the purchase of crude oil or petroleum products in Syria[50] – a restriction that significantly impeded humanitarian actors' operations. In December 2016 the sanctions were amended to remove this prohibition for humanitarian actors that receive public funding from the EU, or from member states to provide humanitarian relief to civilians in Syria.[51] The amendment is a positive instance of constructive engagement between states and humanitarian actors. A member state raised this issue on the basis of input received from humanitarian organizations. The issue was discussed in the sanctions group of the Working Party of Foreign Relations Counsellors, and a formulation was agreed that balanced the needs of humanitarian actors with the concerns of some member states that the exemption could be abused.

This dialogue between states, the multilateral organizations imposing sanctions and humanitarian actors should be built on, with a view to making such engagement systematic – both before the adoption of sanctions, and throughout their implementation.

The EU has also adopted measures to stem terrorist financing. These take two forms: first, Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, *inter alia*, gives effect to Security Council Resolution 1373 for the EU and its member states.[52] Of particular relevance to humanitarian action, it requires the European Community to ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for the benefit of designated persons, groups and entities.[53]

[48] Initially imposed by Council Decision 2011/273/CFSP of 9 May 2011 in relation to Syria, and by Council Decision 2014/386/CFSP of 3 June 2014 in relation to Ukraine.
[49] Council Regulation (EU) No 356/2010 of 26 April 2010 imposing certain specific restrictive measures directed against certain natural or legal persons, entities or bodies, in view of the situation in Somalia, Article 4(1).
[50] Council Regulation (EU) No 36/2012 of 18 January 2012, Art 6(b).
[51] Council Regulation (EU) 2016/2137 of 6 December 2016, Article 1. Article 2 requires humanitarian actors funded by other sources to apply for licences.
[52] Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP).
[53] Ibid., Article 3. Article 3 of the Common Council Position is given effect to by Council Regulation (EC) No 2580/2001. The list of designated entities is found in Council Decision (CFSP) 2017/154 updating the list of persons, groups and entities subject to articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures of combat terrorism, and repealing Decision (CFSP) 2016/1136, *Official Journal of the European Community*, 28.1.2017, L 23/21.

The second element of the EU regulatory framework is based on Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism.[54] This new instrument requires EU member states to criminalize a number of acts. Of relevance to humanitarian action is 'terrorist financing', defined as intentionally 'providing or collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit or to contribute to any of the offences' defined as terrorist in the directive.[55] The mental element required for the commission of the offence is high, and it is unlikely that it would cover funds that reach entities considered to be terrorist in the course of humanitarian action. In addition, the preamble of the directive refers to humanitarian action, noting:

> The provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall under the scope of this Directive, while taking into account the case law of the Court of Justice of the European Union.[56]

To date, academic and policy discussions on the interplay between sanctions, counterterrorism and humanitarian action have tended to focus on the Security Council, with the EU receiving far less attention. This is unwarranted: not only does the EU play a significant role in implementing Security Council decisions, but it also autonomously adopts sanctions and counterterrorism measures that must be implemented by member states – many of which are important donors to humanitarian action, and are therefore presumably aware of and responsive to the challenges facing humanitarian actors. The exemption in the Syria sanctions and the safeguard clause in the new directive suggest that the EU is aware of the tensions and is willing to take measures to address them. The EU dimension is an avenue that warrants further research and continued engagement by humanitarian actors. In addition to establishing good practices for member states, the EU's approach can serve as a positive example for the Security Council and non-member states.

[54] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA. *Inter alia*, this new directive expands existing EU counterterrorism measures to include offences relating to foreign terrorist fighters pursuant to SCR 2178 (2014).
[55] Ibid., Article 11(1).
[56] Ibid., preambular para. 38.

5. Banking-sector Restrictions

The problem

Like humanitarian actors, banks must comply with sanctions and counterterrorism measures. 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 or entities designated under sanctions regimes, or that commit or attempt to commit or facilitate or participate in the commission of terrorist acts. Not only must banks not provide resources or services to such persons or entities themselves, they must also not provide them indirectly.

Fear of violating these measures, coupled with a perception – fuelled to a significant degree by the Financial Action Task Force (FATF)[57] – that the sector is vulnerable to abuse, the reality that humanitarian organizations are rarely profitable clients, and the 'derisking' conducted by banks following the financial crisis of 2008,[58] has led to a significant restriction in the financial services provided to humanitarian organizations. This is particularly the case for those operating in so-called 'high-risk jurisdictions', in or near areas where designated NSAGs are based or operate. In the UK, faith-based, mainly Muslim, humanitarian organizations have been particularly affected.[59]

Research conducted by and for Chatham House on UK-registered humanitarian actors has shown that these are experiencing significant difficulties in accessing the financial services that are crucial to their capacity to fundraise, disburse funds and thus operate. There has been an increase in regulatory compliance and disclosure requirements, with banks demanding increasingly detailed information about the organizations, their transactions and their programmes. More damagingly, humanitarian organizations have been unable to open accounts, receive donations or transfer funds; have experienced delays or significantly increased charges; or have had their accounts closed.[60]

[57] The FATF has developed a series of recommendations to promote effective implementation of measures to combat terrorist financing. Although it was revised in 2016, as originally adopted, Recommendation 8 on Non Profit Organisations had asserted that NGOs 'possess characteristics that make them particularly attractive to terrorists or vulnerable to misuse for terrorist financing', including the fact that they enjoy public trust, have access to considerable sources of funds, and operate cash-intensive activities across borders and often in or near areas where designated NSAGs are based or operate. See Keatinge and Keen (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, pp. 5–7, and Gillard (2017), *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*, pp. 11–12.
[58] Keatinge and Keen (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, pp. 11–13. US-registered non-profit organizations have experienced very similar problems. See Eckert, S. with Guinane, K. and Hall, A. (2017), *Financial Access for U.S. Nonprofits,* (2017), Washington, DC: Charity and Security Network, pp. 39ff. and pp. 79ff.
[59] Keatinge and Keen (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, p. 3. Attention has focused on banks, but credit card companies, online donation websites and internet payment services have also adopted similar restrictions; see Keatinge, T. (2014), *Uncharitable Behaviour*, London: Demos, https://www.demos.co.uk/project/uncharitable-behaviour/, p. 42.
[60] This has been described by NGO representatives as 'a war of attrition'. Keatinge and Keen (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, p. 16.

The impact on humanitarian actors has been twofold. First, it has led to increased operating costs. These have taken numerous forms: organizations have had to hire additional staff to meet banking compliance requirements, or have had to seek expensive legal advice. They have incurred significant losses as they are unable to access the most favourable exchange rates as a result of some banks' unwillingness undertake transactions with them. When transactions are 'returned', charges are levied, and, if a foreign exchange conversion has also taken place, a loss is almost always also incurred on reversal. The restrictions and, in some cases, loss of banking access has also led some humanitarian organizations to resort to less transparent financial channels, such as third-party payment mechanisms via states neighbouring conflict- or sanctions-affected destinations. These are more expensive, and significantly increase transaction costs.[61] Second, and even more problematically, the restrictions have caused delays in the implementation of humanitarian programmes, their scaling back and at times their closure.[62]

The impact of banking-sector restrictions is so significant that some humanitarian actors have noted that banks are effectively dictating where they can operate. This is paradoxical, especially in view of states' efforts to develop good humanitarian donor polices and practices to finance and support principled humanitarian action.[63]

This situation is not a concern just for humanitarian actors. Ultimately, there is a real risk that financial institutions' restriction of services will lead organizations to resort to informal and unregulated channels to transfer the funds necessary to operate.[64] This will make it more difficult to monitor the movement of funds, and will increase the risk of the very abuse the sanctions and counterterrorism measures are trying to prevent.

There is increasing awareness of the problem. But while this is a positive and necessary first step in addressing it, at present the trend is for restrictions to become even tighter.

Possible solutions

Addressing the restrictions imposed by the banking sector is more challenging than alleviating the tensions raised by sanctions and counterterrorism measures *per se*. It is states that adopt the latter, and in doing so they are likely to balance the need for such measures with other public policy interests, including providing assistance to people in need, whatever their motivation for doing so – be it purely humanitarian, to prevent radicalization, or to win hearts and minds.

These considerations do not play into banks' calculations in deciding whether to provide services to clients perceived as high-risk and low-profit. At present there are no incentives – regulatory or other – for banks to balance the risk of providing services to humanitarian organizations against the public policy interest in doing so.[65]

[61] One NGO stated that its alternative arrangements cost 12 times more per transaction than its previous arrangements for overseas transfers. Ibid., p. 19.
[62] For examples of this see ibid., pp. 16–21, and Eckert et al. (2017), *Financial Access for U.S. Nonprofits*, pp. 48–50.
[63] See for example the Good Humanitarian Donorship Initiative, http://www.ghdinitiative.org/ghd/gns/home-page.html.
[64] This risk has been highlighted by, among others, the former US Deputy Treasury Secretary and Under Secretary of State for Political Affairs and National Security Council Executive Secretary: U.S. House of Representatives Committee on Financial Services (2016), *Stopping Terror Finance: Securing the U.S. Financial Sector – Report Prepared by the Staff of the Task Force to Investigate Terrorism Financing*, Statement of Robert M. Kimmitt, p. 30, http://financialservices.house.gov/uploadedfiles/terror_financing_report_12-20-2016.pdf.
[65] Jones (2017), *Humanitarian Action and Non-state Armed Groups: The UK Regulatory Environment*, p. 10. See also the discussion of banks' 'reputational return' in Keatinge (2014).

For banking restrictions to be reduced, humanitarian organizations and banks must deepen their engagement with each other, and states must play a far more active role on this issue at the national and international level. Solutions require the concerted efforts of all three sides.

Enhanced engagement between humanitarian actors and the banking sector

Banks' reaction to increased scrutiny of their compliance with sanctions and counterterrorism measures, coupled with 'derisking', has been described as taking two forms: first, the adoption of necessary and proportionate measures to meet the real risk of funds reaching designated entities or targets; and, second, 'seemingly irrational' and disproportionate measures driven by a fear of regulators and a lack of familiarity with humanitarian organizations, their operations and their risk-management strategies.[66] These approaches call for different responses by humanitarian organizations, banks and states.

Humanitarian actors must accept that the risk of funds reaching designated entities or persons does exist, and that it is incumbent upon them to respond to banks' enhanced due diligence requirements. Dismissing them is neither a credible nor a feasible approach. This investment must become part of 'doing business', even if it comes at a price in terms of increased staff time and additional personnel. The costs are significant for larger organizations, and can be prohibitive for smaller ones.[67] Some humanitarian organizations have been reluctant to include these costs in funding proposals, out of concern that doing so would make their bids less competitive. They should not, however, shy away from including the costs in their funding requests to states: their inclusion will contribute to raising awareness of the extent of the problem, and may galvanize states into assisting banks and humanitarians to find mutually acceptable solutions.

This said, humanitarian actors' frustration that the nature and volume of banks' questions is often not commensurate with the risks, and frequently reflects a lack of familiarity with the sector, is understandable.[68] The relationship between humanitarian organizations and banks must be developed – bilaterally and between the two sectors more generally. Where efforts have been made by management on both sides to engage and understand each other's reservations, this has led to improved relationships and even to positive examples of cooperation – as, for instance, when a high-street bank provided valuable assistance with the risk assessment of a planned cash programme.[69]

A process of mutual education must take place. Humanitarian organizations should invest the time to build their relationships with their banks to assist the latter to develop specialist knowledge of the humanitarian sector, its business model and its approach to risk mitigation. The conversation is already more mature, and there is already greater mutual awareness of respective concerns. Senior leadership on both sides should build on this to advance to the next stage of finding ways of striking the right balance in making banks' requests relevant and effective, with the aim of reducing unwarranted restrictions on humanitarian organizations' access to financial services.

[66] Keatinge and Keen (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, p. 4.
[67] See for example Center for Global Development (2015), *Unintended Consequences of Anti-Money Laundering Policies for Poor Countries*, Washington, DC: Center for Global Development, http://www.cgdev.org/sites/default/files/CGD-WG-Report-Unintended-Consequences-AML-Policies-2015.pdf.
[68] NGOs reported being asked questions about shareholders and owners, which are appropriate for corporate clients but not for humanitarian organizations. See Keatinge and Keen (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, p. 16.
[69] Ibid., p. 21.

In the UK, the British Bankers' Association has played a valuable role in bringing together the banking sector, humanitarian actors and government. In 2013 it coordinated guidance on getting aid to Syria, and in 2014 it convened numerous meetings on Gaza and related fund transfer issues. In 2013 it made a submission to the FATF setting out a number of recommendations for states and regulators to ensure the continuation of payments for humanitarian action.[70]

Equally key in advancing the conversation is the systematic collection by humanitarian organizations of information on the requests they receive from banks, their responses and the time frame and outcome of the exchanges, as well as detailed data on the impact of banking-sector restrictions in terms of delays in receiving, accessing and disbursing funds, direct and indirect costs incurred as a result of the restrictions, and the impact on their operations. Some organizations have reservations about discussing difficulties in accessing financial services, as they fear this could cause reputational harm or dissuade potential donors.[71] Data must therefore be collected and compiled in a manner that addresses these concerns. This information is essential for determining the nature and extent of the problem, and mobilizing all relevant stakeholders (banks, states, the FATF) to find ways of addressing the issue.[72]

The role of states

Nationally

As is the case in relation to sanctions and counterterrorism measures, states have a central role to play in alleviating the negative impact of banking-sector restrictions on humanitarian activity in different capacities, including as donors to humanitarian action, as 'legislators' and implementers of the regulatory framework, and as the ultimate supervisors of the banking sector and members of the FATF and other international financial forums. In respect of this issue, too, there is a need for greater cross-governmental coordination and coherence to reconcile competing priorities and activities.[73]

In their capacity as donors, states should encourage humanitarian organizations to include additional costs arising as a result of these restrictions in their funding proposals, and they should be willing to cover them. Equally importantly, they should also take a more active role, for example by engaging directly with the banking sector to explain the programmes they fund, and the requirements they include in funding agreements to reduce the risk of diversion or abuse.

Banking restrictions make humanitarian operations more expensive at best, and may significantly limit them. It is therefore in the interests of states as donors to humanitarian action to facilitate dialogue between humanitarian organizations and the financial sector to find solutions that address their mutual concerns. One way of doing this would be by establishing a forum to bring together humanitarian actors, banks and relevant government departments on a regular basis. For example, the UK has for some time planned to establish a cross-sectoral working group, chaired by the Home Office, with key government departments, humanitarian actors and the banking sector, to address the impact of sanctions and counterterrorism measures on the funding and delivery of humanitarian

[70] British Bankers' Association, Disasters Emergency Committee and Freshfields Bruckhaus Deringer LLP (2013), *Getting aid to Syria: Sanctions issues for banks and humanitarian agencies,* December 2013, https://www.bba.org.uk/policy/financial-crime/sanctions-compliance/getting-aid-to-syria.
[71] Eckert et al (2017), *Financial Access for U.S. Nonprofits*, p. 76.
[72] On the need for data, see ibid., pp. 36 and 54.
[73] Jones (2017), *Humanitarian Action and Non-state Armed Groups: The UK Regulatory Environment*, p. 10.

assistance, as well as on peacebuilding and development action.[74] At the time of writing, the date of the first meeting was yet to be confirmed.

It is not for governments to micro-manage banks' decisions, but policymakers can 'set the tone from the top'.[75] Derisking is unlikely to abate in the near term, unless pushed by supportive messaging by senior government officials publicly acknowledging and endorsing the work of humanitarian organizations.[76]

While states can facilitate dialogue and galvanize banks to provide services to humanitarian organizations at the national level, the problem is international in character. The nature of the banking system is such that a number of states are involved in transactions. This brings into play the regulatory systems of a number of countries. For example, banks providing services to UK-registered humanitarian organizations must comply not only with UK measures but also with those of a number of other states whose regulatory regimes are brought into play either by the nature of the transaction or through the extraterritorial application of a state's laws.

US implementation of international and autonomous sanctions and counterterrorism measures is particularly influential, and the sanctions enforcement body OFAC plays a pivotal role in shaping not just US but also international banking behaviour. Among other things, this is due to the fact that US dollar-denominated transactions pass through the US, bringing the transaction within OFAC's jurisdiction,[77] even if both the sender and recipient are located elsewhere.

In view of this, creative cooperative solutions should be considered, such as approved channels for transmitting funds recognized by a number of states. Progress is only likely to occur if the issue is addressed by all states that play a key role in financial regulation. States with an interest in humanitarian action and influence in the financial world should initiate a discussion among peers.

The international dimension

At the international level, the FATF plays a central role in shaping the terrorist financing response of states and of the financial sector. After an initial, extremely damaging portrayal of the non-profit sector as a whole as 'particularly vulnerable to abuse', since 2013 the FATF has been engaging constructively with NGOs. This has led to the revision of Recommendation 8 and its Interpretive Note, and to the inclusion of a requirement that meetings with NGOs be held as part of the mutual evaluation process.[78]

The effect of this revision will take time to percolate into banks' perceptions of the humanitarian sector. But the positive momentum it has generated must be maintained, and the adverse impact of banking-sector restrictions on humanitarian action kept on the FATF's agenda. The current, fourth round of FATF evaluations is focusing on technical compliance and effectiveness, including in terms

[74] Ibid., p. 10 and Keatinge and Keen (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, pp. 22–23. See also the UK Parliament record of written questions and answers from January 2017 regarding the working group and efforts to mitigate the effects of bank derisking: 'Non-governmental Organisations: Written question – 60241', http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-01-17/60241/; and 'Non-governmental Organisations: Financial Services: Written question – 60242', http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-01-17/60242/.
[75] Keatinge (2014), p. 67.
[76] Keatinge and Keen (2017), *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, p. 25.
[77] Ibid., p. 8.
[78] This evolution is described in Romaniuk, P. and Keatinge, T. (2017, forthcoming), 'Protecting charities from terrorists … and counter terrorists: FATF and the global effort to prevent terrorist financing though the non-profit sector', *Crime, Law and Social Change*.

of under- and over-compliance with FATF recommendations in the name of counterterrorism.[79] This is a valuable opportunity for humanitarian organizations to highlight the adverse impact of banking-sector restrictions, and could provide the necessary evidence to allow the FATF to issue guidance to the financial sector on how to avoid over-complying with the counterterrorism regulatory framework in a manner that has an undue impact on humanitarian action.[80]

In addition to the FATF, states should also consider raising the issue within the G20 in the context of the discussion on derisking. To date, the World Bank has not addressed this issue. States should bring it into the debate, as it could contribute to finding practical ways of transferring funds for humanitarian operations.

Finally, research so far has focused on the impact of banking restrictions on UK- and US-based humanitarian organizations. Additional work should be conducted to see how banks in other jurisdictions that are subject to similar regulatory frameworks have addressed this issue, and the nature and extent of the adverse impact of such restrictions on humanitarian organizations.

[79] The evaluation of the US, which was completed in December 2016, flagged the challenges facing the non-profit sector, and encouraged the government to continue to work with such organizations and the private sector to find ways of striking the right balance between mitigating the real risks of terrorist financing and addressing banking challenges faces by some non-profit organizations. FATF (2016), *Anti-money laundering and counter-terrorist financing measures – United States*, Fourth Round Mutual Evaluation Report, Paris: FATF, paras 233–34, www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-states-2016.html.

[80] Valuable discussions on non-profit engagement with the FATF are taking place, including under the aegis of the European Center for Not-for-Profit Law and the Global NPO Coalition on FATF. See for example the report of the September 2016 meeting on *Enhancing Effective Implementation of FATF Standards on Nonprofits,* http://ecnl.org/wp-content/uploads/2016/12/FATF_Evaluations_Meeting_2016_Outcomes.pdf.

6. The Way Forward

Prerequisites for progress

At this stage, there are three prerequisites for progress to occur. First, states are involved in this topic in a number of different capacities: they are donors to, and promoters of, humanitarian action; they adopt sanctions and counterterrorism measures at the international level; and they implement and enforce them through legislation at the national level. This means that several government departments are involved: typically, ministries of foreign affairs, home affairs, justice, finance, and overseas aid and development.[81]

All too frequently, however, these departments are not working on the different dimensions of this issue in a coordinated and coherent manner. Clashing government priorities can result in a lack of effective government ownership or consistent messaging. Therefore, 'whole-of-government' awareness of the issues and approaches must be developed to take account of and reconcile competing priorities and activities.[82]

Second, progress is unlikely to occur unless humanitarian actors find ways to provide empirical information on the actual adverse impact of the sanctions and counterterrorism on their operations. Prosecutions have been rare: most frequently, humanitarian organizations speak of a 'chilling effect' – a fear of violating the law, self-censoring, possibly over-complying.[83] These arguments have been valuable in raising awareness of the problem, but they are no longer sufficient to advance the discourse.

Obtaining such information is notoriously challenging.[84] Establishing clear causation between sanctions and counterterrorism measures and their impact on populations in need in situations of armed conflict is extremely difficult, as a range of other factors can also affect programme implementation. Those requesting information must accept this. But humanitarian organizations have been unable or reluctant to provide information that would give an idea of the nature and extent of the impact. There are a number of possible reasons for this: they may simply not be collecting the information, including because some may lack the capacity to do so; they may fear that sharing information might reveal that they are not fully complying with sanctions and counterterrorism measures – something that could pose an 'existentialist reputational threat'; or some forms of adverse impact – such as the capacity to operate in accordance with humanitarian principles – may simply not be suited to quantification. The same lack of information exists in relation to the adverse impact of banking-sector restrictions, even though this is of a more quantifiable nature in terms of delays and increased costs. However, sensitivities to sharing such data also exist, as organizations fear that publicizing their problems may harm their reputation and lead to further difficulties with banks.

[81] Jones (2017), *Humanitarian Action and Non-state Armed Groups: The UK Regulatory Environment*, p. 10.
[82] See for example Chatham House, International Law Programme and International Security Department (2015), 'UN Counterterrorism Legislation: Impact on Humanitarian, Peacebuilding and Development Action'.
[83] See for example Mackintosh and Duplat (2013), *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, p. 84.
[84] See for example ibid., pp. 71ff.; and Burniske and Modirzadeh (2017), *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, p. 71.

Ways must be found for humanitarian actors to collect and share information – in a manner that addresses reservations they may have in doing so – on the adverse impact of sanctions and counterterrorism measures. This should cover both the impact on operations and the costs of complying with the regulatory framework.[85] In the absence of some evidence, states that are supportive of humanitarians' position will be unable to champion it further. States that are reluctant to address the problem will have a convenient excuse for not doing so.

Third, the engagement between states and humanitarian actors is now more informed and mature. It must continue and become more transparent. To the extent possible, humanitarian actors should present a common position on what they consider the best way to advance the discourse and the specific measures they are willing to take to address the concerns of states and the financial sector.[86]

On their side, states should be more transparent about how the regulatory framework is being implemented in practice. For example, in relation to sanctions, they should provide more information on their responses to requests for licences: how many they have received; how many they have approved and how many rejected; and the grounds for their decisions. They should also provide information on minor infractions that they have not pursued. In the absence of case law, this will provide valuable guidance to humanitarian actors in understanding how the regulatory framework is being applied in practice, and it could also provide a degree of reassurance to the banking sector.

Recommendations

Sanctions

- UN Security Council sanctions should systematically include exemptions for humanitarian action.
- The potential adverse impact of sanctions on humanitarian action should be routinely brought to the attention of the Security Council and all UN member states.
- When it considers the imposition of sanctions the Security Council should, in consultation with humanitarian agencies and organizations, conduct an assessment of the possible adverse impact of the sanctions on humanitarian action. Once it has imposed sanctions, it should require panels of experts to conduct impact assessments on this issue and to report on them.
- Ways should be explored to establish an ongoing dialogue between the Security Council and humanitarian organizations on the country-specific impact of sanctions on humanitarian action.
- Arrangements should be established for sanctions committees and panels of experts to systematically consult humanitarian actors.
- The Security Council should systematically request sanctions committee panels of experts to include in their reports information on the adverse impact of sanctions on humanitarian action. If special representatives of the Secretary-General have been appointed for the contexts in which relevant sanctions have been imposed, the Security Council should also request them to provide such information in their periodic reports.

[85] Burniske and Modirzadeh (2017), p. 73, suggest that empirical research be conducted into this second dimension.
[86] Humanitarian actors' 'common voice' on this issue remains elusive. See, most recently, ibid., pp. 78ff.

- As is the case within governments in capital, states should ensure that all relevant experts within their permanent missions to the UN and other relevant intergovernmental organizations are aware of the potential adverse impact of sanctions on humanitarian action, and contribute to the elaboration of a coherent position that balances humanitarian needs with political and security concerns.
- States that are involved in the adoption of sanctions at the multilateral level – for example, Security Council members or EU member states in relation to EU sanctions – should consult humanitarian organizations on the possible adverse impact of sanctions on their operations before they are adopted. All states should do so once the sanctions are implemented nationally. Consultations should continue throughout the implementation of sanctions, so that any adverse consequences can be identified and brought to the attention of the international bodies responsible for the sanctions.
- The domestic implementation of UN and EU sanctions should be researched further, to determine, *inter alia*, whether states are entitled to include exemptions for humanitarian action in national implementing legislation in situations when these are not included in the international measures.
- The arrangements for obtaining licences, and, in the case of regional organizations such as the EU, the possibility for mutual recognition thereof, should be researched.

Counterterrorism measures

- The references in UN General Assembly resolutions to the need for counterterrorism measures not to impede humanitarian action should be retained and built on in future resolutions.
- The UN Counter-Terrorism Implementation Task Force's Working Group on Countering the Financing of Terrorism should address the impact of measures to counter terrorist financing on humanitarian action, in order to reflect the developments in the debates since its 2009 report and make recommendations that are relevant to the current situation. UN agencies, funds and programmes engaged in humanitarian action should endeavour to participate in this Working Group, to inject this dimension into the discussions.
- When adopting national measures criminalizing the provision of support to designated entities, states should include an express exception for humanitarian action.
- States should also frame offences of support to terrorism narrowly. They should follow the approach of the 1999 Terrorist Financing Convention, which criminalizes the provision of funds and other assets with the knowledge or intent that they will be used to commit an act of terrorism, rather than criminalizing support to a terrorist group more generally.
- States should consider establishing positions to exercise independent oversight over the application of counterterrorism measures.

The EU dimension

- EU sanctions should include exemptions for humanitarian action.
- Dialogue between the EU, its member states and humanitarian actors in relation to sanctions

should be built on with a view to making such engagement systematic both before the adoption of sanctions, and throughout their implementation.

- The approach adopted by the EU in relation to sanctions and counterterrorism measures should be the subject of further research and continued engagement by humanitarian actors.

Banking-sector restrictions

- Humanitarian organizations and banks should deepen their engagement with one another, and states should play a far more active role on this issue at the national and international level. Solutions require the concerted efforts of all three sets of actors.
- Humanitarian organizations should build their relationships with their banks to assist them to develop specialist knowledge of the humanitarian sector, its business model and its approach to risk mitigation.
- Humanitarian organizations should collect information on the requests they receive from banks, their responses, and the time frame and outcome of the exchanges, as well as detailed data on the impact of banking-sector restrictions, in terms of delays in receiving, accessing and disbursing funds, direct and indirect costs incurred as a result of the restrictions, and their impact on operations.
- Humanitarian organizations should include the increased costs of complying with banks' due diligence requirements in their funding requests. States should be willing to cover these costs.
- Humanitarian organizations should continue to engage with the FATF. Advantage should be taken of the current, fourth round of FATF evaluations to highlight the adverse impact of banking-sector restrictions on humanitarian action.
- In their capacity as donors, states should take a more active role, for example, by engaging directly with the banking sector to explain the humanitarian programmes they fund, and the requirements they include in funding agreements to reduce the risk of diversion or abuse.
- States should facilitate regular dialogue between humanitarian organizations, the financial sector and relevant government departments to find solutions that address their mutual concerns.
- Senior government officials should publicly acknowledge and endorse the work of humanitarian organizations, with the aim of mitigating the effects of banks' derisking.
- States with an interest in humanitarian action and with influence in the financial world should initiate a discussion among peers to consider creative cooperative solutions, such as approved 'safe channels', recognized by a number of states, for transmitting funds.
- States should consider raising the issue within the G20, in the context of discussions on derisking. The World Bank should be brought into the debate to contribute to finding practical ways of transferring funds for humanitarian operations.
- Additional research should be conducted to see how banks in jurisdictions other than the UK and the US have addressed this issue, and the nature and extent of the adverse impact on humanitarian organizations.

About the Author

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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 concludes a series examining different aspects of the regulatory framework relevant to humanitarian action and NSAGs. Already published in 2017 are:

- *Humanitarian Action and Non-state Armed Groups: The International Legal Framework,* Emanuela-Chiara Gillard
- *Humanitarian Action and Non-state Armed Groups: The UK Regulatory Environment,* Kate Jones
- *Humanitarian Action and Non-state Armed Groups: The Impact of UK Banking Restrictions on NGOs,* Tom Keatinge and Florence Keen

In 2016 Chatham House published a series of five papers as part of the project:

- *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
- *Engaging Armed Actors in Conflict Mediation: Consolidating Government and Non-governmental Approaches,* Claudia Hofmann
- *Improving Respect for International Humanitarian Law by Non-state Armed Groups,* Ben Saul
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