

Conflict-related UN sanctions regimes and humanitarian action: A policy research overview

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Abstract

This paper offers a brief overview of the potential interplay of United Nations (UN) sanctions regimes applied in contexts of armed conflict and humanitarian action. It traces how this issue has emerged within the counterterrorism (CT) sphere, before examining the possibilities of compatibility and risks for humanitarian action in conflict-related sanctions regimes. The paper lays out research gaps and outlines a new path for policy research focused on UN sanctions regimes imposed in the context of armed conflicts (“conflict-related”) yet falling outside the pure CT space. The paper concludes by illuminating why establishing further evidence on this issue is critical to both the legitimacy and the effective use of UN sanctions.

Keywords: international humanitarian law, sanctions, counterterrorism, armed conflict, United Nations.

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Introduction

Since the early 2000s, international and regional organizations as well as States have increasingly imposed sanctions that serve to control, restrict or prohibit interactions with certain States, groups or individuals, for political, social and economic ends. At the United Nations (UN) level, these ends have notably included upholding the international security order, resolving armed conflicts, deterring violations of international human rights or humanitarian law, and blocking sponsorship of or engagement in terrorism. Conversely, for the past few years, increasing assertions have been made inside and outside the humanitarian community that, as a result of international sanctions, especially in the field of counterterrorism (CT), the space for principled humanitarian action has been shrinking.

This paper offers a brief overview of UN sanctions regimes applied in contexts of armed conflict and humanitarian action. It traces the emergence of the issue within the CT sphere and seeks to compare the similarities and differences between the single UN CT sanctions regime and the ten UN regimes imposed in situations of armed conflict with conflict resolution as their primary goal (hereafter referred to as “conflict-related” regimes).¹ In particular, this paper aims to present areas of compatibility and even complementarity between UN conflict-related sanctions regimes and international humanitarian law (IHL), as well as the potential risks that sanctions pose to humanitarian action. The paper lays out research gaps and outlines a new path for policy research focused on conflict-related sanctions regimes and falling outside the pure CT space. The paper concludes with an explanation of why establishing further evidence on this issue is critical to both the legitimacy and the effective use of UN sanctions.

Examining the current moment

Moments of scrutiny and change in the design and use of UN sanctions regimes

Applied under Article 41 of the UN Charter, UN sanctions are composed of all measures “not involving the use of armed force” that the UN Security Council can adopt to give effect to its decisions.² Sanctions are one of the critical instruments employed by the Security Council in its efforts to maintain or restore international peace and security. When imposed in armed conflict situations,

1 The ten sanctions regimes applied in armed conflict contexts with the primary goal of resolving the conflict are Somalia, the Democratic Republic of the Congo (DRC), Yemen, Mali, Sudan, South Sudan, the Central African Republic (CAR), Libya, Iraq (formal occupation regime) and 1988 (Afghanistan).

2 Charter of the United Nations, 1 UNTS XVI, 24 October 1945 (UN Charter), Art. 41: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

their primary goal is contributing to mitigating and preventing an escalation of or return to violent conflict.³ Sanctions are also used to counter terrorism. In practice, UN sanctions regimes most frequently include assets freezes, travel bans, arms embargoes and commodity bans. They are applied to individuals and entities with the aim of changing their behaviour, constraining their activities or signalling that their actions fall outside generally accepted international norms.⁴ Article 25 of the UN Charter creates a legal obligation on member States to carry out the decisions of the UN Security Council, including the Council's call for sanctions under Article 41.

Members of the Security Council have redesigned and refined sanctions over time, leading to more targeted, efficient and effective versions of the tool. Two significant moments of crisis, scrutiny and change have fundamentally altered the design of and approach to UN sanctions. The first involved the reforms undertaken between 1998 and 2002 in response to the devastating humanitarian impacts of comprehensive sanctions on the civilian population in the former Yugoslavia, Haiti and Iraq. Comprehensive sanctions measures were found to have contributed to deleterious effects both through the restriction of access to essential goods, including medical supplies and petrol, and through the secondary effects that arose as governments diverted resources away from public services and towards sanctions evasion.⁵ In view of these consequences and in response to concerted lobbying from a coalition of researchers, member States, UN officials and private sector representatives, the UN Security Council members adapted their approach to designing sanctions. Instead of placing comprehensive sanctions on a government or territory as a whole, the architects of UN sanctions regimes shifted to using "targeted" measures intended to have a limited, strategic impact on selected individuals and entities. In addition, sanctions designers narrowed trade embargoes to diminish the impact on the overall economy.⁶ Sanctions designers intended for the new approach to help minimize the effects of sanctions on the civilian population and the national or regional economy while also increasing the efficacy of the measures in achieving their stated goals of exerting influence over specific individuals or groups.

The second moment of crisis, scrutiny and change emerged as an unexpected consequence of efforts to make sanctions more targeted. As sanctions measures became more individualized and discriminating, the procedures for listing and the process required for de-listing individuals were called into

3 Rebecca Brubaker and Thomas Doerfler, *UN Sanctions and the Prevention of Conflict: A Thematic Paper for the United Nations–World Bank Study on Conflict Prevention*, United Nations University, August 2017, available at: <https://collections.unu.edu/eserv/UNU:6431/UNSanctionsandPreventionConflict-Aug-2017.pdf> (all internet references were accessed in September 2021).

4 Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, Cambridge University Press, New York, 2016.

5 David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Lynne Rienner, Boulder, CO, 2000.

6 For example, the new measures targeted vessels transporting illicit oil rather than banning the import of oil in general, and banned the export of rough diamonds rather than a country's diamond trade. For more on this moment of change, see T. J. Biersteker, S. E. Eckert and M. Tourinho, above note 4.

question.⁷ A growing wave of litigation raised the issue that the UN's targeted listings were unduly impacting individuals' and entities' due process rights, especially in the CT sphere. In the wake of significant pressure from both member States and national and regional courts, the UN Security Council, wishing to protect both the efficacy and the legitimacy of its measures, undertook to address the threats to due process rights in the CT sphere, established an ombudsperson for the 1267 sanctions regime (named after Security Council Resolution 1267) and began to reform the listing procedures.⁸

UN sanctions are now facing a third moment of crisis and scrutiny around the impact of current sanctions measures on the humanitarian sector's ability to safely, promptly and effectively access and assist those in need.⁹ The scrutiny to date has mostly focused on UN sanctions applied with the sole objective of countering terrorism. Although not necessarily new for many humanitarian actors, this issue has gained momentum in the past few years, attracting attention both amongst the broader set of sanctions implementers and among sanctions designers. However, UN sanctions imposed in situations of armed conflict with different objectives than countering terrorism, such as conflict resolution, have largely been left out of the analysis.

This history of previous challenges and processes of reform of UN sanctions presents two useful lessons on how to understand and subsequently address the current crisis. The first lesson is that sanctions' effectiveness is inextricably linked to their legitimacy as a global policy tool. While the Security Council may design and adopt the measures, it relies on others to implement them.¹⁰ When left unaddressed, past challenges have hurt the legitimacy of the measures in the eyes of other States. In turn, scrutiny of the legitimacy of sanctions has led to decreased willingness on the part of States to implement them. Accordingly, UN sanctions, as a whole, have become less effective. Second, the previous two moments of change demonstrate that when faced with clear evidence of adverse impacts, the UN Security Council has risen to the challenge and enacted reforms.¹¹ Thus, there is reason to believe that the Security Council and its sanctions committees may be moved to act in this third case as well.

7 James Cockayne, Rebecca Brubaker and Nadeshda Jayakody, *Fairly Clear Risks: Protecting UN Sanctions' Legitimacy and Effectiveness through Fair and Clear Procedures*, research report, United Nations University Centre for Policy Research (UNU-CPR), 2018.

8 UNSC Res. 1904, 17 December 2009. The Council also adopted reforms on the processes for listing individuals. States cannot put a name forward for listing until the name has been independently verified by three separate sources. Groups of experts also have to rely on three independent sources in their reports before putting a name forward. Reforms have made it harder to be listed.

9 For the purposes of this paper, the terms "humanitarian sector", "humanitarian organizations" and "humanitarian actors" are used interchangeably and are meant to include all non-governmental organizations, civil society actors and UN agencies operating in an impartial manner and engaging in exclusively humanitarian activities.

10 Although all States are legally required to implement all UN Security Council decisions, hence including sanctions measures, the practice does not always match the theory. In practice, some States automatically implement Security Council decisions. Other States filter Security Council decisions through their own courts and only implement what they feel is legally sound.

11 In the case of challenges regarding due process safeguards, reforms were more modest and related principally to the CT sanctions regime.

By continuing to respond to new evidence and refine its tools, the Council helps to protect both the legitimacy and the effectiveness of sanctions.

Overview of existing research and looking beyond CT sanctions

Over the last decade, there have been an increasing number of reports from humanitarian organizations, UN humanitarian agencies, civil society organizations and sanctions experts that raise concerns that CT measures in general, and CT-related sanctions measures in particular, are negatively impacting the ability of humanitarian organizations to carry out their activities in contexts of armed conflicts in line with provisions under IHL.¹²

As demonstrated by existing research, the constraints posed by CT measures writ large and CT sanctions in particular on humanitarian actors' ability to operate in certain areas or for the benefit of certain categories of individuals challenge the fundamental requirement under IHL according to which humanitarian actors must operate in an impartial manner.¹³ These constraints also take a toll on the ability of humanitarian organizations to be perceived as neutral actors by the parties to the conflict.¹⁴ Although the concrete negative impacts of CT sanctions in particular on humanitarian action are difficult to isolate from the impacts of other international, regional and national CT measures, research conducted to date provides initial evidence that the three main sanctions measures used in efforts to counter terrorism – asset freezes, travel bans and sectoral embargoes – may all affect humanitarian action. As a result, some research has concluded that a tension exists between CT measures writ

12 For the impacts of CT measures in general, see, notably, Emma O'Leary, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, Norwegian Refugee Council, June 2018; Tom Keatinge, *Uncharitable Behavior and Banks that Drop Nonprofit Customers*, Demos, 2019; Ben Hayes, *The Impact of International Counterterrorism on Civil Society Organizations: Understanding the Role of the Financial Action Task Force*, Bread for the World, 2017; Tom Keatinge and Florence Keen, *Humanitarian Action and Non-State Armed Groups: The Impact of Banking Restrictions on UK NGOs*, research paper, Chatham House, April 2017; Stuart Gordon, Alice Robinson, Harry Goulding and Rawaad Mahyub, *The Impact of Bank De-risking on the Humanitarian Response to the Syrian Crisis*, Humanitarian Policy Group (HPG), August 2018; Stuart Gordon and Sherine El Taraboulsi-McCarthy, *Counter-Terrorism, Bank De-risking and Humanitarian Response: A Path Forward: Key Findings from Four Case Studies*, HPG, August 2018, p. 2; Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Norwegian Refugee Council, 2013; Sherine El Taraboulsi-McCarthy and Camilla Cimatti, *Counter-Terrorism, De-risking and the Humanitarian Response in Yemen: A Call for Action*, HPG, February 2018. On CT sanctions in particular, see, notably, Alice Debarre, *Making Sanctions Smarter: Safeguarding Humanitarian Action*, policy report, International Peace Institute, December 2019; High Level Review of United Nations Sanctions, *Compendium*, November 2015; Emanuela-Chiara Gillard, *Recommendations for Reducing Tensions in the Interplay between Sanctions, Counterterrorism Measures and Humanitarian Action*, research paper, Chatham House, August 2017.

13 Note that IHL is applicable only in relation to situations of armed conflict. Only some, not all, CT sanctions are applied in relation to such situations.

14 Neutrality is not a required condition under IHL, but it is considered a fundamental operational principle for humanitarian action. A perceived lack of impartiality and neutrality might endanger the safety and security of humanitarian workers when operating in sensitive conflict contexts and when engaging with non-State armed groups considered to be "terrorists".

large, CT sanctions, and IHL—in particular, IHL rules governing humanitarian activities, IHL rules protecting the wounded and sick as well as persons providing medical care, and IHL rules protecting humanitarian personnel.¹⁵

The vast majority of existing UN sanctions regimes applied in armed conflicts, however, pursue objectives other than countering terrorism. In these regimes, the primary goal of sanctions is to address the existing armed conflict and pursue objectives such as conflict mitigation or resolution, protection of civilians, and respect for the humanitarian mission. These sanctions regimes are “conflict-focused” or “conflict-related”. Yet, research on the impacts of UN sanctions on humanitarian activities in these conflict-related regimes is somewhat scarce. As described above, scholars have established a tension between CT measures and IHL rules protecting the humanitarian space, and it remains to be seen whether this tension also exists in the conflict-related sanctions regimes. While research is currently lacking, two assumptions can be made on this issue: one of alignment, and one of risks.

Apparent alignment between conflict-related sanctions regimes, IHL and humanitarian action

Some may believe that there is an obvious and therefore unproblematic complementarity between UN-mandated sanctions applicable outside the counterterrorism sphere and IHL, for two reasons. First, conflict-related sanctions regimes apply in armed conflict contexts in which IHL is the prevailing legal framework. As sanctions must comply with international law, including IHL, they should thus be compatible with safeguarding the humanitarian space. Second, conflict-related regimes do not have certain complications that the single CT regime does possess, and they are thus presumed to present fewer risks to humanitarian action. Let us examine these two points in turn.

Compatibility and complementarity between conflict-related sanctions regimes and humanitarian action

The design of conflict-related sanctions regimes can be complementary to the application of IHL rules. Indeed, unlike in the single CT regime, conflict-related sanctions regimes have always included language and provisions illustrating the intent or the willingness of the Security Council to use sanctions as a tool to help facilitate the delivery of humanitarian assistance and to protect humanitarian organizations from unlawful action and abuse by parties to the conflict. There are

15 See, for example, Emanuela-Chiara Gillard, *Humanitarian Action and Non-State Armed Groups: The International Legal Framework*, research paper, Chatham House, February 2017; Naz K. Modirzadeh, Dustin A. Lewis and Claude Bruderlein, “Humanitarian Engagement under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011.

three elements of protection used by the UN Security Council that are worth noting here.

First, in all but one of its conflict-related sanctions regimes, the Security Council recalls the obligation of the parties to the conflict to comply with their obligations under international law, including IHL, human rights law and refugee law. It may be useful to note that this call to comply with IHL in general implicitly covers the specific rules regulating humanitarian access and the protection of humanitarian and medical workers (hence all IHL obligations on the parties to the conflict pertaining to the protection of the humanitarian space). Moreover, all but one of the conflict-related regimes includes language specifically referring to and condemning violations of IHL, violations which often represent barriers to humanitarian access and humanitarian action. By contrast, the 1267 (ISIL and Al-Qaeda) UN sanctions regime—known as IDAQ—does not refer to the obligations of the parties to the conflict to comply with IHL, and very rarely contains specific condemnations of IHL violations, even where the targeted individuals and groups are “parties to the conflict” and are reported as being involved in violations of the laws of war.

Second, and again in contrast to the IDAQ regime, all conflict-related regimes emphasize the importance of securing humanitarian access and assistance and of protecting humanitarian personnel. Over the last two decades, sanctions regimes have developed to include language and provisions specifically intended to protect the humanitarian space from violations by parties to the conflict. Current conflict-related sanctions regimes include frequent and standardized language in both preambles and operative paragraphs that reflect the specific rules of IHL related to humanitarian activities and humanitarian personnel.¹⁶

Third and finally, these references to IHL in general, and humanitarian access, assistance and personnel in particular, are translated into action through two designation criteria. These criteria provide the basis on which the Security Council can act to prevent or put a stop to abuses of and impediments to humanitarian relief. Eight of the conflict-related sanctions regimes include a general designation criterion of “violations of IHL”.¹⁷ Thus, cases of obstruction of access, diversion of aid or attacks on personnel could be sanctioned on this basis when demonstrated by the relevant panel or group of experts to amount to a violation of IHL. Moreover, six of the conflict-related sanctions regimes also include a stand-alone designation criterion based on the obstruction of humanitarian access, impediments to the delivery or distribution of humanitarian assistance, and/or attacks against humanitarian personnel.¹⁸ Thus, cases of

16 Said language notably condemns the obstruction and misappropriation of humanitarian assistance; condemns the targeting of and attacks against humanitarian personnel; recalls the corresponding obligations to ensure full, safe and unhindered humanitarian access to all those in need; and recalls the importance of respecting the humanitarian principles of humanity, impartiality, neutrality and independence.

17 South Sudan, Mali, Yemen, CAR, DRC, Libya.

18 South Sudan, Mali, Yemen, CAR, DRC, Libya, Somalia, Sudan.

obstruction or attacks could be sanctioned on that basis even when they do not amount to an IHL violation.

These three elements demonstrate that protection of humanitarian access, assistance and personnel against abuses and violations of IHL is integrated as part of the secondary objectives of conflict-related sanctions regimes. Thus, the primary goal of conflict-related regimes (conflict resolution) and the design of the sanctions measures adopted in pursuit of that goal are assumed, by some, to be complementary and compatible with IHL and the humanitarian space.

Comparing contexts: Fundamental differences with the CT sphere

Only one of the current fourteen UN sanctions regimes has as its primary objective the countering of terrorism. IDAQ is the only “pure” CT regime. It was adopted in 2011, following a split between what was once a single UN sanctions regime covering both the Taliban and Al-Qaeda. The Security Council split the regime to signal to the Taliban the possibility of reconciling through selected de-listing from the 1988 sanctions regime, which was redesigned to focus primarily on resolution of the conflict within Afghanistan. By contrast, the new CT regime – which initially focused on Al-Qaeda and its associates – had as its goal not reconciliation, conflict resolution or bringing members of Al-Qaeda “in from the cold”; rather, it only aimed to contain terrorist activities, making it more difficult for Al-Qaeda to fund initiatives, travel, and procure weapons.¹⁹ The IDAQ regime applies globally – i.e., everywhere that Al-Qaeda, ISIL or the groups and individuals listed as their affiliates operate. However, while the regime overlaps with situations of international and non-international armed conflict in which ISIL, Al-Qaeda or their affiliates might be parties to the conflict – such as Syria, Iraq and Afghanistan, Mali, Libya, Somalia and Yemen – it is not meant to address them, and only focuses on the deterrence and constraint of the terrorist-affiliated groups.²⁰ As described by Biersteker, Van Den Herik and Brubaker, “listings of groups” in the IDAQ regime, in contrast to the conflict-related regimes focusing on conflict resolution,

are intended to exclude them from global society and disrupt their ability to engage in terrorist activity. Eligibility for designation is based on individual behaviour, especially conduct associating a person with a terrorist/ clandestine group either through direct participation or the provision of indirect support.²¹

On the other hand, the most common type of contextual setting for UN sanctions is situations of armed conflict, which the sanctions are designed to address. Currently,

19 Thomas J. Biersteker, Rebecca Brubaker and David Lanz, *UN Sanctions and Mediation: Establishing Evidence to Inform Practice*, UNU-CPR, 18 February 2019.

20 Note that there are no UN sanctions regimes applicable to Syria as a country; however, the UN sanctions measures on ISIL and Al-Qaeda are applicable to the region.

21 Thomas J. Biersteker, Larissa van den Herik and Rebecca Brubaker, *Enhancing Due Process in UN Security Council Targeted Sanctions Regimes*, internal report drafted for Switzerland’s International Law Directorate, April 2021, p. 10 (pending publication, on record with the authors).

there are ten conflict-related sanctions cases pertaining to situations in Somalia, the Democratic Republic of the Congo (DRC), Yemen, Mali, Sudan, South Sudan, the Central African Republic (CAR), Libya, Iraq (formal occupation regime), and Afghanistan. Six out of ten cases (Iraq, Libya, Mali, Somalia, Afghanistan and Yemen) possess significant CT dimensions, either because of the global application of the IDAQ sanctions regime on top of the armed conflict regime or because of the application of parallel regional or unilateral CT sanctions. The four remaining conflict-related regimes (CAR, DRC, South Sudan and Sudan) are either “pure” armed conflict cases or have minor CT elements. Contrary to the singular IDAQ regime, in these ten cases sanctions are deployed as leverage towards settlement of the conflict.²² In other words, the primary purpose of these sanctions regimes remains resolution of a conflict through a negotiated settlement, not the deterrence of terrorist-affiliated groups.²³ As a result, sanctions are imposed on key political and military actors involved in the armed conflict, in order to constrain their activity or to nudge them towards cooperation with an ongoing peace or reconciliation process.²⁴ Individuals and groups are listed on the basis of both their status and their conduct.²⁵

This fundamental difference in the underlying purposes of sanctions regimes in the CT and the conflict-related spheres might impact States’ interpretation, and hence their implementation, of sanctions. In particular, there might not be the same level of severity and scrutiny on engaging with listed non-State armed groups in the conflict-related sphere as there is in the CT sphere. This relatively diminished focus extends to concerns over the risks of diversion of humanitarian aid. For example, looting, stealing, diversion and abuse of humanitarian aid by non-State actors, including listed armed groups and individuals, have been reported over the years by the panels of experts for the majority of conflict-related regimes. Yet, such actions were never directly reported by the Monitoring Team in the IDAQ regime—even though the IDAQ regime strongly emphasizes aid diversion and abuse as a potential source of financing of terrorist-affiliated groups and individuals, while the majority of the other conflict-related regimes condemn aid diversion and abuse by listed armed groups as one of a number of actions hindering the delivery of humanitarian relief to populations in need.²⁶ Moreover, the IDAQ regime emphasizes the need for States to adopt a risk-averse approach and refers heavily to the Financial Action Task Force’s (FATF) recommendations regarding “the risk of abuse of non-profit organizations by terrorist groups and networks”.²⁷ By contrast, FATF recommendations do not apply to the same extent in conflict-related sanctions

22 *Ibid.*, p. 8.

23 J. Cockayne, R. Brubaker, and N. Jayakody, above note 7, p. 4; see also Table 8 and pp. 30–35.

24 T. J. Biersteker, L. van den Herik and R. Brubaker, above note 21, p.8

25 *Ibid.*

26 Note that Taliban sanctions regime (1988) makes similar references to the risk of humanitarian aid being diverted and used as a source of financing.

27 See, for example, FATF, *Best Practices: Combating the Abuse of Non-Profit Organizations (Recommendation 8)*, June 2015.

regimes. This may give the impression that financial sanctions applied in conflict-related regimes without CT components may not need to be subjected to an equally rigorous review, especially regarding the risks of abuse of humanitarian aid.

A final significant difference between the armed conflict sphere and the CT sphere may lead to different research results. The single UN CT sanctions regime is part of a larger political and legal CT framework developed by the UN Security Council over the years under Chapter VII of the UN Charter. This framework imposes general and abstract rules binding on all UN member States, a trend which started with Resolution 1373. In particular, through this framework, Resolutions 1373 and 2462 impose obligations on States to criminalize the financing of terrorism in domestic orders, which includes violations of the sanctions measures imposed in the IDAQ regime.²⁸ By contrast, in the conflict-related sanctions regimes, States have the discretion to decide the type of penalty to institute in relation to national actors' non-compliance with UN sanctions. As a result, States may be less severe regarding violations of UN sanctions in the conflict-related regimes than in the CT context, with potential repercussions on private actors' approach to risk when working with humanitarian actors in both spheres.²⁹ In summary, all these distinctions can foster different interpretations and implementation practices in conflict-related regimes. Conflict-related sanctions regimes may thus bear less risks for humanitarian action than the 1267 regime – at least in appearance.

Challenging the assumptions of inherent compatibility and absence of risk

As described above, the design of the conflict-related regimes indicates the will to protect humanitarian action and to uphold IHL. Yet, UN sanctions applied in conflict contexts might also both directly and indirectly limit, and in certain cases even undermine, humanitarian action. Moreover, some humanitarian actors are increasingly concerned that their activities may be contravening UN sanctions or the measures adopted by States and donors to implement them in conflict contexts outside the pure CT sphere.³⁰ Concern over being found to be out of compliance has led some organizations to severely limit or even shut down their

28 This notably includes the obligation of States to criminalize in their domestic orders violations of sanctions measures (in particular the assets freeze measure) applicable in the ISIL/Al-Qaeda regime. Obligations arising from UN Security Council resolutions on counterterrorism adopted under Chapter VII, such as Resolution 1373 and later Resolution 2462, are very similar to conventional obligations of the International Convention for the Suppression of the Financing of Terrorism. After the adoption of Resolution 1373, scholars notably wrote about the Security Council acting as a supranational legislator for the rest of the UN member States. See, for example, Stefan Talmon, "The Security Council as World Legislature", *American Journal of International Law*, Vol. 99, No. 1, 2005; Paul C. Szasz, "The Security Council Starts Legislating", *American Journal of International Law*, Vol. 96, No. 4, 2002.

29 However, this might not be true when looking beyond UN sanctions.

30 Based on author telephone interviews with a broad range of international and national humanitarian actors in the DRC, Somalia, Yemen and Mali, November 2020–May 2021 (transcripts on record with the authors).

own operations, while others have decided to simply disregard the sanctions measures. The question thus becomes whether the conflict-related regimes, as they stand now, contain sufficient safeguards to prevent or mitigate the unintended and yet potentially harmful effects of sanctions on humanitarian action, especially considering the seeping of CT objectives into conflict-related regimes.

Increasing overlap with the CT sphere

While it is important to appreciate general differences between the conflict-related and CT spheres, in an increasing number of cases, these spheres overlap.

First, it is important to remember that the sanctions measures are the same across both conflict-related regimes and the CT regime. What ultimately varies is how the scope of these sanctions measures is interpreted by Security Council members as well as implementing member States. This can be particularly problematic for the implementation of assets freeze measures, which require that funds, financial assets or economic resources are prevented from being made available, directly or indirectly, to or for the benefit of designated entities. Although the interpretation of the assets freeze in the contexts of conflict regimes is assumed to be less widely enforced as in the IDAQ regime, there is nothing that prevents a shift to a stricter position in conflict-related regimes. In the absence of any specific humanitarian carve-out or guidance, this prohibition can be interpreted as encompassing the typical activities of impartial humanitarian actors. Such activities might include the delivery of large quantities of assistance items diverted by a listed entity, or the handover of water, sanitation and habitation infrastructures, or even the provision of humanitarian assistance or services to designated entities, including notably the provision of medical care to wounded and sick members of designated groups.

Second, from Somalia to Mali and from Yemen to Afghanistan, the application of UN sanctions has increasingly turned to both conflict mitigation and countering terrorism. In some of these contexts, the Security Council has updated the design of its sanctions regimes to address this overlap. For example, affiliation to groups designated under the IDAQ regime is mentioned in the 2374 (Mali), 751 (Somalia) and 1970 (Libya) sanctions regimes, as an additional basis for the listing of several individuals and entities. Currently Al-Shabaab is listed under the 751 sanctions regime, a regime with a standing humanitarian exemption and a primary focus on conflict resolution rather than on CT. However, Kenya has been pushing for the addition of Al-Shabaab to the 1267 CT list, which would in turn jeopardize the application of the standing humanitarian exemption for humanitarian actors operating in areas under the control of the group. Furthermore, States are encouraged to list individuals and entities supporting ISIL or Al-Qaeda operating in Mali and Libya. In one instance, an individual was re-listed on the Somalia list after being de-listed from the IDAQ list. In addition, the groups of experts affiliated with these regimes and the CT regime conducted joint analyses upon recognizing that threats and financing

schemes apparent in the analysis of ISIL or Al-Qaeda may also be relevant to investigations on the financing of the arms trade, armed groups, or human trafficking.

Most importantly, the Security Council's increasing imposition of a CT framework in armed conflict settings has been shown to create challenges for humanitarian action. One of these challenges pertains to the fungibility approach, predominant in the CT context, which might overflow into the design and implementation of conflict regimes. In the other cases, the design of the regimes has remained out of step with the way the sanctions are being used. As a result, the humanitarian space is being limited in these contexts, in large part due to the transfer of CT goals into an armed conflict context, without the subsequent transfer of the humanitarian safeguards that now exist in the primary CT regime.

Lack of adequate IHL safeguards against the deleterious effects of sanctions themselves within conflict-related regimes

Considering the seeping of CT objectives into conflict-related regimes, there may be problems for humanitarian action despite an apparent alignment. Indeed, while IHL and humanitarian action are relevant to the design of sanctions regimes imposed in conflict contexts, they remain peripheral issues, and are not the core purpose of what the sanctions regimes are about. Thus, there is always a risk that the measures adopted to reach the objectives of conflict-related regimes run counter the rules of IHL and the humanitarian space. Most importantly, the conflict-related sanctions regimes only explicitly focus on the IHL obligations of the parties to the conflict to support humanitarian access and fail to mention the obligations of third-party member States to comply with IHL when implementing sanctions.

Indeed, the majority of conflict-related sanctions regimes fail to contain any language requesting member States to comply with IHL when implementing sanctions measures. To be clear, although conflict-related regimes do include language protecting humanitarian action from interference by the parties to the conflict, these same regimes generally do not contain language protecting humanitarian actors who engage and conduct activities with listed individuals and non-State armed groups, nor do they contain language protecting humanitarian action from interference by third States. This lapsus may lead States to prioritize their sanctions obligations over their IHL obligations when these appear to conflict with each other. By contrast, this language now exists in the IDAQ sanctions regime following the adoption of Security Council Resolution 2462.

This lack in the conflict-related regimes is problematic, as most of the negative effects of sanctions on humanitarian actors may be secondary or tertiary and can arise at the level of sanctions implementation by member States – at least from what has been witnessed in the CT sphere. Moreover, in contrast to the IDAQ regime, which now protects “humanitarian activities” since the adoption of Resolution 2462, language in the conflict-related regimes is limited to humanitarian activities of “assistance”, thus failing to include formally and

explicitly “protection” activities. It remains to be explained why this language is restricted to “assistance” activities, and an exploration of the potential implications on the ground is needed.³¹ However, risks for impartial humanitarian organizations are particularly important when sanctions are imposed against an armed group controlling territory rather than individual actors viewed as obstructing a peace process. Narrow and broad sanctions exist both in the CT and conflict spheres. Lack of proper language to protect humanitarian organizations engaging with armed groups holding territory, such as in the DRC and Somalia, might be problematic. Thus, the existing elements of protection described above may not be sufficient on their own to fully cover and protect humanitarian actors and their activities from the potential negative effects of UN sanctions.

The fact that sanctions regimes must comply with IHL is clearly expressed only in a few conflict-related sanctions regimes, namely the 1988 regime, Somalia, Libya, Yemen, and since very recently, the DRC. The language adopted in the DRC regime drastically departs from the other regimes and is worth noting, as the Security Council demands in Resolution 2582 that “States ensure that all measures taken by them to implement this resolution comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, as applicable”.³² Moreover, the Council has stressed that “the measures imposed by this resolution are not intended to have adverse humanitarian consequences for the civilian population of the DRC”.³³ This language demonstrates some awareness of the challenges evident in applying sanctions in armed conflict contexts.

Looking ahead: An agenda for future research

In summary, there is a pressing need to understand the impact of UN sanctions in conflict contexts beyond the CT sphere, as only one of the current UN sanctions regimes focuses exclusively on CT. Only a few studies have focused on cases involving UN sanctions designed to address armed conflict cases rather than CT, and never in isolation from other regional or unilateral measures. The difficulties in engaging in such research may account for this lacuna—although most of them also apply to research on CT sanctions. This gap matters for two reasons. First, UN sanctions are the only type of sanctions universally endorsed through the delegated authority that UN member States have given to the Security Council under Article 25 of the UN Charter. Thus, even though they are neither the most frequently applied nor necessarily the most effective, they are the most widely accepted as legitimate amongst the range of sanctions measures deployed.

31 Note that former regimes, such as the one applicable in Yugoslavia, mentioned the need to allow access to camps, prisons and detention centres (for the International Committee of the Red Cross and other relevant international humanitarian organizations), which belongs to the realm of protection activities.

32 UNSC Res. 2582, 29 June 2021, op. para. 4.

33 *Ibid.*, Preamble.

In addition, they both benefit from an implied international consensus and are held to a higher level of global accountability than individual or regional State sanctions. To the extent that they set the tone and standards or pave the way for the application of additional regional and unilateral measures, it is even more imperative that UN sanctions in particular conform to certain basic standards when imposed in armed conflict contexts, vis-à-vis IHL.

Second, UN sanctions tend to be of a more limited nature than regional or unilateral measures. The parallel application of UN and other sanctions in a single case will have interactive effects, but to the extent that research can deduct the impact of UN sanctions alone, it is more valuable for engaging with UN sanctions designers. Effecting change requires convincing sanctions designers of the impacts of their measures. As a result, if the original UN measures are found to have deleterious effects in a given case, there is a strong basis for pushing for a change in their design and application.

Any future research agenda will need to take three elements into consideration when embarking on further study: (1) the need for more terminological and conceptual clarity, (2) the need to dive into substantive areas for new research, and (3) a realistic understanding of the challenges inherent to the research methodology.

Terminology

In the research conducted thus far, common language often remains elusive, leading at times to critical misunderstandings between the CT and sanctions field, on the one hand, and the sanctions and IHL field, on the other. Six terminological issues warrant particular attention:

1. First, future research endeavours should aim to distinguish between instances of “direct” or “primary” impact and “indirect” or “secondary” impact. While the effects on humanitarian action may be similar, the plan for mitigating impact varies considerably, as does the political coalition needed to push for change.
2. Second, within the sanctions literature there is common reference to the term “unintended consequences”. This term is used to refer to the type of effects described in this paper. Just as a closer look at the meaning and type of “impact” would help clarify the meaning of “consequences”, a more studied look at the intentions of designers and implementers would help shine more light on what has otherwise been a long ignored or perhaps overly simplified description of the phenomenon under study.
3. Third, there is a critical issue of terminology around the use and meaning of the terms “exemption” and “exception”.³⁴ The UN uses the terms as they are employed in this paper; by contrast, at the EU level, the meaning of the

34 Rebecca Brubaker, *Nine Points on Designing UN Sanctions to Better Protect Humanitarian Activities*, remarks given at the High-Level Retreat on IHL, UN Sanctions and Counterterrorism, Greentree Estate, New York, March 2020, available at: <https://i.unu.edu/media/cpr.unu.edu/post/3989/SanctionsBriefing-July2020.pdf>.

terms is reversed. In a similar vein, the *Interlaken Manual on Targeted Financial Sanctions* follows a similar approach to the EU.³⁵ As a result, there is a general confusion of terms both within the sanctions community and amongst humanitarian practitioners. This terminological confusion has led to a tendency for past work either to mistakenly concur on points of divergence or to seek consensus where no real differences exist. Thus, there is a pressing need for future research to look for conditions which would help to generate consensus and propose a standard definition for these terms so that new work both within and across the two fields can speak from a common foundation of understanding.³⁶

4. Fourth, there is general confusion and lack of terminological clarity on the meaning of “impact”. To begin with, there is a need to distinguish more systematically between three types of impact: (1) the impact on the affected population, (2) the impact on humanitarian activities, and (3) the impact on the impartial and humanitarian character of the humanitarian sector. Within category (2), the impact on humanitarian activities, there is also a need to parse the effects on humanitarian access, on the one hand, and on humanitarian activities of assistance and protection, on the other. Such a studied distinction in future work would help better ground arguments for further adjustments in existing international legal frameworks.
5. Fifth, and similarly, future research would do well to clarify the origins and importance of the terms “impartial” and “neutral” in descriptions of humanitarian organizations, when discussing appropriate derogations and safeguards. Most individuals in the sanctions community will not be familiar with the debates around these terms. As a result, they are less likely to appreciate the potential impact that their measures may have either in support of or in contravention to these fundamental concepts. Rather, sanctions experts and practitioners are more accustomed to considering humanitarian actors as one uniform category.
6. Finally, amongst the community of sanctions implementers, on the one hand, and government regulators, on the other, there is a persistent terminological and conceptual debate at the heart of discussions around compliance, as well as a lack of understanding regarding the operational realities faced by humanitarian organizations. This debate centres around the question of whether there is such a thing as zero risk, and if not, what an acceptable level of risk tolerance should look like. This debate is key to any future research on potential measures for mitigating the impact of sanctions due to overcompliance and de-risking. Further terminological clarity would assist in building consensus around currently divergent approaches to risk and conceptions of acceptable risk.

35 Thomas J. Biersteker, Sue E. Eckert, Peter Romaniuk, Aaron Halegua and Natalie Reid, *Targeted Financial Sanctions: A Manual for Design and Implementation*, Contributions from the Interlaken Process, Watson Institute at Brown University, 2001.

36 For example, the term “exemption” used at the UN sanctions level is inverted with the term “exceptions” in the EU forum. This confusion is reproduced in the academic sector as well.

Substantive areas for further research

Foremost on any future research agenda should be the primary and secondary impacts of the remaining thirteen sanctions regimes on humanitarian action, given how substantially these regimes differ from the single CT sanctions regime. However, such an analysis should look for both negative and positive impacts rather than presume one or the other. There is an under-researched element of sanctions regimes which sees them as one source of deterrence in efforts to uphold IHL and protect the humanitarian space. Accordingly, there is a need for a dual-pronged research agenda, with one prong that looks for a potential negative impact of sanctions measures on humanitarian action and one that looks for potential positive impacts. Both prongs will have to treat the issue of impact carefully, as described above, given previous findings that secondary impacts, which are less directly attributable to sanctions measures, can have more noticeable effects. As part of this dual research endeavour, researchers should identify and recommend measures that could mitigate negative impacts and amplify positive impacts identified at the sanctions design, interpretation, application and adjustment stages.

An additional area of investigation that is ripe for further research is the extent to which States can and must take IHL into account when implementing UN sanctions in armed conflict settings. Studying implementation remains an ongoing challenge, however, given the variety of approaches amongst the 193 members of the UN as well as the complexity of the intergovernmental process that is often involved in implementation. Short of a comprehensive analysis of State implementation, policy actors may still benefit if future research identifies best practices from select States, such as those which have managed to apply UN sanctions measures effectively while remaining in compliance with their IHL obligations.

Methodological challenges

Future research will have to take into consideration and look to surmount certain key methodological challenges. Some of these challenges are simply inherent to this field of study. Paramount amongst these is the debate around how to most accurately and efficiently measure impact. This challenge can largely be divided into two subsequent hurdles: sourcing and validating information, and establishing a causal chain.

On the first point, previous studies have relied on self-reporting by humanitarian actors, and this in turn has resulted in criticism from sanctions experts, sanctions architects and government stakeholders, who point both to the self-reporting bias and to the lack of concrete details supplied to back up

anecdotal evidence.³⁷ Many humanitarian actors have asserted that detailed reporting is impossible given the confidentiality inherent in their work. In some cases, humanitarian actors may simply lack information and knowledge regarding the often complex, and sometimes rather opaque, UN sanctions regimes. Moreover, humanitarian actors may be wary of providing information or analysis that could subject them to greater scrutiny or potentially even legal action. Previous research efforts have cited challenges in reporting due to practitioners' wariness of admitting to conduct that, while covered by IHL, may nevertheless be interpreted by some States as prohibited under an existing UN sanctions regime. This, therefore, precludes cross-sectional studies on a sufficiently large scale.³⁸ An entity trusted by both communities could consider engaging in such a project in the future, given adequate resources and access, while noting that it may be extremely difficult to effectively undertake such an initiative in light of prevailing circumstances.³⁹

The second challenge exists in attempting to establish a causal link between a policy intervention and an outcome. This is a challenge that has plagued many fields of applied research. It is particularly fraught in the realm of sanctions given the myriad factors influencing the outcomes in question—restricted access, diminished assistance and hampered protection activities, to name a few. One current study is looking precisely at the challenge of establishing a causal chain between the application of CT measures writ large and the impact on humanitarian action.⁴⁰ There is also an inherent difficulty in isolating UN sanctions measures from other regional and unilateral sanctions. In addition, the relatively limited scope of certain sanctions regimes and the limited number of designations in others may also make it difficult to obtain a general overview of impact.⁴¹ As a result of these various factors, there is a significant gap in understanding of the interplay between UN sanctions and humanitarian action in armed conflict contexts beyond the realm of the CT sphere.

One could consider an alternative approach that looks to use counterfactuals to gauge impact, as has been much explored in the area of conflict prevention.⁴² Looking for the impact of a non-event has the advantage of simplifying contextual factors and better isolating a policy contribution. In this setting, rather than looking at the most severe instances of impeded access or diminished assistance, one could instead look at cases where UN sanctions

37 This has been a criticism repeated several times at different workshops and conferences bringing together sanctions experts and government practitioners. There are also increased requests from governments for “hard data” evidencing the direct impacts of sanctions measures on humanitarian action.

38 Based on author interviews.

39 Consultations under Chatham House, 2019–20.

40 This study is being produced by the Harvard Law School Program on International Law and Armed Conflict's Counterterrorism and Humanitarian Engagement Project.

41 For example, most designations in the Iraq regime date from the period immediately following the post-2003 US-led invasion and focus on former Baathists who no longer play a significant role in the conflict. As another example, in Sudan, only four individuals have been listed since 2005.

42 See for example, Laurie Nathan, Adam Day, João Honwana and Rebecca Brubaker, *Capturing UN Preventive Diplomacy Success: How and Why Does It Work?*, UNU-CPR, May 2018.

coexist with humanitarian activities and seek to understand what enables them to coexist productively. Any such study will, of course, have to account for situational differences, such as the scope of the existing UN sanctions, the presence of additional non-UN sanctions, the degree of stigmatization of the actors involved, and the existence of additional measures such as UN peace operations or foreign military occupation. Lastly, the counterfactual approach could also be used to examine instances of best practice when it comes to the degree of compliance with IHL rules regulating humanitarian access and activities.

Conclusion

It is important to understand what is at stake in this third moment of crisis and scrutiny around the UN sanctions tool. It is an opportunity for change. Addressing instances of negative impact effectively can serve to ensure that the legitimate end of maintaining international peace and security through sanctions is not at the expense of meeting the needs of victims of armed conflicts as envisaged under IHL. In the mid- to long term, addressing frictions through careful adjustments to the sanctions tool can help maintain both the legitimacy and the effectiveness of UN sanctions. The current research demonstrates that the stakes are high – if actors feel they cannot both maintain access and protect humanitarian activities in compliance with IHL while implementing sanctions, it is likely that instances of non-compliance will only increase. Alternatively, humanitarian organizations unwilling to risk non-compliance may choose to increasingly disengage from conflict contexts under UN sanctions. By contrast, if future research can better identify the sources of friction and suggest actionable paths forward that both protect humanitarian action and enable compliance with UN sanctions, there exists some potential for the two sets of activities to work in tandem and to ensure that compliance with sanctions does not come at the expense of meeting the needs of victims of armed conflicts.