

The relationship between international humanitarian law and asset freeze obligations under United Nations sanctions

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Abstract

While challenges may persist with respect to the relationship between counterterrorism (CT) and humanitarian action, it is at least understood that CT measures must comply with international humanitarian law (IHL). Clarifying the relationship between this body of law and CT measures is one of the modest but important innovations of United Nations (UN) Security Council Resolution 2462. At a minimum, references to IHL in this resolution leave a pathway for States to take measures to preserve impartial humanitarian action from the effects of CT, and at most, they prescribe that States should take such measures. Progress in clarifying the relationship between UN sanctions obligations and IHL obligations appears to be lacking with respect to non-CT-related UN sanctions. As will be discussed in this paper, this leads to questions regarding the application of the so-called “supremacy clause” contained in Article 103 of the UN Charter vis-à-vis IHL obligations.

Keywords: sanctions, humanitarian action, international humanitarian law, UN Charter.

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Introduction

Over recent years, the potential for counterterrorism (CT) measures to negatively impact the ability of impartial humanitarian organizations¹ to carry out their work has received much attention.² Against this backdrop, it has also been suggested that United Nations (UN) sanctions, including those that are not strictly related to CT, may similarly have an impact on such humanitarian action in situations of armed conflict.³ For example, the United Nations University has sought to specifically study the relationship between non-CT-related UN sanctions and humanitarian action, a project that is ongoing at the time of writing.⁴

“Non-CT-related” UN sanctions which are related to armed conflict make up a majority of the sanctions regimes adopted by the UN Security Council (UNSC) that are currently in force. Of the fourteen UN sanctions regimes in force at the time of writing, ten can be characterized as “conflict-related” sanctions – i.e., those that are designed to apply to situations of armed conflict. These are those sanctions applicable to Somalia, the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Yemen, Mali, Sudan, South Sudan, Libya, Iraq, and the 1988 sanctions regime relating to the Taliban in Afghanistan,⁵ all of which are the focus of this paper.⁶ The paper therefore excludes an analysis of the 1267

- 1 The term “impartial” is a term of art under international humanitarian law (IHL) that triggers specific legal consequences, some of which will be elaborated in this paper. It is used throughout IHL, including in key provisions relating to humanitarian action such as Articles 3 and 9/9/9/10 common to the four Geneva Conventions. According to the International Committee of the Red Cross (ICRC), “impartiality” denotes an “attitude to be adopted vis-à-vis the persons affected by armed conflict” in the planning and implementation of humanitarian activities. Impartiality dictates that the needs of the persons affected by armed conflict are the exclusive criteria in shaping and implementing humanitarian activities. Naturally, and as the ICRC makes clear, any discrimination based on “nationality, race, religious beliefs, class or political opinions or any similar criteria” would disqualify a humanitarian activity from being “impartial”. See, generally, ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), paras 794–796, 1160–1164.
- 2 Jessica S. Burniske and Naz K. Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action & Comment on Study*, Harvard Law School Program on International Law and Armed Conflict, 2017; Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Prevention/Countering Violent Extremism on Principled Humanitarian Action*, 12 June 2018; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 22 November 2019, pp. 59–61.
- 3 Alice Debarre, *Making Sanctions Smarter: Safeguarding Humanitarian Action*, International Peace Institute, December 2019; Emanuela-Chiara Gillard, *Recommendations for Reducing Tensions in the Interplay Between Sanctions and Counterterrorism Measures and Humanitarian Action*, Chatham House, August 2017.
- 4 Rebecca Brubaker and Sophie Huvé, *UN Sanctions and Humanitarian Action: Review of Past Research and Proposals for Future Investigation*, United Nations University, Centre for Policy Research, January 2021.
- 5 It must be noted that this article was written prior to the Taliban’s takeover of Afghanistan in August 2021. As a result, the observations in this paper relating to the Afghan context may no longer be applicable by the time this paper is published.
- 6 For an overview, see United Nations, “The Subsidiary Organs of the United Nations Security Council: 2021 Fact Sheet”, 16 July 2021, available at: www.un.org/securitycouncil/sites/www.un.org/securitycouncil/files/subsidiary_organ_factsheets.pdf (all internet references were accessed in November 2021).

sanctions regime on Al-Qaeda and the Islamic State of Iraq and the Levant (ISIL), which is the only “pure CT” sanctions regime within the UN system.⁷

Focusing on the ten conflict-related UN sanctions regimes listed above, this paper is an attempt to add to the discourse surrounding these UN regimes, which have thus far appeared to receive less attention from a legal perspective than their CT-related counterparts. It seeks to draw lessons from the legal discourse surrounding CT obligations binding on member States pursuant to decisions by the UNSC acting under Chapter VII of the UN Charter,⁸ and their potential impacts on impartial humanitarian action. More concretely, it examines the possible threats posed to impartial humanitarian action by UN sanctions, and any potential mitigating measures based on past discussions concerning CT and international humanitarian law (IHL).

Comparisons between non-CT-related sanctions and UN sanctions with CT measures mandated by the UNSC are drawn,⁹ because the threats to impartial humanitarian action they both pose are similar in kind. As will be elaborated in the following section, the dangerous elements of CT resolutions such as Resolution 2462 find parallels in non-CT-related UN sanctions. Both have the potential to either directly prohibit impartial humanitarian action or at least have a prohibitive impact.

With regard to CT, however, there have been developments towards striking a balance between CT objectives, on the one hand, and IHL and humanitarian action, on the other. For instance, Resolutions 2462 and 2482 have explicitly clarified that all CT measures must be implemented in accordance with IHL using binding “decides” and “demands” language in their operative paragraphs.¹⁰ To date, however, there have been no such references in non-CT-related UN sanctions.

What may seem like banal references to IHL could in fact be rather crucial from a legal perspective. At a minimum, these explicit references using mandatory language in the operative paragraphs of CT resolutions clarify the relationship between the obligations contained therein and IHL. They dictate that the former cannot come at the expense of the latter; rather, all CT obligations must be implemented in accordance with IHL. As will be explained, this includes specific IHL rules that protect and privilege impartial humanitarian action.¹¹ In the

7 See the article by Rebecca Brubaker and Sophie Huvé in this issue of the *Review*.

8 Recalling that UNSC decisions under Chapter VII are binding on member States. Charter of the United Nations, 1 UNTS XVI, 26 June 1945 (entered into force on 24 October 1945) (UN Charter), Art. 25.

9 Among the many examples of what could be considered a “CT measure”, laws criminalizing support to individuals or entities designated as “terrorists” have raised particular concerns. The ICRC has also brought attention to CT sanctions regimes and the tendency for States to impose cumbersome CT clauses in their funding agreements as examples of CT measures that negatively impact impartial humanitarian action. See ICRC, above note 2, p. 60.

10 UNSC Res. 2462, 28 March 2019, op. paras 5, 6. In Resolution 2462, this is coupled with a relatively weaker paragraph “urging” member States to “take into account” the impact that measures taken to counter the financing of terrorism may have on impartial humanitarian action (op. para. 24). Resolution 2482 expands the requirement to comply with IHL to all CT-related measures, not just measures to counter the financing of terrorism as was the case in Resolution 2462. UNSC Res. 2482, 19 July 2019, op. para. 16.

11 These obligations will be elaborated below in the section entitled “Mitigating Measures and Obligations under IHL”.

absence of such references to IHL, as is the case for non-CT-related UN sanctions, not only is the relationship between IHL and sanctions obligations unclear, but it could also lead to assumptions that UNSC obligations take precedence over IHL by virtue of Article 103 of the UN Charter.

Article 103 stipulates that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under this present Charter shall prevail”.¹² At first glance, this “supremacy clause”, meant to prioritize UN Charter obligations over conflicting obligations, could be considered to apply to IHL. Indeed, the supremacy of UN Charter obligations over IHL has already been argued in the past within the context of CT.¹³ Against this backdrop, this paper seeks to explore the relationship between IHL and UN sanctions obligations. It focuses on Article 103 and argues that the supremacy clause does not impact obligations under IHL relating to impartial humanitarian action even in the absence of references to IHL akin to those found in UNSC Resolution 2462.

This discussion is useful in determining the extent to which States may take measures to safeguard impartial humanitarian activities in the absence of UNSC resolutions that call for such measures. For example, there may be hesitancy to adopt measures to mitigate the impact of sanctions on humanitarian action through domestic or regional “carve-outs” for impartial humanitarian organizations¹⁴ without specific instructions to do so in UNSC resolutions. The reasoning is that such carve-outs could result in actual or perceived non-compliance with sanctions because they necessarily result in the non-application of sanctions measures vis-à-vis humanitarians and their work. The European Union (EU), for instance, takes the position that it is only possible to include mitigating measures such as “humanitarian exemptions” or carve-outs¹⁵ when implementing UN sanctions if such exemptions are authorized or demanded in the UNSC resolutions themselves.¹⁶

Accordingly, the fundamental question this paper seeks to answer is whether States can adopt mitigating measures such as carve-outs from UN sanctions, in the absence of language contained in UNSC resolutions obliging or authorizing them to do so. To address this question, the article proceeds by first providing a brief overview of recent studies on the impact of UN sanctions on humanitarian action, with a particular focus on asset freeze measures and the

12 UN Charter, Art. 103.

13 For one example, see David McKeever, “International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations”, *Comparative Law Quarterly*, Vol. 96, No. 1, 2019, p. 31.

14 Such carve-outs have also been referred to as “sectoral” humanitarian exemptions. See Katie King, Naz K. Modirzadeh and Dustin A. Lewis, *Understanding Humanitarian Exemptions: U.N. Security Council Sanctions and Principled Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict, 2016, p. 8.

15 This terminology is explained in more detail below in the section entitled “Existing Mechanisms for Preventing and Mitigating Harm to Impartial Humanitarian Action”.

16 Council of the European Union, *Sanctions Guidelines: Update*, Brussels, 4 May 2018, para. 46, available at: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>.

dangers they could pose to impartial humanitarian action.¹⁷ This is followed by a discussion of select IHL rules which could safeguard impartial humanitarian organizations from the effects of UN sanctions. Finally, the article concludes by examining the relationship between IHL and sanctions obligations in light of the supremacy clause under Article 103 of the UN Charter.

At the outset, it must be noted that the purpose of this paper is not to provide a comprehensive presentation of how these sanctions have actually prevented or impeded humanitarian action. Rather, primarily from a legal perspective, the paper explains how the current formulation of UN sanctions obligations has the potential to inhibit or prevent the work of humanitarians. Gathering of concrete evidence of negative impact, which is undoubtedly an important task for this discussion, is left to others who are better placed and equipped for such purposes.¹⁸ That said, this paper was prompted by a study which indicates that there are already a handful of examples indicating unintended repercussions on humanitarian action.¹⁹ Accordingly, it borrows examples from this and other studies to articulate the actual and potential practical implications of the legal obligations posited by the UNSC. At the same time, the present author fully accepts that it is not always possible to state with certainty that a negative impact vis-à-vis impartial humanitarian action necessarily stems from UN sanctions. The studies that gather evidence of impact on humanitarian action make this abundantly clear.²⁰

Notwithstanding these caveats, the forthcoming legal discussions, particularly with regard to the relationship between IHL and sanctions obligations, are worth having while further evidence is being gathered. Ideally, these discussions will become moot in the absence of evidence indicating impact on humanitarians. At the same time, however, this paper strives to anticipate and provide a way out of potential legal quagmires in the event that additional concrete evidence of the negative impact of sanctions on humanitarian action is uncovered.

Potential tensions between asset freezes under UN sanctions and impartial humanitarian action

Of the three core sanctions measures of asset freezes, travel bans and embargoes,²¹ asset freezes have been described as posing the biggest threat to impartial

17 As is elaborated in the following section, asset freezes are the focus of this paper due to the fact that they are likely to pose the greatest impediments to impartial humanitarian action. Moreover, asset freezes are the most relevant for the purposes of this paper because they most closely resemble measures demanded by the UNSC in Resolution 2462 relating to countering the financing of terrorism.

18 See, for example, the United Nations University Centre for Policy Research project on “UN Sanctions and Humanitarian Action”, available at: <https://cpr.unu.edu/research/projects/unsha.html#outline>.

19 A. Debarre, above note 3.

20 *Ibid.*; R. Brubaker and S. Huvé, above note 4, p. 5.

21 Of the ten UN sanctions regimes within the scope of this paper, eight include all three sanctions measures. Of the remaining two, the regime applicable to Iraq contains an asset freeze and an arms embargo and the Mali regime contains an asset freeze and a travel ban.

humanitarian action.²² This is not to say that the other categories of UN sanctions measures do not have the potential to negatively impact humanitarian action. Embargoes, most commonly in the form of arms embargoes, can impede the ability for humanitarian organizations to import equipment in instances where the equipment could qualify as a “dual-use” object, meaning an object that could be used for both humanitarian/civilian and military purposes.²³ Travel bans, while seemingly innocuous, also have the potential to limit the ability of humanitarian organizations to interact with listed individuals. One example of this is the difficulty experienced by some organizations in conducting training on humanitarian or legal concerns, if such interactions would require the listed individuals to travel across international borders.²⁴ That said, asset freeze measures are the focus of this paper because they resemble measures demanded by the UNSC in relation to countering the financing of terrorism under UNSC Resolution 2462.

The similarities between asset freezes and obligations under Resolution 2462 stem primarily from the resolutions establishing the sanctions themselves. The UN sanctions applicable to Mali, for instance, stipulate the following obligation under Chapter VII of the UN Charter:

[The UNSC] *decides* further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, directly or indirectly to or for the benefit of the individuals or entities designated by the [Sanctions] Committee.²⁵

Identical phrasing can be found in the asset freeze language in the resolution applicable to South Sudan²⁶ and the 1988 regime applicable to the Taliban in Afghanistan.²⁷ The DRC,²⁸ Somalia,²⁹ Libya,³⁰ Sudan,³¹ CAR³² and Yemen³³ regimes also contain similar language but with the omission of the words “directly or indirectly”, thereby arguably narrowing the scope of the obligation to freeze assets.³⁴ This language is concerning because the precise scope of these obligations is unclear and could lead to expansive interpretations by member States. For instance, what does it mean to “make available” any “funds, financial

22 R. Brubaker and S. Huvé, above note 4; United Nations, *Compendium of the High-Level Review of United Nations Sanctions*, UN Doc. S/2015/432, 12 June 2015, p. 47.

23 *Ibid.*, p. 5.

24 *Ibid.*

25 UNSC Res. 2374, 5 September 2017, op. para. 4.

26 UNSC Res. 2206, 3 March 2015, op. para. 12.

27 UNSC Res. 2255, 22 December 2015, op. para. 1(a).

28 UNSC Res. 1807, 31 March 2008, op. para. 11.

29 UNSC Res. 1844, 20 November 2008, op. para. 3.

30 UNSC Res. 1970, 26 February 2011, op. para. 17.

31 UNSC Res. 1591, 29 March 2005, op. para. 3(e).

32 UNSC Res. 2399, 30 January 2018, op. para. 16.

33 UNSC Res. 2140, 26 February 2014, op. para. 11.

34 The regime applicable to Iraq does not contain this type of asset freeze. See, generally, UNSC Res. 1483, 22 May 2003, op. para. 23(b).

assets or economic resources” for the “benefit” of individuals? The danger is that member States may interpret these asset freeze obligations in a way that could hamper impartial humanitarian action.³⁵

Compare this asset freeze language with operational paragraph 5 of UNSC Resolution 2462 relating to CT:

[The UNSC] [*d*]ecides that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law ... establish serious criminal offenses ... [for the] the wilful provision or collection of funds, financial assets or economic resources or financial or other related services, directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act.³⁶

As was reported in the lead-up to the adoption of Resolution 2462, the breadth of this language raised the concerns of the humanitarian community for the potential impact that it could have on their work.³⁷ Others have pointed to the potential for obligations under this paragraph to collide with those under IHL. For example, as Lewis and Modirzadeh have argued, terms such as “for the benefit of terrorist organizations” in Resolution 2462 could include the provision of funds financing medical care for wounded or sick fighters in armed conflict who are considered to be “terrorists”.³⁸

It is submitted that asset freezes may likewise give rise to interpretations that result in impediments to humanitarian action. This is in part because there is also currently little to no uniform guidance from the UN itself as to how these asset freezes are to be interpreted and implemented.³⁹ Moreover, unlike

35 For example, the United States has implemented the Somalia asset freeze by, *inter alia*, prohibiting “[t]he making of any contribution or provision of funds, goods, or services by, to, or for the benefit” of listed individuals or entities. See Somalia Sanctions Regulations, US Code of Federal Regulations, Title 31, Part 551, 1 July 2011, Section 551.201(b)(1). This could potentially overlap with goods and services provided by impartial humanitarian organizations.

36 UNSC Res. 2462, 28 March 2019, op. para. 5.

37 “Combatting Financing of Terrorism Open Debate”, *What’s in Blue*, 27 March 2019, available at: www.securitycouncilreport.org/whatsinblue/2019/03/combatting-financing-of-terrorism-open-debate.php; Nathalie Weizmann, “Painting Within the Lines: The UN’s Newest Resolution Criminalizing Financing for Terrorists – Without Imperiling Humanitarian Activities”, *Just Security*, 29 March 2019, available at: www.justsecurity.org/63442/painting-within-the-lines-the-uns-newest-resolution-criminalizing-financing-for-terrorists-without-imperiling-humanitarian-activities/.

38 Dustin A. Lewis and Naz K. Modirzadeh, *Taking into Account the Potential Effects of Counterterrorism Measures on Humanitarian and Medical Activities: Elements of an Analytical Framework for States Grounded in Respect for International Law*, Harvard Law School Program on International Law and Armed Conflict, May 2021, pp. 27–28.

39 At the time of writing, Implementation Assistance Notices (IANs), a potential tool for clarifying the scope of such measures, have only been drafted for asset freezes in the Libya sanctions regime (excluding regimes that do not fall within the scope of this paper). The IANs relate to three narrow issues, none of which are relevant to the fundamental question of the scope of the asset freeze obligations mentioned above. One of the IANs deals with the question of whether subsidiaries of listed entities are subject to the asset freeze; the

Resolution 2462, asset freeze obligations are broader in certain respects because the UNSC resolutions establishing them do not include subjective requirements such as “wilful” or “with the intention to”.⁴⁰ This is coupled with the fact that failure to comply with these measures results in grave consequences depending on the jurisdiction, including civil and criminal liability.⁴¹ There are indeed States that prescribe penal sanctions for violations of asset freezes, even due to negligence.⁴²

This poses a risk for humanitarian organizations, and for their donors when providing and transferring funds and assets to the former. Humanitarian organizations operating in armed conflict naturally encounter listed individuals and entities in the course of their work, especially when the parties to the armed conflict themselves are listed entities.⁴³ Within these contexts, humanitarian organizations may be forced to provide incidental payments, such as tolls, taxes and permit fees, to designated individuals or entities when operating.⁴⁴ The diversion of relief supplies, an occurrence that cannot be avoided with absolute certainty, may also result in such supplies falling into the hands of listed individuals and entities.⁴⁵

The most obvious risk is that humanitarian organizations and their staff could be implicated and punished for sanctions violations. Moreover, these measures could have indirect effects to the detriment of humanitarian action. There is at least anecdotal evidence of self-regulation and “over-compliance” by humanitarians, in an effort to avoid liability arising out of sanctions violations.⁴⁶

other two deal with the payment of management fees on frozen assets and the payment of interest and other earnings on frozen assets respectively. See UNSC, “Implementation Assistance Notices”, available at: www.un.org/securitycouncil/sanctions/1970/implementation-assistance.

40 UNSC Res. 2462, 28 March 2019, op. para. 5.

41 The Somalia Sanctions Regulations, above note 35, Section 551.701(a)(2), applying the International Emergency Economic Powers Act (United States Code, Title 50, Section 1705), “provides for a maximum civil penalty not to exceed the greater of \$311,562 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed”; Section 551.701(a)(3) stipulates that “[a] person who willfully commits, willfully attempts to commit, willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition [under the Somalia Sanctions Regulations] may, upon conviction, be fined not more than \$1,000,000, or if a natural person, be imprisoned for not more than 20 years, or both.” Within the EU context, penalties are set by each member State individually, even for UN sanctions implemented through EU regulations and decisions. For an overview, see Francesco Giumelli, “Implementation of Sanctions: European Union”, in Masahiko Asada (ed.), *Economic Sanctions in International Law and Practice*, Routledge, New York, 2021, p. 125.

42 Germany imposes a term of imprisonment of up to five years for violations of the DRC asset freeze. Violations due to negligence could result in imprisonment of up to three years or fines. See *Report of Germany to the Security Council Committee Established Pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo on the Implementation of Measures set Forth in Security Council Resolutions 1857 (2008) and 1896 (2009) and Subsequent Resolutions*, UN Doc. S/AC.43/2010/9, 24 September 2010.

43 According to Gillard, at least three parties to armed conflict are listed in country-specific UN sanctions: Somalia, the DRC and the CAR. E.-C. Gillard, above note 3, p. 10.

44 *Ibid.*, p. 6.

45 See, for example, *Final Report of the Panel of Experts on Yemen*, UN Doc. S/2020/326, 28 April 2020, para. 86 and the table on p. 34, citing an example of assets being appropriated by the Houthis from revenues provided by Save the Children.

46 United Nations, above note 22, p. 48.

This so-called “chilling effect” has reportedly caused responses in certain contexts to skew heavily towards government-controlled areas.⁴⁷

Another indirect consequence stems from risks for donors, which in turn impacts humanitarian responses. The High-Level Review of United Nations Sanctions documented difficulties for some humanitarian organizations in obtaining funding to operate in certain areas, particularly those under the control of listed non-State armed groups.⁴⁸ Such challenges in obtaining funds may be due to de-risking by States and private institutions such as banks, which are hesitant to transfer funds for programmes in areas under the control of listed entities.⁴⁹

Existing mechanisms for preventing and mitigating harm to impartial humanitarian action

This section seeks to introduce the existing mechanisms for mitigating the impact of sanctions on impartial humanitarian action and to examine how such mechanisms may fit within IHL. Before doing so, however, a brief discussion of semantics is useful.

Broadly speaking, “humanitarian exemptions” are often cited when discussing mechanisms for protecting impartial humanitarian action from both CT measures and sanctions. That said, the current paper prefers the term “carve-outs”. As some authors have pointed out, the term “humanitarian exemption” may lead to confusion, because “exemption” denotes several different mechanisms.⁵⁰ Within the UN system, a “humanitarian exemption” could denote the case-by-case non-application of sanctions measures against a listed individual, including on humanitarian grounds.⁵¹ Other “exemptions” are directed at the humanitarian organizations and activities themselves.⁵²

Even within this latter type of exemptions, there are two subtypes. The first requires that relevant sanctions committees selectively derogate sanctions measures on a case-by-case basis,⁵³ while the second precludes the application of sanctions

47 With regard to the situation in Somalia in and around 2008 and 2010, when Al-Shabaab was listed by the United States and the UN respectively, humanitarian organizations were forced to suspend programmes in Al-Shabaab-controlled areas in order to avoid violating sanctions prior to the current “carve-out” contained in the Somalia sanctions regime. Debarre notes similar effects in Afghanistan in Taliban-controlled areas, prior to the Taliban’s takeover in August 2021. Given the lack of clarity as to what is permitted under the applicable sanctions regimes in these contexts, humanitarian responses have been “heavily skewed” towards government-controlled areas. Granted, the factors contributing to this observation cannot be solely attributed to sanctions per se. See A. Debarre, above note 3, pp. 14, 16.

48 United Nations, above note 22, p. 48.

49 A. Debarre, above note 3, pp. 15–16.

50 *Ibid.*

51 For instance, a designated individual could be exempt from a travel ban to allow life-saving medical assistance in another State or to allow the flow of assets needed to cover basic expenses for foodstuffs and medical treatment. See, for example, UNSC Res. 1596, 3 May 2005, op. para. 16.

52 R. Brubaker and S. Huvé, above note 4, pp. 6–7.

53 See, e.g. for Yemen sanctions, UNSC Res. 2564, 25 February 2021, op. para. 4.

measures vis-à-vis select humanitarian actors and activities without the need for any case-by-case assessments. For the purposes of this paper, these two mechanisms will be referred to as “*ad hoc* derogations”⁵⁴ and “carve-outs”⁵⁵ respectively.

From the perspective of mitigating the impact on impartial humanitarian action and upholding the framework under IHL, there is therefore a preference for carve-outs.⁵⁶ They would clarify at the outset, for both the entities implementing sanctions and humanitarian organizations, that the sanctions measure would not apply to impartial humanitarian action.⁵⁷ Currently, there is only one such carve-out in force, which exists within the Somalia sanctions regime. Resolution 2551 most recently renewed this carve-out, which precludes the application of sanctions measures vis-à-vis

the United Nations, its specialised agencies or programmes, humanitarian organisations having observer status with the United Nations General Assembly that provide humanitarian assistance, and their implementing partners including bilaterally or multilaterally funded non-governmental organisations participating in the United Nations Humanitarian Response Plan for Somalia.⁵⁸

This is reportedly immensely helpful, if not crucial, for the continuation of humanitarian action in Somalia. Among other things, it provides a “basis for donors, contractors and finance and banking systems to enable the financing of humanitarian assistance in areas in which Al-Shabaab operates”.⁵⁹ At the same time, it has garnered criticism on the grounds that it is limited to select humanitarian actors.⁶⁰ Reproducing such a carve-out in other sanctions regimes, or better yet, adopting a similar, more inclusive carve-out across all sanctions regimes, has been put forward as one of the most effective ways to prevent and

54 The present author borrows this term from R. Brubaker and S. Huvé, above note 4, p. 7.

55 Another example of a mitigating measure that falls in between *ad hoc* derogations and carve-outs can be found in the United Nations Verification and Inspection Mechanism for Yemen (UNVIM). The Mechanism itself was meant for alleviating the dire humanitarian situation facing Yemen, exacerbated by the enforcement of sanctions under UNSC Resolution 2216. Prior to the creation of UNVIM, ships seeking entry into Yemeni ports had to be inspected by the Saudi Arabia-led coalition as part of the enforcement of an arms embargo, which could delay deliveries of goods, including food, for up to four to six weeks. UNVIM facilitates the flow of commercial cargo into Yemen to mitigate delays that would be caused by the inspections under the prior system. Vessels are required to obtain clearance from UNVIM, but a carve-out is technically included inasmuch as humanitarian organizations are exempt from this requirement. For more details, see the UNVIM website, available at: www.vimye.org/about. For background on UNVIM, see “In Hindsight: The Story of the UN Verification and Inspection Mechanism in Yemen”, *Security Council Report*, 1 September 2016, available at: www.securitycouncilreport.org/monthly-forecast/2016-09/the_story_of_the_un_verification_and_inspection_mechanism_in_yemen.php.

56 E.-C. Gillard, above note 3, p. 7.

57 *Ibid.*

58 UNSC Res. 2551, 12 November 2020, op. para. 22.

59 “Letter Dated 13 September 2019 from the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator addressed to the Chair of the Security Council Committee pursuant to Resolution 751 (1992) concerning Somalia”, UN Doc. S/2019/799, 7 October 2019, paras 41–43.

60 A. Debarre, above note 3, p. 16.

mitigate the impact on humanitarian action.⁶¹ The reality, however, is that such a comprehensive carve-out at the international level does not currently exist.

In contrast to carve-outs, the reaction towards *ad hoc* derogations has been more mixed. These derogations have been criticized due in part to the fact that the process of obtaining approval from the sanctions committees can be time- and energy-intensive on the part of humanitarian actors.⁶² Moreover, *ad hoc* derogations may have a negative effect on the actual or perceived impartiality, neutrality and independence of the humanitarian actors applying for them.⁶³ This is because, in effect, these procedures allow sanctions committees to influence “when, how and with whom” humanitarians can operate in armed conflict.⁶⁴ Such derogations could also provide an avenue for sanctions committees to second-guess humanitarian organizations’ needs assessments on the ground, or how each organization can meet those needs. For instance, humanitarian activities are exempt from the measures included under the Yemen sanctions regime if “the Committee determines that such an exemption is *necessary* to facilitate the work of the United Nations or other humanitarian organisations in Yemen”.⁶⁵

From a legal standpoint, such a layer of “approval” or determination of “necessity” by members of sanctions committees appears to disturb the normative framework for impartial humanitarian action. Under IHL it is only the parties to the conflict and impartial humanitarian organizations that are given the prerogative to appraise the outstanding humanitarian needs and the “necessity” of the humanitarian response and its implementation. Without delving into the framework in its entirety, the key facets are as follows.

As a starting point, the parties to the armed conflict have the primary obligation to meet the needs of the affected population, and will naturally make needs assessments.⁶⁶ Against this backdrop, IHL provides a legal basis for *impartial* humanitarian bodies to offer their services to the parties to the conflict and to supplement the humanitarian responses of those parties to the conflict.⁶⁷ Within this framework, impartial humanitarian organizations may assess any outstanding needs that must be met and put forward proposals to do so.⁶⁸ Where the needs assessments by impartial humanitarian organizations may come under scrutiny, albeit in a limited way, lies in the requirement that such activities be undertaken with the consent of the parties to the conflict concerned.⁶⁹ At least in theory, a party to the conflict could deny consent on the grounds that there were no outstanding humanitarian

61 E.-C. Gillard, above note 3, p. 9.

62 A. Debarre, above note 3, pp. 7–8.

63 R. Brubaker and S. Huvé, above note 4, p. 7.

64 *Ibid.*

65 UNSC Res. 2564, 25 February 2021, op. para. 4 (emphasis added).

66 ICRC Commentary on GC I, above note 1, para. 826.

67 *Ibid.*, paras 826, 1124.

68 *Ibid.*, para. 803.

69 See common Article 3(2) and common Article 9/9/9/10. See also Additional Protocol II, Art. 18(1).

needs,⁷⁰ provided that the assessment was made in “in good faith”.⁷¹ That said, a miscalculation, even if made in good faith, regarding the needs of the affected population could lead to both moral and legal responsibility for denying consent.⁷²

Once consent is granted, parties to the conflict are granted a limited degree of control over how humanitarian programmes are implemented through their “right of control”.⁷³ This does not, however, allow the relevant party to the conflict to determine what is necessary to facilitate the implementation of such programmes. In reality, the right of control is rather limited. While not an exhaustive list, the International Committee of the Red Cross (ICRC) mentions the following as falling under the right of control: verifying the nature of the humanitarian action, prescribing technical arrangements, and restricting humanitarian activities due to imperative military necessity, provided limitations are temporally and geographically limited and do not unduly delay or render impossible the implementation of humanitarian activities.⁷⁴

This framework under IHL limits the degree to which the needs assessments, planning and implementation of activities by humanitarian organizations can be second-guessed. Based on the reasons outlined above, the framework of IHL envisages impartial humanitarian organizations as the primary appraisers of outstanding humanitarian needs, with scope (albeit limited) for parties to the conflict to challenge such assessments. Contrary to this system, however, *ad hoc* derogations appear to allow sanctions committees to add an additional layer of assessment and control other than what is envisaged under IHL.⁷⁵

Questions as to the legality of domestic carve-outs and other mitigating measures in light of Chapter VII of the UN Charter

In lieu of carve-outs at the international level mandated by the UNSC, UN member States could theoretically take the initiative and adopt carve-outs in their domestic legislation. In the CT sphere, there have been regional and domestic efforts to

70 See Eve Massingham and Kelisiana Thynne, “Humanitarian Relief Operations”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 329, citing, for example, Geneva Convention IV, Art. 59, and Additional Protocol II, Art. 18(2).

71 ICRC Commentary on GC I, paras 834, 1121.

72 See, for instance, *ibid.*, para. 834: “Thus, any impediment(s) to humanitarian activities must be based on valid reasons, and the Party to the conflict whose consent is sought must assess any offer of services *in good faith* and in line with its international legal obligations in relation to the humanitarian needs of the persons affected by the non-international armed conflict. Thus, where a Party to a non-international armed conflict is unwilling or unable to address basic humanitarian needs, international law requires it to accept an offer of services from an impartial humanitarian organization. If such humanitarian needs cannot be met otherwise, the refusal of an offer of services would be arbitrary, and therefore in violation of international law” (emphasis added).

73 For more on the “right of control”, see “ICRC Q&A and Lexicon on Humanitarian Access”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014, p. 373.

74 ICRC Commentary on GC I, para. 839.

75 This issue with *ad hoc* derogations was highlighted in the *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc No. A/75/337, 3 September 2020, para. 35.

prevent CT legislation and measures from applying to humanitarian action. Key examples include the EU CT directive as well as domestic criminal legislation such as that of the United Kingdom and Australia.⁷⁶

The question that the following section seeks to address, however, is whether such mitigating measures would be permissible as a matter of law vis-à-vis UN sanctions obligations adopted under Chapter VII.⁷⁷ Would, for instance, a State be permitted to preclude, *in toto*, the application of domestic civil and criminal penalties against a humanitarian organization through a domestic carve-out?

The issue is that in the absence of a carve-out at the level of the UNSC, a member State adopting mitigating measures necessarily appears to be implementing sanctions in a way that is lax when compared to what is envisaged in the relevant UNSC resolution. This reasoning appears to prevent the EU from adopting carve-outs or exemptions when implementing UNSC resolutions in its own restrictive measures:

Chapter VII UNSC Resolutions are mandatory under international law. In the case of EU implementation of restrictive measures decided by the Security Council through a resolution, it will therefore only be possible to include exemptions if they are in line with the Resolution.⁷⁸

As will be discussed below, however, there is an argument to be made that such mitigating measures would be in furtherance of fulfilling obligations under IHL. The question then turns to the crux of this issue – that is, whether or not States could adopt such measures based on IHL when doing so could be interpreted as failing to comply with UN sanctions obligations.

Mitigating measures and obligations under IHL

Two IHL rules are of particular relevance to mitigating measures.⁷⁹ The first is the obligation to “allow and facilitate” impartial humanitarian action. According to the ICRC, this obligation binds, at a minimum, parties to the armed conflict as a matter of customary international law applicable to both international and non-international armed conflicts.⁸⁰ Not only does this obligation require parties not

76 Directive (EU) 2017/541 of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 15 March 2017, Recital 38; United Kingdom, Counter-Terrorism and Border Security Act 2019 (c. 3), 12 February 2019, Part I, Chap. 1, Section 4 (amending the 2000 Terrorism Act with the inclusion of Section 58(B)); Australian Criminal Code Act 1995, Compilation No. 138, 20 April 2021, Sections 80.1AA, 102.8(4)(c), 119.4(7), 119.5(4).

77 Recalling that the UN Charter, at Article 25, stipulates that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

78 Council of the European Union, above note 16, para. 46.

79 Other articles in this issue of the *Review* provide a more comprehensive analysis of potentially relevant IHL. See, for example, the article by Tristan Ferraro in this issue of the *Review*.

80 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 55, pp. 193–200, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

to “impede” impartial humanitarian action, but it also creates positive obligations such as the lifting of measures and formalities that could unduly interfere with or hinder humanitarian activities.⁸¹

At least for States party to Additional Protocol I, this obligation applies not only to the immediate parties to the conflict but also to all States that could potentially have an impact on the ability for humanitarian organizations to carry out their missions.⁸² A similar stipulation was dropped from Additional Protocol II at the last minute of drafting; that being said, the ICRC also cites practice to indicate that the scope of the obligation to allow and facilitate may extend beyond the immediate parties to a non-international armed conflict as a matter of customary international law.⁸³

A second relevant rule under IHL is the obligation of “non-prohibition” of impartial humanitarian activities. Crucially, this rule is a potential legal basis for carve-outs from sanctions measures. According to the ICRC, the prerogative of impartial humanitarian organizations to offer services as enshrined in Article 3 common to the four Geneva Conventions, applicable to all types of armed conflicts, includes protection from criminalization and prosecution. In other words, IHL prohibits the criminalization, or penalization through other means, of impartial humanitarian action.⁸⁴

Against the backdrop of these rules, the ICRC argued with respect to CT in its 2019 Challenges Report that measures which impede impartial humanitarian action are “incompatible with the letter and spirit of IHL”, citing, among other things, the obligation to allow and facilitate humanitarian action and the protection from prohibition and criminalization.⁸⁵ Carve-outs have thus been described as a means to allow and facilitate humanitarian action and protect it from prohibition.⁸⁶ Hence, it is at least plausible to argue that IHL calls for, or at least provides the legal basis for, mitigating measures vis-à-vis UN sanctions. Such measures would perhaps be in the form of carve-outs or other means to

81 The *Manual on the Law of Non-International Armed Conflict* states that measures taken by a conflict party in control of an area “should not unduly impede or delay the provision of humanitarian assistance”. International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, Sanremo, 2006, p. 61, para. 5.1(4), available at: www.legal-tools.org/doc/ccf497/pdf/.

82 This is evident from the reference to both “Parties to the conflict” and “each High Contracting Party” in Additional Protocol I, Art. 70. See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 2829.

83 ICRC Customary Law Study, above note 80, Rule 55.

84 ICRC Commentary on GC I, above note 1, para. 804.

85 ICRC, above note 2, p. 61.

86 *Ibid.* To be precise, the ICRC stops short of stating that carve-outs are required under IHL, stating instead that they are in the “letter and spirit” of the law. Granted, this is not universally accepted by States within the CT sphere, particularly with respect to the notion that IHL obliges States to posit carve-outs from CT legislation. According to a statement by the US Mission to the UN, “the United States rejects the efforts by some to read language included in paragraph 109 [of UNGA Res. 75/291] to mean that all Member States—including non-parties to the relevant armed conflict—have obligations under international humanitarian law ... any time it applies to ensure that counterterrorism legislation does not impede humanitarian aid, even if terrorists benefit from such aid”. United States Mission to the United Nations, “Explanation of Position on the UN General Assembly Global Counter-Terrorism Strategy”, 30 June 2021, available at: <https://usun.usmission.gov/explanation-of-position-on-the-un-general-assembly-adoption-of-the-global-counter-terrorism-strategy/>.

clarify the scope of sanctions and reassure humanitarians, their donors and any other related stakeholders.⁸⁷

The potential effect of Article 103 of the UN Charter on IHL

Taking for granted that UN sanctions have the potential to impact impartial humanitarian action, and that mitigating measures could be interpreted as measures to respect IHL, the next question is whether States would be permitted to implement such measures without falling foul of the UN Charter. On this particular point, the relationship between obligations under IHL and obligations stemming from the UN Charter is key.

While Resolution 2462 has not escaped criticism for falling short with regard to the protection of humanitarian action,⁸⁸ it at least makes clear that member States must implement the resolution in compliance with their obligations under IHL.⁸⁹ As mentioned, no such stipulations exist with respect to UN sanctions more generally. While resolutions may call on parties to the armed conflict to adhere to IHL, to date there are no stipulations in relevant UNSC resolutions requiring that sanctions be implemented in accordance with this body of law. This absence of references to IHL could lead to the conclusion that sanctions obligations prevail over obligations under IHL, such as the obligation to allow and facilitate impartial humanitarian action and to refrain from prohibiting such action.

As was explained at the beginning of this article, such a conception of the relationship between IHL obligations and sanctions could be based on the so-called “supremacy clause” under Article 103 of the UN Charter. Article 103 dictates that all obligations under the UN Charter prevail over obligations under “any other international agreement”.⁹⁰ To be clear, sanctions obligations adopted under Chapter VII would undoubtedly qualify as a UN obligation coming under the scope of Article 103.⁹¹

Within the CT context, some have used Article 103 to argue that IHL obligations are subject to the supremacy of conflicting UN Charter obligations,⁹²

87 In terms of other measures, the obligation to allow and facilitate could also be interpreted as requiring States to take positive measures to address the aforementioned “chilling effect” impacting humanitarian organizations and their donors. States could take steps to clarify and communicate the extent of their sanctions legislation to these actors or encourage banks with offices within their jurisdictions to transfer funds to impartial humanitarian actors even if they operate in “high-risk” areas.

88 Scott Paul and Kathryn Achilles, “Correcting Course: Avoiding the Collision between Humanitarian Action and Counterterrorism”, *Just Security*, 23 May 2019, available at: www.justsecurity.org/64158/correcting-course-avoiding-the-collision-between-humanitarian-action-and-counterterrorism/.

89 UNSC Res. 2462, 28 March 2019, op. paras 5, 6; UNSC Res. 2482, 19 July 2019, op. para. 16.

90 For a discussion on the importance of Article 103 for the legality of UN sanctions which, in some instances, would be “*per se*” violations of international law but for the supremacy clause, see Masahiko Asada, “Definition and Legal Justification of Sanctions”, in M. Asada (ed.), above note 41, p. 8.

91 UN Charter, Art. 25. See International Court of Justice (ICJ), *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)*, Order, Provisional Measures, *ICJ Reports 1992*, paras 39, 42.

92 D. McKeever, above note 13, p. 31.

with the exception of those rules under IHL that have attained the status of *jus cogens*.⁹³ If this were the case, a State facing seemingly conflicting obligations under UN sanctions regimes and IHL would be required to implement the former at the expense of the latter. Article 103 would, at least temporarily, suspend IHL obligations relating to the protection of impartial humanitarian action, such as the obligation to allow and facilitate, or to refrain from punishing, humanitarian action. This could in turn lead to the conclusion that mitigating measures violate UN sanctions and the Charter.⁹⁴

Given the potential for this line of argument to harm impartial humanitarian action, it would therefore be a welcome development if UN sanctions regimes were to clarify, similarly to the aforementioned Resolution 2462, that all sanctions measures must be implemented in accordance with IHL.⁹⁵ At the very least, this would bring clarity for impartial humanitarian organizations and States as to the relationship between sanctions and IHL. Failing to do so should not, however, lead to the conclusion that until such language is included, Article 103 necessarily leads to sanctions obligations overriding those under IHL.

Granted, some already take this view, based on the notion that IHL would constitute the *lex specialis* in situations of armed conflict and that Article 103 would not have an impact on customary IHL even if the relevant norms did not attain the status of *jus cogens*.⁹⁶ Both arguments are plausible⁹⁷ but fall outside of the scope of this current contribution. As will be discussed below, there are additional avenues to arrive at a similar conclusion. Without prejudicing the forthcoming discussion, suffice it to say that this hinges on what is meant by “conflict” within the meaning of Article 103.

“Discretionary” and “non-discretionary conflicts” between UN Charter obligations and IHL

The aforementioned “supremacy clause” under Article 103 applies to “conflicts” between obligations stemming from the Charter and those under other

93 Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary*, Vol. 2, 3rd ed., Oxford University Press, Oxford, 2021, p. 2133. While some issues relating to humanitarian action, such as the prohibition of the war crime of starvation as a method of warfare, could be argued by some to qualify as *jus cogens*, such a reading with respect to the other elements relating to humanitarian action is, in the present author’s opinion, unlikely to gather much support at this stage.

94 D. McKeever, above note 13, pp. 30, 31.

95 A. Debarre, above note 3, pp. 17–19.

96 *Report of the Special Rapporteur*, above note 75, para. 24.

97 This is not to say that these two propositions are without controversy. As mentioned above, determining what body of law is *lex specialis* is not a clear-cut task. Moreover, some may argue that *lex specialis* is irrelevant in light of Article 103. See B. Simma *et al.* (eds), above note 93, p. 2116. See also Ben Saul, “International Humanitarian Law and Terrorism”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 410; International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L/682, 13 April 2006, para. 345.

“international agreements”.⁹⁸ Whether or not obligations under IHL, such as the obligation to allow and facilitate humanitarian action or refrain from its prohibition, would survive the supremacy of Article 103 and the Charter hinges on how we interpret “conflicts” in this context.

On the one hand, the International Law Commission (ILC) has adopted a broad definition of conflicts generally. In its report on fragmentation, it defines “conflicts” as any situation in which there are two sets of obligations and each frustrates the goals of the other, even “without there being any strict incompatibility between their provisions”.⁹⁹ Based on this definition, one could argue, for instance, that precluding the application of sanctions measures to humanitarian actors “frustrates” the goals of the sanctions regime. This is especially true if there is a risk of assets being diverted for the benefit of listed individuals or entities. It is, however, questionable whether such a broad definition would be appropriate with respect to the relationship between IHL and sanctions. To be clear, the aforementioned definition of “conflicts” was a general definition adopted by the ILC for conflicts of norms and not one that was specific to its discussion on Article 103.

Given the potential breadth of sanctions measures as outlined in the previous section,¹⁰⁰ it is important to distinguish between two broad categories of conflicts: “discretionary” and “non-discretionary”. Starting with the latter, a “non-discretionary” conflict exists where the implementation of one obligation necessarily results in the violation of another.¹⁰¹ Such would be the case if the implementation of a sanctions obligation would result in, for instance, an impediment to impartial humanitarian action with no room to accommodate the latter. The other type of conflict is what this paper refers to as a “discretionary” conflicts. This would include cases where a UNSC obligation is flexible enough that it can be implemented in accordance with other obligations such as those under IHL.¹⁰² In such discretionary conflicts, there is no inevitable conflict between obligations; rather, the existence of a conflict is dependent on how the obligations are interpreted.

98 UN Charter, Art. 103.

99 ILC, above note 97, paras 24–25. The ILC also notes that there are other, narrower understandings of “conflict” – for example, when one obligation “may be fulfilled only by thereby failing to fulfill another obligation” (para. 24).

100 For instance, the obligation to prevent assets or economic resources from being “made available ... directly or indirectly to or for the benefit of” listed individuals or entities. UNSC Res. 2374, 5 September 2017, op. para. 4.

101 This is precisely the predicament that the EU faced with respect to the *Kadi* cases, albeit in the context of human rights law. In these cases, member States were required to freeze Mr Kadi’s assets and any failure to do so would have constituted a violation of Article 25 of the UN Charter. At the same time, the sanctions measures were such that their implementation necessarily limited Mr Kadi’s enjoyment of his human rights, including his right to property as well as his rights to be heard and to effective judicial review. See Antonios Tzanakopoulos, “The *Solange* Argument as a Justification for Disobeying the Security Council in the *Kadi* Judgments”, in Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial*, Routledge, New York, 2014, p. 123.

102 *Ibid.*

It is submitted that currently, the potential conflict between UN sanctions and IHL is a discretionary conflict. This is based on the fact that whether the relevant obligations are incompatible depends on how sanctions measures such as asset freezes are interpreted. To date, the precise meaning of UN sanctions measures is still open to interpretation. While the aforementioned asset freeze language prohibiting the “mak[ing] available” of any “funds, financial assets or economic resources” for the “benefit of [designated] individuals”¹⁰³ certainly can be interpreted to encompass humanitarian activities, there is currently nothing to suggest that these measures must be implemented in such a way. There is nothing intrinsic to these terms to indicate that they would cover impartial humanitarian activities, nor is there an indication that the UNSC wishes this to be the case.

This distinction and conclusion is supported by the jurisprudence of the European Court of Human Rights (ECtHR). In the *Al-Jedda* case, the ECtHR had to determine whether obligations under UNSC Resolution 1546 prevailed over those under international human rights law. The precise question at hand was whether the UK could place individuals under internment or preventive detention, a modality of detention that is not foreseen under Article 5 of the European Convention on Human Rights (ECHR).¹⁰⁴ In this case, the ECtHR decided that Article 103 did not have the effect of displacing obligations under human rights law. The key factor was that there was no explicit language authorizing or requiring internment,¹⁰⁵ and the Court reasoned that “there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights”.¹⁰⁶ Perhaps most importantly for the present discussion, the Court opined that “[i]n the event of any ambiguity in terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the [ECHR] and which avoids any conflict of obligations”.¹⁰⁷

This reasoning suggests that tensions between UN obligations and their goals, on the one hand, and clear-cut IHL rules safeguarding humanitarian action, on the other, would be insufficient to trigger the supremacy clause at the expense of the latter. As mentioned above, what is required is express language authorizing or requiring the implementation of sanctions even at the expense of impartial humanitarian action. No such language currently exists within UN sanctions regimes, nor is there interpretive guidance to suggest otherwise.

In the absence of explicit language or other indications as to the intent of the Council, it is submitted that it would be difficult to presume that the UNSC

103 See the discussion surrounding the text at above note 25.

104 ECtHR, *Al-Jedda v. The United Kingdom*, Appl. No. 27021/08, Judgment, 7 July 2011, para. 100.

105 Resolution 1546 authorized the taking of “all necessary measures” to contribute to the maintenance of security and stability in Iraq; see UNSC Res. 1546, 8 June 2004, op. para. 10. The question of whether mere authorizations, rather than obligations, stemming from the UNSC fell within the ambit of Article 103 was discussed by the ECtHR and was answered in the affirmative.

106 ECtHR, *Al-Jedda*, above note 104, para. 102.

107 *Ibid.*

specifically intends to impose sanctions obligations that would impede humanitarian action to the detriment of IHL. On the contrary, Resolution 2286, for example, reiterates at the outset the UNSC's responsibility to "promote and ensure respect for the principles and rules of international humanitarian law",¹⁰⁸ and individual members of the UNSC have made it clear that sanctions are not intended to hinder or impede humanitarian action.¹⁰⁹ The transition from comprehensive to "targeted" sanctions suggests an intention to avoiding negative humanitarian consequences.¹¹⁰ Furthermore, it is worth recalling that one of the objectives of UN sanctions appears to be to protect and facilitate impartial humanitarian access. Not only do conflict-related sanctions regimes include language condemning the obstruction of humanitarian action, but six sanctions regimes enable entities that obstruct humanitarian access to be sanctioned themselves.¹¹¹ As outlined in the previous section, there is little guidance from the UN as to how exactly States must implement asset freezes and other measures, thereby leaving room for States to adopt interpretations and implementation measures that benefit impartial humanitarian action.¹¹²

The focus then turns to a hypothetical but more difficult question: what to make of a non-discretionary conflict. An example of such a situation would be if the UNSC were to adopt asset freeze measures, or even interpret current measures, to cover cases where listed entities benefit through diversion of assets.¹¹³ Or perhaps even more damaging would be if the Council were to clearly adopt interpretations akin to the "fungibility" theory which arose out of CT jurisprudence, whereby humanitarian assistance could be characterized as providing assets to listed entities insofar as it "frees up" those entities' other resources.¹¹⁴

While there is certainly room for debate, the present author is of the view that the relevant provisions of such a resolution would still fall outside of the ambit

108 UNSC Res. 2286, 3 May 2016, preambular para. 1.

109 "President Kaljulaid of Estonia: Pandemic Cannot Be Used as Pretext to Hinder Access of Humanitarian Aid", statement given at the Open Debate on the Protection of Civilians in the UNSC, 27 May 2020, available at: <https://un.mfa.ee/president-kaljulaid-of-estonia-pandemic-cannot-be-used-as-pretext-to-hinder-access-of-humanitarian-aid/>.

110 R. Brubaker and S. Huvé, above note 4, p. 2.

111 *Ibid.*, p. 9. The Somalia, DRC, Yemen, Mali, South Sudan and CAR sanctions all include the obstruction of humanitarian assistance or access as a listing criterion.

112 For an example of how conflicts between humanitarian considerations and UNSC obligations have been avoided in practice, see the ICJ's Namibia Advisory Opinion. Here, the Court opined that member States' obligations under UNSC Resolution 276 "cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia". ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, ICJ Reports 1971 (Namibia Advisory Opinion), para. 122. The obligations under Resolution 276 to which the Court refers are as follows: UNSC Res. 276, 30 January 1970, op. para. 5, "[c]alls upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution". Paragraph 2 declares that the continued presence of South African authorities in Namibia is illegal and that all acts taken by those authorities on behalf of or concerning Namibia are illegal and invalid.

113 Such as what occurred in Yemen with respect to Save the Children: see above note 45.

114 D. A. Lewis and N. K. Modirzadeh, above note 38, p. 9, referring to US Supreme Court, *Holder v. Humanitarian Law Project*, 561 US 1, 21 June 2010.

of Article 103. This is based on the fact that there are limits to the competence of the UNSC,¹¹⁵ and that a violation (or violations) of IHL at the expense of humanitarian action would fall outside of the powers of the Council. Admittedly, the question of precisely what constitutes an *ultra vires* act by the UNSC, and how to make such a determination, is a difficult one. What is clear, however, is that the UNSC is bound by the purposes and principles of the UN.¹¹⁶ Article 24(2) of the UN Charter stipulates that the UNSC “shall act in accordance with the Purposes and Principles of the United Nations” when discharging its duties.¹¹⁷

These principles and purposes are found in Article 1(3) of the UN Charter, which posits international cooperation in solving international problems, including of a humanitarian character, as one of the purposes of the organization.¹¹⁸ Based on this, some commentators have argued that the rule of law and respect for IHL constitute limitations on the powers of the UNSC acting under Chapter VII.¹¹⁹ Accordingly, leaving aside the immense issue of how to determine the legality of UNSC acts, it is submitted that the UNSC does not have the power to impose a sanctions resolution which explicitly results in violations of IHL and undermines efforts to solve problems of a “humanitarian character”. Such sanctions obligations, enacted *ultra vires* by the UNSC, would not be subject to the supremacy clause under Article 103 of the Charter.¹²⁰

Admittedly, this is a highly theoretical line of argument. If such a situation were to arise in practice, determining the legality of a UN sanction would not be a straightforward task, and nor would determining the forum in which to conduct such a legal review of UNSC acts. Member States would truly be caught “between a rock and a hard place”, having to choose between IHL and UN Charter obligations. Some may choose to rely on Article 103 to justify deviations from

115 As put by the International Criminal Tribunal for the former Yugoslavia (ICTY), the “Charter ... speaks the language of specific powers, not of absolute fiat”. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Judgment (Appeals Chamber), 2 October 1995, para. 28.

116 Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart, Oxford, 2004, pp. 191–216.

117 UN Charter, Art. 24(2). See also Namibia Advisory Opinion, above note 112, para. 110: “The only limitations [to the powers of the UNSC to maintain international peace and security] are the fundamental principles and purposes found in Chapter I of the Charter.”

118 UN Charter, Art. 1(3): “To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

119 E. de Wet, above note 116, pp. 204–216; Hans-Peter Gasser, “Collective Economic Sanctions and International Humanitarian Law: An Enforcement Measure under the United Nations Charter and the Rights of Civilians to Immunity: An Unavoidable Clash of Policy Goals?”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 56, No. 4, 1996, pp. 880, 881, 885.

120 See, for instance, ILC, above note 97, para. 331: “The question has sometimes been raised whether also Council resolutions adopted *ultra vires* prevail by virtue of Article 103. Since obligations for Member States of the United Nations can only derive out of such resolutions that are taken within the limits of its powers, decisions *ultra vires* do not give rise to any obligation to begin with. Hence no conflict exists.” See also B. Simma *et al.* (eds), above note 93, p. 2127; Rain Liivoja, “The Scope of the Supremacy Clause of the United Nations Charter”, *International and Comparative Law Quarterly*, Vol. 57, No. 3, 2007, p. 586.

IHL, while others may strive to preserve IHL.¹²¹ Either way, such a clear contradiction between the object and purposes of the UN and the effects of UN sanctions may reflect negatively on the legitimacy of sanctions as a global policy tool for influencing actors involved in armed conflict.¹²²

Conclusion

If subsequent research confirms the indications that UN sanctions can have an adverse impact on impartial humanitarian action, it is useful to take note of their broader implications for humanitarian action. Such evidence of impact would mean that UN sanctions could undermine the ability of humanitarian organizations to act, or to be perceived to be acting, in an impartial, neutral and independent manner. It would also mean that a political body such as the UNSC could dictate the implementation programmes of humanitarian activities that are meant to be quintessentially apolitical. This is despite the fact that adherence, and perception of adherence, to these principles is often a necessary condition for humanitarians to be able to operate effectively and safely.¹²³

This paper has hoped to address this potential dynamic from a legal perspective, with particular attention paid to the apparent friction between IHL and sanctions obligations. As has been argued, Article 103 cannot trigger the supremacy of sanctions obligations over IHL unless such an effect is clearly intended by the UNSC. In the absence of clear evidence to the contrary, it should be assumed that the Council does not intend unduly to encroach on this crucial humanitarian space.¹²⁴ IHL must therefore always be respected when sanctions

121 The EU, for instance, may have difficulties implementing a resolution that explicitly requires a violation of IHL. Recall a similar situation with respect to the *Kadi* cases, albeit with respect to Mr Kadi's human rights. In a series of cases, his human rights were preserved even in light of Article 103 of the Charter. In making such a determination, the European Court of Justice in *Kadi I* took the view that "obligations imposed by international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights". See European Court of Justice, *Kadi and Al Barakaat International Foundation v. Council and Commission*, Case Nos C-402/05 P and C-415/05 P (Grand Chamber), 3 September 2008, para. 285. It remains to be seen whether IHL and humanitarian action would be given a similar status to human rights in *Kadi*, but it is difficult to rule this out given the impressive commitment that the EU has placed on respecting and promoting respect for IHL, as well as impartial humanitarian action. See Treaty on European Union (Consolidated Version), C 235/5, 7 February 1992 (entered into force 1 November 1993), Arts 3(5), 21(2)(g); Treaty on the Functioning of the European Union (Consolidated Version), OJ L 326/47-326/390, 26 October 2012, Art. 214(2). See also *Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law*, OJ C 303, 15 December 2009.

122 R. Brubaker and S. Huvé, above note 4.

123 See, for example, Daniel Thürer, "Dunant's Pyramid: Thoughts on the 'Humanitarian Space'", *International Review of the Red Cross*, Vol. 89, No. 865, 2007; Marrion Harrof-Tavel, "Neutrality and Impartiality – the Importance of these Principles for the International Red Cross and Red Crescent Movement and the Difficulties Involved in Applying Them", *International Review of the Red Cross*, Vol. 29, No. 273, 1989.

124 As argued, this is not least because one of the purposes of UN sanctions is to facilitate and protect impartial humanitarian actors. R. Brubaker and S. Huvé, above note 4, p. 9.

obligations do not explicitly require States to violate such obligations. On the other hand, if the UNSC clearly intends for its decisions and demands on member States to violate IHL, the effect of such a provision in a UNSC resolution may be null, at least in theory, due to the Council acting *ultra vires*.¹²⁵

The present author is aware of the theoretical, political and practical challenges that this may give rise to, but it is important not to lose sight of the current reality of UN sanctions. Given that the primary issue is that there is a lack of clarity as to the precise scope of sanctions obligations, one could imagine that an overwhelming majority of issues would fall under the category of a “discretionary” conflict, which must be resolved in favour of preserving IHL. Such a line of argument, should it be accepted, is of course far from being a panacea – it is merely the first step of many.

Experts who are familiar with the issue will be quick to note that it is not necessarily UN sanctions that are the root cause of impediments to humanitarian action, but a combination of multilateral and unilateral sanctions which can lead to further complications. Accordingly, this paper only addresses part of the issue, but it is hopefully one that helps to avoid inaction by States with regard to preserving the impartial humanitarian space due to fears that doing so would violate UN Charter obligations. As studies into the impact of sanctions on humanitarian action continue, it would certainly be interesting and useful to determine what proportion, if any, of the issues relating to IHL would amount to such a “non-discretionary” conflict with sanctions obligations. In such cases, the theoretically and practically difficult question of whether the UNSC has acted *intra vires* may come into play.

To address doubts that may stem from either of these types of norm conflicts, it would perhaps be prudent to include explicit language in UN sanctions reminding States implementing related duties that they have an obligation to respect IHL. A lack of such a stipulation, however, should not be taken to mean that IHL may be left by the wayside.

125 ILC, above note 97, para. 331; B. Simma *et al.* (eds), above note 93, p. 2127; R. Liivoja, above note 120.