

Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action

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Abstract

For some time, the impact of counterterrorism (CT) measures and sanctions on humanitarian action did not attract the attention that it merited. However, owing to a surge in awareness of this issue over the past two years, the fact that CT measures and sanctions can have negative consequences for principled humanitarian action is now widely accepted by a broad range of actors, and is

* The views expressed in this article are the author’s alone and do not necessarily reflect the Norwegian Refugee Council’s institutional position.

supported by a strong body of research identifying and analyzing these impacts. This article adds to this existing work by examining recent developments related to this issue. It looks at the impact of growing risk aversion in relation to CT measures and sanctions among donors, humanitarian organizations and other actors on principled humanitarian action, and highlights recent efforts to address and mitigate these impacts. The central argument is that CT and sanctions risks cannot be eliminated from humanitarian action. As such, policy change is needed to protect principled humanitarian action from further detrimental impacts and to ensure that people can access the assistance they need, regardless of where they are located.

Keywords: principled humanitarian action, counterterrorism, sanctions, risk.

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Introduction

The impact of counterterrorism (CT) measures and sanctions on principled humanitarian action is not a new challenge, but it is only in recent years that the issue has attracted the widespread attention that it merits from a broad range of stakeholders, including of course humanitarian organizations, but also donors, diplomats, civil servants and policy-makers responsible for developing these measures at international and domestic level. This increased attention has come with a growing acceptance of the fact that the application of humanitarian action's ethical and operational framework—the principles of humanity, impartiality, neutrality and independence—is increasingly threatened by CT measures and sanctions.¹

The legal basis for humanitarian action in situations of armed conflict is provided by international humanitarian law (IHL). The four principles of humanity, impartiality, neutrality and independence are incorporated into IHL via the Geneva Conventions.² The aim of principled humanitarian action as provided for in IHL is to relieve the suffering of individuals, wherever it may be found, guided solely by their needs, and to give priority to the most urgent cases

1 See, for example, Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and Norwegian Refugee Council (NRC), July 2013; Jessica S. Burniske and Naz K. Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict, March 2017; Emma O'Leary, *Principles under Pressure: The Impact of Counter-Terrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, NRC, June 2018.

2 For more on the links between humanitarian action, IHL and the normative background to the humanitarian principles, see Kate Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law: Study 4*, Humanitarian Policy Group (HPG) Report No. 5, in Overseas Development Institute (ODI), *The Politics of Principle: The Principles of Humanitarian Action in Practice*, London, March 2000; Jérémie Labbé and Pascal Daudin, "Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross", *International Review of the Red Cross*, Vol. 97, No. 897–898, 2016.

of distress.³ This objective, captured in the principle of humanity, reflects a moral imperative that views the individual as a human being alone and “refuses to take anything else into consideration”.⁴

Strongly linked with humanity is the principle of impartiality, which covers non-discrimination and proportionality, reflecting the fact that humanitarian assistance should be delivered according to the severity of needs alone. The principles of neutrality and independence enable the operationalization of humanity and impartiality by seeking to ensure that humanitarian actors do not take sides in conflicts, and operate independently of political, military or other objectives.⁵ These principles are not referred to explicitly in the Geneva Conventions, but the concept of non-participation (direct or indirect) in hostilities by those providing assistance is at the core of the Conventions.⁶ These four principles have been reaffirmed in various United Nations (UN) resolutions and integrated into frameworks developed by humanitarian organizations to guide their work.⁷

Delivering assistance in conflict-affected settings presents many challenges, and adherence to the humanitarian principles involves constant compromises. Depending on the circumstances, an organization may decide to provide assistance to displaced people in a camp that is effectively a place of internment, or to accept a military escort to enable it to provide assistance to communities in an area under siege. Acting in a principled manner means using the principles as both a guiding ethical framework and an operational risk management tool to identify what is an acceptable compromise and what amounts to unacceptable interference in humanitarian action.⁸ The application of the principles helps organizations to ensure that needs are met and the potential for manipulation of aid is minimized. In the absence of this framework, institutional, political, security and other considerations could dominate decision-making in relation to humanitarian action.⁹

Two such considerations are sanctions and CT measures. There is now widespread and increasing recognition of the fact that these can represent barriers

3 International Committee of the Red Cross (ICRC), *The Fundamental Principles of the International Red Cross and the Red Crescent Movement*, Geneva, August 2015, available at: www.icrc.org/sites/default/files/topic/file_plus_list/4046-the_fundamental_principles_of_the_international_red_cross_and_red_crescent_movement.pdf (all internet references were accessed in August 2021).

4 J. Labbé and P. Daudin, above note 2, p. 186.

5 OCHA, “OCHA on Message: What are the Humanitarian Principles?”, June 2012, available at: www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf.

6 K. Mackintosh, above note 2, p. 13.

7 UNGA Res. 46/182, 19 December 1991; UNGA Res. 58/114, 5 February 2004. See also ICRC and International Federation of Red Cross and Red Crescent Societies, *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations in Disaster Relief*, Geneva, 1994; Sphere, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response*, Geneva, 2018.

8 Katherine Haver and William Carter, *What It Takes: Principled Pragmatism to Enable Access and Quality Humanitarian Aid in Insecure Environments*, Secure Access in Volatile Environments Research Programme, Humanitarian Outcomes, November 2016, p. 37.

9 Nicholas Leader, *The Politics of Principle: The Principles of Humanitarian Action in Practice*, HPG Report No. 2, ODI, London, March 2000, p. 4.

to the application of the humanitarian principles during crisis response, with the risk that people living in areas impacted by them will have diminished access to humanitarian assistance and protection as a result. A strong body of research detailing how this might happen exists, illustrating that CT measures and sanctions can limit humanitarians’ engagement with non-State armed groups which may be in control of areas where people in need of aid are located, encourage donors to attach restrictive conditions on funding, raise challenges in access to vital support services from financial institutions and others, and encourage the avoidance of associated legal, reputational and other risks rather than appropriate risk management.¹⁰

This article begins by framing the issue and then seeks to build on, and add to, the existing work by highlighting some recent challenges to principled humanitarian action that have arisen as a result of growing risk aversion in relation to CT measures and sanctions on the part of donors, humanitarian organizations and others, drawing on the author’s operational experience. The article then analyzes some of the recent efforts to mitigate these impacts, many of which have been made as a result of advocacy efforts by an increasingly engaged and mobilized humanitarian community, before looking at the way forward.

CT, sanctions and principled humanitarian action: What’s the problem?

To understand recent developments in relation to the impact of CT measures and sanctions, it is first necessary to understand the origin of these measures as they relate to principled humanitarian action. Since 9/11, there has been a proliferation of measures designed to prevent funds or other assets from directly or indirectly benefiting groups or individuals targeted by CT measures or sanctions. While the targets and goals of sanctions and CT measures can differ, both generally seek to achieve their aims by stemming the flow of funds to certain groups or individuals.

At the international level, the UN Security Council has introduced sanctions against a number of groups and individuals, imposing asset freezes and requiring member States to prevent financial support from directly or indirectly benefiting them.¹¹ In addition, the Security Council has developed CT measures that require all States to criminalize financial transactions carried out with the intention or knowledge that they are to be used for the benefit of “terrorist organizations or individuals”, without providing a definition of such organizations or individuals.¹² At present only one Security Council sanctions

10 See, for example, K. Mackintosh and P. Duplat, above note 1; J. S. Burniske and N. K. Modirzadeh, above note 1; E. O’Leary, above note 1; Alice Debarre, *Making Sanctions Smarter: Safeguarding Humanitarian Action*, International Peace Institute, December 2019; InterAction, *Detrimental Impacts: How Counter-Terror Measures Impede Humanitarian Action*, April 2021.

11 See UN Security Council, “Sanctions”, available at: www.un.org/securitycouncil/sanctions/information.

12 UNSC Res. 2462, 28 March 2019; UNSC Res. 1373, 28 September 2001.

regime, that in relation to Somalia, includes an exemption excluding humanitarian actors, allowing them to deliver their services without the risk of contravening the regime.¹³

CT measures and sanctions at regional and national level

Member States must transpose these Security Council decisions regarding sanctions and CT domestically.¹⁴ In the absence of a universally agreed definition of terrorism, States have a very broad scope with which to interpret and apply Security Council decisions related to CT, and they unsurprisingly do so in ways that reflect their own political and security aims. In addition to transposing these Security Council decisions domestically, member States, including both donor and host States, can also develop and apply their own sanctions and CT measures. Some States have given their courts extra territorial reach in relation to CT measures and sanctions.¹⁵ Regional organizations, like the European Union (EU), also develop their own sanctions regimes and CT measures, which relevant States must also reflect at national level.¹⁶ In addition to asset freezes, other forms of sanctions can be imposed – for example, the EU’s prohibition on the purchase of crude oil or petroleum products in its Syria sanctions regime, which contains an exemption meaning that it does not apply to humanitarian organizations that receive funding from the EU or its member States; and the United States’ export ban in relation to some countries, which requires humanitarian organizations and others to apply for licences to gain permission for the export of some goods and technology to relevant contexts.¹⁷

CT measures and sanctions in grant agreements

In addition to international and national measures, humanitarian organizations that are reliant on funding from institutional donors are also bound by CT and sanctions-related clauses that may be included in some grant agreements.¹⁸ These clauses can mean that organizations are contractually required to comply with sanctions regimes that they would otherwise not be bound by as they have no other legal obligation to the donor state. In some cases, CT and sanctions-related requirements in grant agreements go further than requirements imposed by

13 UNSC Res. 751, 24 April 1992.

14 Charter of the United Nations, 26 June 1945, Chap. V, Art. 25.

15 See, for example, European Parliament, Directorate-General for External Policies, *Extraterritorial Sanctions on Trade and Investments and European Responses*, requested by the European Parliament’s Committee on International Trade, November 2020.

16 For an overview of these, see the EU Sanctions Map, available at: www.sanctionsmap.eu/#/main.

17 EU, Council Regulation 2016/2137 Amending Regulation (EU) No. 36/2012 concerning Restrictive Measures in View of the Situation in Syria, 6 December 2016; US Department of Commerce, Bureau of Industry and Security, Export Administration Regulations, March 2020.

18 NRC, *Toolkit for Principled Humanitarian Action: Managing Counterterrorism Risks*, May 2020, available at: www.nrc.no/toolkit/principled-humanitarian-action-managing-counterterrorism-risks/.

domestic legislation.¹⁹ It has become increasingly common for donors to espouse “zero tolerance” for risks related to sanctions and CT.²⁰ While there is no standard definition of the term “zero tolerance”, use of the phrase by donors indicates an expectation that grantees will eliminate exposure to relevant risks. This generally reflects an effort to address donors’ legal and financial risks, ultimately by transferring these risks on to humanitarian organizations.

How do CT measures and sanctions impact principled humanitarian action?

States’ broad interpretations of prohibitions on providing support to groups and individuals targeted by sanctions and CT measures result in a real risk that activities carried out by humanitarian organizations trying to respond to crises in an impartial, needs-based manner may fall under their scope.²¹ Activities that could potentially fall foul of these measures may include trainings in IHL or the provision of medical care to members of groups that are sanctioned or designated as terrorists.²² Incidental payments that humanitarians may need to make in the course of operations, or aid that is diverted, could also fall under the scope of these measures.²³

If found to be in violation of sanctions or CT measures, humanitarian organizations and their staff may face risks of fines or prosecution, as well as associated reputational risks and the risk of loss of funding. Strongly linked with these possibilities is the fact that, in seeking to comply with sanctions and CT measures and avoid exposure to legal and reputational issues, particularly in the wake of a number of high-profile scandals,²⁴ donors and humanitarian organizations are growing increasingly risk-averse, in some cases basing operational decisions on the need to accommodate the constraints imposed by these measures, rather than on humanitarian needs. This section explores some recent examples of risk aversion in relation to CT measures and sanctions.

19 An example of this can be found in grant agreements of the US Agency for International Development (USAID): USAID, *Certifications, Assurances, Representations, and Other Statements of the Recipient: A Mandatory Reference for ADS Chapter 303*, May 2018, pp. 4–5, available at: www.usaid.gov/sites/default/files/documents/1868/303mav.pdf.

20 See International Council of Voluntary Agencies, *Risk and Humanitarian Culture: An ICVA Briefing Paper*, Geneva, January 2020, p. 6.

21 Emanuela-Chiara Gillard, *Recommendations for Reducing Tensions in the Interplay between Sanctions, Counterterrorism Measures and Humanitarian Action*, Chatham House, London, August 2017, p. 6.

22 Supreme Court of the United States, *Holder v. Humanitarian Law Project*, 561 U.S. (2010), Nos 08-1498, 09-89, 21 June 2010; Marine Buissonniere, Sarah Woznick and Leonard Rubenstein, *The Criminalization of Healthcare*, Johns Hopkins, Safeguarding Health in Conflicts and University of Essex, June 2018.

23 E.-C. Gillard, above note 21, p. 2.

24 Jessica Alexander and Hannah Stoddard, “Then and Now: 25 Years of Sexual Exploitation and Abuse”, *The New Humanitarian*, 11 February 2021, available at: www.thenewhumanitarian.org/feature/2021/2/11/25-years-of-sexual-exploitation-and-abuse; Philip Kleinfeld, “Congo Aid Scam Triggers Sector-Wide Alarm”, *The New Humanitarian*, 11 June 2020, available at: www.thenewhumanitarian.org/investigation/2020/06/11/Congo-aid-fraud-corruption-Mercy-Corps.

Risk aversion among donors

This risk-averse approach is reflected in decision-making and compliance requirements imposed by donors, which can sometimes go further than what is required by CT legislation and sanctions themselves. In some cases, donors' risk aversion may be influenced by increasing public and media scrutiny of how their funds are spent. Efforts to protect increasingly limited aid budgets by avoiding reputational damage can result in risk-averse decisions. In 2019, the UK's then Department for International Development (DFID) suspended support for cash assistance in northeast Syria following the movement of people from areas that had been controlled by the so-called Islamic State (IS). An estimated 50,000 people were impacted by the decision.²⁵ DFID described this as a "precautionary measure due to the risks associated with the dispersal of *Daesh* members"²⁶ and stressed in communications with grantees that the decision was not a result of any suspected diversion. The move reflected the donor's concern that those moving from IS-held areas were somehow linked with, or were sympathizers of, the group, and a belief that they should not be given cash-based assistance owing to the potential for negative publicity and reputational damage if this were reported on.²⁷ In trying to avoid reputational risks, this decision limited beneficiaries' access to cash—a form of aid that DFID itself considered "faster (and) safer"²⁸ than others—on the basis of possible affiliation with IS, contrasting with a principled approach which requires that beneficiaries be selected on the basis of needs alone, regardless of political, religious or other affiliations.

Other donors have made efforts to minimize exposure to risk through the use of wording in grant agreements that limits who grantees can assist. In 2018, the US Agency for International Development (USAID) inserted a standard clause in its agreements with grantees in northeast Nigeria obligating funding recipients to obtain written approval before providing assistance to individuals known to have been "formerly affiliated" with Boko Haram, including "individuals who may have been kidnapped by Boko Haram or ISIS-West Africa but held for periods of greater than six months and those under the control or acting on behalf of the same".²⁹ Variations on the same clause appeared in USAID grant agreements in other contexts.

25 Ben Parker, "UK Keeps Limits on Cash Aid in Syria Over Counter-Terror Fears", *The New Humanitarian*, 16 May 2019, available at: www.thenewhumanitarian.org/news/2019/05/16/uk-keeps-limits-cash-aid-syria-over-counter-terror-fears.

26 Campbell MacDiarmid and Jack Dutton, "UK Cuts Cash Aid to Northeast Syria, Citing Fear of Funding ISIS", *The National*, 22 April 2019, available at: www.thenationalnews.com/world/mena/uk-cuts-cash-aid-to-northeast-syria-citing-fear-of-funding-isis-1.851970.

27 B. Parker, above note 25.

28 Department for International Development, *Saving Lives, Building Resilience, Reforming the System: The UK Government's Humanitarian Reform Policy*, London, September 2017.

29 For the full text of the clause, see Lindsay Hamsik, *NGOs and Risk: Managing Uncertainty in Local-International Partnerships—Case Studies: Northeast Nigeria and South Sudan*, InterAction, USAID and Humanitarian Outcomes, March 2019, p. 10.

The clause appeared to have stricter parameters than US government prohibitions on the provision of material support, which impose penalties on anyone who “knowingly provides material support or resources to a foreign terrorist organisation, or attempts or conspires to do so”.³⁰ In potentially targeting individuals such as those who have been kidnapped, and those that have been coerced into marriages with non-State armed group (NSAG) members, the clause implied that those who could reasonably be seen as victims of the conflict may be affiliated with the very groups that victimized them, and that they could lose access to assistance as a result.

In some instances, donors have required humanitarian grantees to ensure that beneficiaries of assistance that they fund do not appear on sanctions lists through beneficiary vetting (sometimes referred to as screening). Vetting of beneficiaries is generally considered a red line for humanitarian organizations: to ensure an impartial response, beneficiaries are selected on the basis of need alone, and affiliation with political or other groups cannot form part of the selection criteria. In contexts where IHL applies, assistance that aims at preserving life, preventing and alleviating human suffering, and maintaining human dignity cannot be denied on the basis of sanctions or CT measures. Vetting beneficiaries jeopardizes this approach.

The requirement to vet beneficiaries principally arises with some development donors who take the position that their funds must be used in a manner compliant with their obligations under CT measures and sanctions, and that as they are development-focused, IHL and the humanitarian principles are not relevant to the activities they support. The increasing involvement of development donors in conflict-affected settings in recent years,³¹ in line with the humanitarian–development nexus, means that this issue has become a pressing challenge for humanitarian organizations that are seeking to partner with development donors.

Insistence that humanitarians vet beneficiaries has resulted in organizations turning down significant funding opportunities in conflict-affected environments. In 2020, a consortium of humanitarian organizations responding to the Syrian crisis decided to forgo approximately €14 million in funding because of the donor’s requirement that the beneficiaries of humanitarian assistance under that project be vetted. In another case, a donor in Iraq rejected an application for a \$3.3 million grant after the applicant indicated that it could not comply with the donor’s requirement that beneficiaries of the project be vetted.

Governments’ and donors’ desire to ensure that funding is spent appropriately is legitimate. Humanitarian organizations share the aim of ensuring that assistance reaches people in need and have strict internal policies and procedures in place to see to it that this happens.³² However, humanitarian

30 United States Code, 2006 ed., Title 18, “Crimes and Criminal Procedure”, Chap. 113B, Sec. 2339B, “Providing Material Support or Resources to Designated Foreign Terrorist Organizations”.

31 See, for example, Lydia Poole and Vance Culbert, *Financing the Nexus: Gaps and Opportunities from a Field Perspective*, UN Food and Agriculture Organization, NRC and UN Development Programme, June 2019.

32 NRC, above note 18.

action takes place in complex and volatile environments and inherently involves exposure to a broad range of risks, including those related to CT and sanctions. Those most in need of assistance and protection are often located in conflict-affected environments, which may have weak civil and government institutions targeted by sanctions, or the presence of NSAGs that could be designated as terrorists. A commitment to providing aid in these areas necessitates accepting a high degree of risk. These risks can be managed, but they cannot be eliminated. Under such conditions, a zero-tolerance approach is not an effective risk management strategy. It discourages open engagement on challenges and dilemmas which would allow for the mitigation of risks where possible and the acceptance of risks where necessary.

Risk aversion among humanitarian actors

In the absence of an acceptance of risks by governments, some organizations consider it both safer and easier to limit operations to areas where CT and sanctions-related risks may not arise, regardless of where needs might be greatest.³³ This has resulted in some organizations altering programmes, or limiting or avoiding operations, in contexts impacted by sanctions or CT measures, reflecting a growing risk aversion within the sector that is further damaging adherence to the humanitarian principles and moving away from a needs-based response. This can be seen in some conflict-affected contexts where humanitarian organizations are crowded into government-controlled areas, leaving people in areas controlled by NSAGs without the assistance they need.

By extension, efforts to avoid exposure to CT and sanctions risks also affect how humanitarian actors are perceived by parties to conflicts. If humanitarians do not engage with parties to a conflict in a neutral manner, they may themselves be perceived as taking sides, with a corresponding impact on staff security. In contexts like northeast Nigeria, where some donors have imposed restrictive CT compliance requirements in their grant agreements, as mentioned above, and where the government has utilized CT measures to restrict humanitarian operations, limiting access to NSAG-controlled areas, the impact of these measures on how humanitarians are perceived is clear.³⁴

In August 2020, an article published in IS's weekly magazine *Al-Naba* called for the targeting of staff of humanitarian organizations, describing them as "partners in combat even if their personnel do not carry weapons or participate in combat".³⁵ Coming shortly after the killings of five humanitarians in Nigeria by Islamic State West Africa Province, the piece defended these killings, espousing a view that humanitarian workers are not neutral and are therefore legitimate targets for attack. In the absence of the ability to engage directly with such groups, it is extremely difficult for humanitarians to challenge this perception.

33 E. O'Leary, above note 1, p. 23.

34 *Ibid.*, p. 21; L. Hamsik, above note 29.

35 International NGO Safety Organisation, "A Declaration of Global Intent", The Hague, October 2012, p. 5.

Risk aversion among banks

Donors and humanitarian organizations are not the only actors whose risk appetite is impacted by CT measures and sanctions. Banks must also comply with these measures, and in order to minimize their exposure to risk of liability, many have significantly curtailed the services they offer to humanitarian actors operating in contexts perceived as “high-risk”, with the result that organizations can struggle to get funding to areas where it is needed. A survey of international non-governmental organizations (INGOs) working in Damascus indicated that in 2020, 56% of transfers requested were either not successful or were subject to significant delays.³⁶ Similar issues have arisen in other contexts, including Iran.³⁷ With banks having no incentive to provide transfers to areas they perceive as risky, and the availability of banking channels declining, the impact on principled humanitarian action is clear. If this issue is not addressed, banks, rather than needs, will ultimately dictate where humanitarian organizations work.

What has been done to address the issue?

The past decade has seen some significant efforts to safeguard principled humanitarian action from the impact of CT measures and sanctions and to mitigate the associated risks. These initiatives have taken a variety of forms, including exemptions that exclude humanitarian organizations from the scope of CT measures and sanctions, improved language in grant contracts, and guidance for humanitarians and private sector actors such as banks. These have come about largely because of extensive lobbying by a number of organizations within the humanitarian community, sometimes with the support of concerned States and intra-governmental bodies, in line with the increasing awareness of the negative impacts of CT measures and sanctions.

Perhaps most notable among these developments was the 2010 UN Security Council decision to include a humanitarian exemption in its Somalia sanctions regime, stating that the sanctions “shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia”.³⁸ Introduced owing to concerns that the sanctions’ asset freeze targeting Al-Shabaab would limit the humanitarian response to famine in areas under the control of that group, the exemption represented an effort to share risks between States and humanitarian organizations. It acknowledged the challenges of aid delivery in Somalia, and clearly indicated that the delivery of needs-based humanitarian assistance should

36 Damascus-Based INGOs, *Understanding the Operational Impacts of Sanctions on Syria II: Damascus-Based INGOs and Bank De-Risking*, April 2021.

37 NRC, “Future of Aid Work at Risk in Iran Due to U.S. Sanctions”, 5 August 2019, available at: www.nrc.no/news/2019/august2/aid-work-in-iran-at-risk-due-to-u.s.-sanctions/.

38 UNSC Res. 751, 24 April 1992.

be prioritized over enforcement of the sanctions.³⁹ The Somalia exemption remains the only such exemption in a Security Council sanctions regime.

This and a number of other efforts to safeguard principled humanitarian action from the impact of CT measures and sanctions over the past ten years have been analyzed extensively elsewhere.⁴⁰ This section of the article focuses primarily on highlighting the significant number of developments since 2019, during which time there has been a notable increase in engagement on this issue within the humanitarian community, largely because the impacts of CT measures and sanctions on principled humanitarian action have become so prominent that they can no longer be ignored. In recent years, advocacy by humanitarians to mitigate the impacts of CT measures and sanctions on their work has broadly, though not exclusively, focused on the following: UNSC action to safeguard principled humanitarian action; improved language in donor grant agreements; clearer guidance and more dialogue regarding sanctions and bank de-risking; the use of derogations and licenses; and extending the use of humanitarian exemptions.

Reflecting growing acceptance of the fact that solutions to this issue cannot be found among humanitarians alone, many recent initiatives have involved action by sanctions and CT policy-makers, as well as financial institutions. While the resulting steps have certainly not gone so far as to eliminate the difficulties that CT measures and sanctions pose to principled humanitarian action, they have provided strong precedents on which to build future efforts.

Improved language in UN Security Council resolutions

Since 2004, preambular paragraphs in various UN Security Council resolutions have stated that CT measures should comply with IHL.⁴¹ When, in March 2019, the Security Council began to negotiate a new resolution on countering the financing of terrorism, a surge in awareness of the impact of CT measures and sanctions meant that the move was met with a galvanized humanitarian community and with several member States that were attuned to the problem and concerned about the potential impacts that the resolution could have if it passed in the absence of language which safeguarded humanitarian action.⁴² Intense lobbying efforts resulted in the inclusion of new language to protect humanitarian action in Security Council Resolution 2462. While the resolution is not without its problems from a humanitarian perspective,⁴³ the inclusion of this safeguarding

39 K. Mackintosh and P. Duplat, above note 1, pp. 73–75.

40 See, for example, K. Mackintosh and P. Duplat, above note 1; E. O’Leary, above note 1; European Center for Non-Profit Law, *A String of Successes in Changing Global Counter-Terrorism Policies that Impact Civil Space*, Budapest, July 2016.

41 UNSC Res. 1535, 26 March 2004.

42 Information on the negotiations for Resolution 2462 can be found in UN Security Council, “Combatting the Financing of Terrorism Open Debate”, 27 March 2019, available at: www.securitycouncilreport.org/whatsinblue/2019/03/combatting-financing-of-terrorism-open-debate.php.

43 Fionnuala Ní Aoláin, “The Massive Perils of the Latest U.N. Resolution on Terrorism”, *Just Security*, 8 July 2019, available at: www.justsecurity.org/64840/the-massive-perils-of-the-latest-u-n-resolution-on-terrorism/.

language created a strong precedent at Security Council level and represented a significant step forward in efforts to ensure that principled humanitarian action is not impeded by CT measures.

- For the first time in the operative paragraphs of a Chapter VII resolution, Resolution 2462 included a legally binding decision that States shall establish criminal offences “in a manner consistent with” IHL, a demand that States ensure that their CT financing measures “comply with” IHL, and the urging of States to “take into account the potential effect” of measures to counter the financing of terrorism on exclusively humanitarian activities.⁴⁴
- Resolution 2462 was followed four months later by Resolution 2482 on the links between organized crime and CT. This resolution goes further than Resolution 2462 in that it refers to CT measures in general, not solely to CT financing efforts. It urges member States to ensure that all measures taken to counter terrorism “comply with their obligations under international law, including international humanitarian law”, and “urges States to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities”.⁴⁵

Improved language in grant agreements

CT- and sanctions-related language in grant agreements has been a key concern of humanitarian actors for some time. Advocating for adjustments to these clauses to ensure that they do not negatively impact principled humanitarian action has proved difficult, partly owing to the fact that donors do not always inform partners when they change the wording of CT clauses or when they introduce new clauses. As a result, problematic wording often comes to light when partnership discussions are at an advanced stage, making negotiations challenging. This is exacerbated by an increasingly competitive funding environment, which disincentivizes some organizations from pushing back on potentially harmful requirements. Nevertheless, in recent years, focused collective advocacy efforts by humanitarian organizations have resulted in several donors making positive changes to the language in their grant agreements.

- In December 2020, the EU’s humanitarian donor ECHO released its new grant agreement which explicitly mentions that respect for EU restrictive measures must not impede effective and principled humanitarian responses. It states that “persons in need must therefore not be vetted”.⁴⁶
- In 2020, USAID⁴⁷ published significant revisions to its anti-terrorism requirements for grantees. The update to the Anti-Terrorism Certification⁴⁸

44 UNSC Res. 2462, 28 March 2019.

45 UNSC Res. 2482, 19 July 2019.

46 European Commission, *Humanitarian Aid General Model Grant Agreement*, Directorate-General for European Civil Protection and Humanitarian Aid Operations, June 2020, Art. 18, p. 76.

47 USAID, above note 19.

48 *Ibid.*

pertains to assurances that the grantee has not provided material support to any designated terrorist groups, anywhere in the world, regardless of the source of funding, within the last three years (reduced from the previous requirement of ten years). The second change, to USAID's Standard Provisions, prohibits grantees from engaging in unlicensed transactions with entities or persons on the US government or UN terrorist lists. This revision eliminated the broad requirement that all publicly available information be considered when screening partners and other parties.⁴⁹

Guidance and dialogue in relation to sanctions and bank de-risking

Reflecting the widespread acceptance of the multifaceted nature of the issue of bank de-risking, several initiatives have focused on clarifying compliance requirements in relation to sanctions for both financial institutions and humanitarian organizations. These have been complemented in some contexts by multi-stakeholder dialogues that convene relevant stakeholders from government, banks and humanitarian organizations to try to address various aspects of the problem. These include the UK's Tri-Sector Working Group and the Swiss Development Corporation and ECHO-hosted Compliance Dialogue on Syria-Related Humanitarian Payments.⁵⁰ Such initiatives are valuable in clarifying some key issues and in building a mutual understanding of the problem, but in the absence of concrete policy and regulatory change by States, non-binding guidance and dialogue have not proven sufficient to increase banks' risk appetite in dealing with humanitarian organizations.

- At the start of the COVID-19 pandemic, concerns were raised about the potential impact of sanctions on the ability of humanitarian organizations to respond to the crisis.⁵¹ In May 2020, the European Commission produced its *Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures*.⁵² The first version of the guidance note covered Syria, with later versions⁵³ expanding beyond the COVID-19 response and covering other contexts. Most

49 Charity & Security Network, "USAID Revises Grantee Documents Relating to Anti-Terrorism Requirements", May 2020, available at: <https://charityandsecurity.org/news/usa-id-revises-grantee-documents-relating-to-anti-terrorism-requirements/>.

50 Graduate Institute Geneva, "The Compliance Dialogue on Syria-Related Humanitarian Payments", 29 May 2020, available at: www.graduateinstitute.ch/communications/news/compliance-dialogue-syria-related-humanitarian-payments.

51 NRC, "Review Sanction Regimes to Facilitate Covid-19 Response", April 2020, available at: www.nrc.no/news/2020/april/review-sanction-regimes-to-facilitate-covid-19-response/.

52 European Commission, *Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures*, C (2020) 3179 final, Brussels, 11 May 2020, available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200511-syria-humanitarian-aid-guidance-note_en.pdf.

53 European Commission, *Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures*, C (2020) 7983 final, Brussels, December 2020, available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/201116-humanitarian-aid-guidance-note_en.pdf.

significantly for humanitarians, the guidance note stresses the primacy of aid delivery, noting that “where no other option is available, the provision of humanitarian aid should not be prevented by EU restrictive measures”.⁵⁴ The guidance note also clearly states that beneficiaries must not be vetted: “The identification as an individual in need must be made by the Humanitarian Operators based on these [IHL and the humanitarian] principles. Once this identification has been made, no vetting of the final beneficiaries is required.”⁵⁵ In relation to bank de-risking, the guidance note highlights that “EU restrictive measures should not lead to over-compliance”.⁵⁶

- Similarly, in April 2020 the US Office of Foreign Assets Control (OFAC) released a fact sheet on “Provision of Humanitarian Assistance and Trade to Combat COVID-19”.⁵⁷ The fact sheet does not contain new information but highlights the relevant exemptions and exceptions for humanitarian assistance and trade under various sanctions regimes. In a statement that preceded the release of the fact sheet, OFAC expressed its commitment “to working with financial institutions and non-profit organizations in their efforts to mitigate risks and allow humanitarian assistance and associated payments to flow to those who need it”.⁵⁸

Increased use of licenses and derogations for humanitarian activities

In the absence of consensus among States on the use of humanitarian exemptions, some States and regional bodies have introduced licenses (known as derogations at EU level) within their sanctions regimes. Rather than excluding humanitarian organizations from the scope of these measures from the outset, as exemptions do, these allow for case-by-case exceptions to be made, sometimes on the basis of applications made by humanitarian organizations. While the use of these measures reflects efforts to protect humanitarian action from the impact of sanctions, the increasing reliance on them as a means to do so has attracted criticism from humanitarian organizations owing to the fact that they can be limited to certain activities, organizations or amounts of funding, and because application processes can be opaque and bureaucratic, with slow response times that make them incompatible with emergency response and with a principled approach.⁵⁹

54 European Commission, above note 52, p. 9.

55 *Ibid.*, p. 12.

56 *Ibid.*, p. 10.

57 US Department of the Treasury, “Publication of a Fact Sheet on the Provision of Humanitarian Assistance and Trade to Combat COVID-19”, 4 April 2020, available at: <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20200416>.

58 US Department of the Treasury, “Treasury Underscores Commitment to Global Flow of Humanitarian Aid in Face of COVID-19 Pandemic”, Washington, DC, 9 April 2019, available at: <https://home.treasury.gov/news/press-releases/sm969>.

59 Peter Maurer, “Without Urgent Action to Protect Essential Services in Conflict Zones We Face Vast Humanitarian Disaster”, speech given to the UN Security Council Open Debate on the Protection of Objects Indispensable to the Survival of the Civilian Population, 27 April 2021, available at: www.icrc.org.

- Following its exit from the EU, the UK put in place an independent sanctions regime under the Sanctions and Anti-Money Laundering Act.⁶⁰ Lobbying by humanitarian organizations resulted in the Act incorporating provisions for the UK to issue general licences.⁶¹ While the process, criteria and political will to actually issue general licences are not yet clear, there is now legal scope for this under UK law which did not exist previously.
- In January 2021, in response to widespread concern about the potential impact of the designation of Ansar Allah as a terrorist group on the humanitarian response in Yemen, OFAC introduced four broad general licenses authorizing a wide range of activities. These included those “by non-governmental organisations to support humanitarian projects, democracy building, education, non-commercial development projects, and environmental protection in Yemen”.⁶² The designation was revoked shortly after taking effect.
- The EU has included the possibility for humanitarian organizations to apply to member States for derogations in several of its sanctions regimes.⁶³ In 2021, the European Commission launched an EU-level contact point for humanitarian organizations to provide information and guidance on the practicalities of requesting humanitarian derogations under EU sanctions.⁶⁴ As yet, it is too early to tell whether the contact point has proved a useful resource for the humanitarian community.

Increased used of exemptions

To date there has been a reluctance on the part of some States to expand the use of humanitarian exemptions beyond the few existing examples, which include the exemptions found in the UN Security Council’s Somalia sanctions regime and the EU’s Syria fuel sanctions.⁶⁵ For some time, humanitarians were also slow to advocate for exemptions, often owing to a lack of awareness and understanding of the issues involved. Due to broader consciousness of the impact of CT and sanctions, this has changed, with many humanitarian organizations now actively

[org/en/document/without-urgent-action-protect-essential-services-conflict-zones-we-face-vast-humanitarian.](#)

- 60 UK Sanctions and Anti-Money Laundering Act, c. 13, 2018, available at: www.legislation.gov.uk/ukpga/2018/13/contents.
- 61 Simmons & Simmons, “Overview of UK Financial Sanctions Regime Post Brexit”, February 2020, available at: <https://tinyurl.com/3vkxcsnm>.
- 62 US Department of the Treasury, “Issuance of Counter Terrorism General Licenses and related FAQs; Counter Terrorism Designations; Venezuela-Related Designations; CAATSA – Russia-Related Designations; Yemen-Related Designations Updates”, January 2021, available at: <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210119>.
- 63 See, for example, EU, above note 17.
- 64 European Commission, “EU-Level Contact Point for Humanitarian Aid in Environments Subject to EU Sanctions”, 2021, available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/eu-level-contact-point-humanitarian-aid-environments-subject-eu-sanctions_en.
- 65 UNSC Res. 2551, 12 November 2020; European Commission, *Commission Frequently Asked Questions on EU Restrictive Measures in Syria*, Brussels, September 2017, p. 7.

advocating for humanitarian exemptions.⁶⁶ Some States have included exemptions at domestic level, often as a result of advocacy efforts by humanitarians.

- The UK's 2019 Counter-Terrorism and Border Security Act contains an exemption for "providing aid of a humanitarian nature".⁶⁷ The Act gives the government the power to make it a criminal offence for British nationals and residents to enter or remain in designated countries and regions unless they can provide a "reasonable excuse" for being there. Initially, only government workers were explicitly exempted from this clause, leaving humanitarian workers exposed to the risk of police investigation and a ten-year prison sentence. Lobbying by humanitarian organizations that were concerned about the impact of this clause on their staff resulted in the inclusion of the exemption.⁶⁸ Humanitarian organizations have also lobbied for an exemption in similar legislation introduced in the Netherlands.⁶⁹
- In Chad, a law on the suppression of acts of terrorism passed in 2020 contains a clause stating that "nothing in this law may be interpreted as derogating from international humanitarian law and international human rights law", as well as a humanitarian exemption stating that "activities of an exclusively humanitarian and impartial nature carried out by neutral and impartial humanitarian organisations are excluded from the scope of application of the present law".⁷⁰
- A law passed in Switzerland in 2020 included the offence of support to terrorist organizations, which could have criminalized essential humanitarian activities such as the provision of medical care or engagement with NSAGs for humanitarian purposes. Advocacy by humanitarian actors helped to ensure that the law included an exemption for humanitarian activities carried out by impartial humanitarian actors on the basis of Article 3 common to the four Geneva Conventions.⁷¹

66 See, for example, Action Against Hunger *et al.*, "Counter-Terrorism Frameworks and Safeguarding Humanitarian Space: Humanitarian Recommendations ahead of the UNGA High Level Side Event", *Reliefweb*, 23 September 2019, available at: <https://reliefweb.int/report/world/counter-terrorism-frameworks-and-safeguarding-humanitarian-space-humanitarian>; ICRC, "Counter-Terrorism Measures Must Not Restrict Impartial Humanitarian Organizations from Delivering Aid", 12 January 2019, available online at: www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations.

67 UK Counter-Terrorism and Border Security Act, c. 3, 2019, available at: www.legislation.gov.uk/ukpga/2019/3/contents.

68 Karen McVeigh, "MPs Pass Counter-Terror Bill Amendments to Protect Aid Workers", *The Guardian*, 23 January 2019, available at: www.theguardian.com/global-development/2019/jan/23/mps-pass-counter-terror-bill-amendments-to-protect-aid-workers.

69 Jan Egeland, "New Dutch Terror Bill Must Not Target Aid Workers", *EU Observer*, 14 October 2019, available at: <https://euobserver.com/opinion/146230>.

70 Republic of Chad, Law No. 003/PR/2020, available at: www.unodc.org/documents/westandcentralafrica/Loi_terrorisme_du_Tchad_2020.pdf.

71 Geneva Call, "An Exemption for Humanitarian Activities in the New Swiss Counter-Terrorism Law: A Much-Needed Safeguard and a Welcome Step Protecting the Humanitarian Space", 6 October 2020, available at: www.genevacall.org/an-exemption-for-humanitarian-activities-in-the-new-swiss-counter-terrorism-law-a-much-needed-safeguard-and-a-welcome-step-protecting-the-humanitarian-space/.

- At the 2020 French National Humanitarian Conference, President Macron announced the issuing of a new directive from the Ministry of Justice to all French prosecutors recalling the “specific nature and mandate of humanitarian organisations, including their protection under IHL”,⁷² with the intention of avoiding the possible criminalization or prosecution of aid workers.

The developments outlined above are positive and much-needed responses to growing calls for safeguards for the humanitarian community. The sheer variety of recent initiatives by such a broad range of actors aimed at protecting principled humanitarian action from the negative impacts of CT measures and sanctions must be interpreted as a widespread acceptance that these impacts exist, and that they should be addressed. However, some efforts go further than others in terms of dealing with the core problems. Because they are binding, humanitarian exemptions in domestic CT legislation and safeguarding language in Security Council resolutions carry more weight than non-binding guidance in relation to sanctions compliance. Derogations and licenses are not a suitable solution for safeguarding efficient and principled humanitarian action. Application procedures can be confusing, cumbersome and slow, thereby delaying the delivery of vital assistance. In some contexts, humanitarian organizations adjust programmes to avoid delays as a result of having to apply for derogations or licenses, with a corresponding impact on the quality of aid provided to people in need.⁷³ Requiring humanitarian organizations to seek permission from political bodies to carry out activities in some contexts can also affect the perception of humanitarian organizations as neutral, impartial and independent, with a corresponding impact on the safety of staff. While multi-stakeholder dialogues are welcome and necessary for developing a shared understanding of the challenges involved, they form just one part of a wider set of tools for addressing this issue and should not be thought of as stand-alone solutions in and of themselves. Meanwhile, in the absence of the application of comprehensive solutions, negative impacts continue to affect principled humanitarian action and, as a result, people’s ability to access the assistance they need.

Accepting and sharing risks: The most effective solution

Ultimately, the clearest solution to the challenges outlined in this article lies in humanitarian exemptions that exclude the activities of impartial humanitarian organizations from the scope of sanctions regimes and CT measures. Humanitarian exemptions “create a space in sanctions and counterterrorism regimes for forms of principled humanitarian action, allowing humanitarian

72 “Conclusion by President Emmanuel Macron of the National Humanitarian Conference”, *Élysee*, 17 December 2020, available at: www.elysee.fr/emmanuel-macron/2020/12/17/conclusion-par-le-president-emmanuel-macron-de-la-conference-nationale-humanitaire.

73 Damascus-Based INGOs, *Understanding the Operational Implications of Sanctions on Syria: Insights from Damascus-Based INGOs*, June 2020.

actors to deliver their services without the risk of contravening those measures".⁷⁴ Exemptions are now widely accepted by humanitarian organizations, and by some States, as the most effective way to reconcile States' obligations under IHL with the political and security-related objectives of CT measures and sanctions. Crucially, the use of exemptions would provide much-needed support in addressing the trend of risk aversion in relation to principled humanitarian action, by reassuring donors, humanitarian organizations and banks. If carefully worded and well-framed, such exemptions could allow States to share risks and to safeguard principled humanitarian action without impacting the effectiveness of CT measures and sanctions as foreign policy and security tools.

Those States that oppose the increased use of exemptions tend to cite concerns about the creation of loopholes which may be open to abuse by non-humanitarian actors. It should be noted that to date, there have been no public reports of such abuse of the Somalia or Syria exemptions. The limiting of the exemptions to impartial humanitarian actors would naturally exclude organizations with political or other non-humanitarian motives.

Exemptions may not provide a blanket solution to all of the challenges posed to principled humanitarian action by CT measures and sanctions. It is possible, for example, that development donors would not accept humanitarian exemptions, covering impartial humanitarian organizations, as applicable to activities that they fund. Further policy action is needed to comprehensively address the entrenched issue of bank de-risking.

For their part, significant advocacy efforts have been made by humanitarian organizations to limit the ethical and operational impact of these measures. Recognizing that risks related to the application of the humanitarian principles should form part of humanitarian risk management approaches, the Norwegian Refugee Council's *Toolkit for Principled Humanitarian Action: Managing Counterterrorism Risks*⁷⁵ outlines practical steps that humanitarian organizations can take to strengthen risk management through an approach underpinned by these principles. Joint advocacy efforts increasingly focus on limiting the impacts of new CT measures and sanctions on humanitarian action, with some notable successes, as outlined above.

However, like donors, humanitarian organizations also need to demonstrate greater recognition of the fact that risks cannot be eliminated from humanitarian response. More open discussion on what amounts to an acceptable compromise in relation to the application of the humanitarian principles, and what amounts to inappropriate influencing by politically motivated actors, is a crucial part of pushing back against the growing impact of CT measures and sanctions on humanitarian action.

74 Katie King, Naz K. Modirzadeh and Dustin A. Lewis, *Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict Counterterrorism and Humanitarian Engagement Project, April 2016, p. 8.

75 NRC, above note 18.

Conclusion: Where do we go from here?

The negative consequences of CT measures and sanctions for principled humanitarian action are clear. These measures directly and indirectly impact many aspects of the provision of humanitarian assistance, from the locations in which humanitarian organizations operate and who they assist, to the modalities they can use. They do so by limiting organizations' ability to engage with groups for the purposes of gaining and maintaining access, through the imposition of donor requirements that prevent a needs-based response, by constraining the use of suppliers of crucial services who may be sanctioned, and by making it increasingly difficult to transfer funding needed to support operations to where it needs to go.

These impacts are clear not only to humanitarian organizations but also to other key stakeholders, including donors and CT and sanctions policy-makers. This is evident from the variety of efforts undertaken in recent years to safeguard humanitarian action in the development of these measures. These efforts reflect the fact that while States use sanctions and CT measures as effective instruments of security and foreign policy, many of these States are also major donors with the goal of supporting principled humanitarian action. These two aims are not mutually exclusive, but current policy inconsistencies mean that humanitarian organizations are being granted funds to support activities by donor governments and are then unable to deliver fully on their objectives because of restrictions applied by the same governments.

Humanitarian organizations will inevitably continue to face challenges in the application of the humanitarian principles. Wider acceptance of the fact that risk is inherent in aid delivery, accompanied by a move away from a zero-tolerance, risk-averse approach to humanitarian action, would allow for a more nuanced, open discussion of how these challenges are engaged with and resolved. Ultimately this would support an improvement both in people's access to assistance and in the quality of aid provided.