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UN Sanctions and Humanitarian Action

Review of Past Research and Proposals for Future Investigation

Dr Rebecca Brubaker and Sophie Huvé



Dr Rebecca Brubaker / Sophie Huvé

Dr Rebecca Brubaker is Senior Policy Adviser at United Nations University Centre for Policy Research and **Sophie Huvé** is Legal Expert at United Nations University Centre for Policy Research.

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Contents

- 02** **I. Introduction**
- 02** **II. Moments of scrutiny and change in the design and use of UN sanctions regimes**
- 03** **III. Examining the current moment**
 - Scrutinizing the impact of counter-terrorism measures in general and sanctions in particular on humanitarian action
 - Looking beyond counter-terrorism sanctions
 - Calls for change and options for potential solutions
- 08** **IV. Looking ahead: a call for further scrutiny outside the counter-terrorism sphere**
 - Areas of complementarity and tension
 - Comparing counter-terrorism and conflict sanctions contexts and implications for research findings
 - A note on combined counter-terrorism and armed conflict settings
- 11** **V. Presenting an agenda for future research**
 - Terminology
 - Substantive areas for further research
 - Methodological challenges
- 14** **VI. Conclusion**
- 16** **References**

I. Introduction

Since the early 2000s, international and regional organizations as well as States have increasingly imposed various measures that aim to control, restrict or prohibit interactions with certain States, groups or individuals, for political, social and military ends. These ends have included upholding the international security order, deterring violations of human rights, frustrating the pursuit of weapons of mass destruction and nuclear proliferation, and blocking sponsorship of or engagement in terrorism. Conversely, for the past few years, increasing assertions have been made inside and outside the humanitarian community that, as a result of these international restrictive measures, the space for principled humanitarian action has been shrinking.

This paper offers an overview of research conducted on the interplay of UN sanctions

and humanitarian action and provides a roadmap for future research endeavors. It situates this issue as the third in three waves of UN sanctions reform. It traces how it emerged within the counter-terrorism (CT) sphere and seeks to summarize the research findings on the impact of CT measures on humanitarian action, noting differences between CT measures in general and sanctions (including CT sanctions) in particular. The paper outlines a new path for policy research; one focused on the remaining thirteen UN sanctions regimes, all of which largely fall outside of the CT space. The paper concludes with clarification of key terms and an articulation of why establishing further evidence on this issue is critical to both the legitimacy and the effective use of UN sanctions.

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

UN sanctions are one of the critical instruments employed by the Security Council in its efforts to counter terrorism, stem nuclear proliferation, and prevent or resolve armed conflict. UN sanctions are applied under Article 41 of the UN Charter and consist in all of the measures “not involving the use of armed force” that the UN Security Council can adopt to give effect to its decisions.¹ In practice, UN sanctions most frequently include assets freezes, travel bans, arms embargoes, and commodity bans. They are applied to individuals and entities with the aim of changing their behaviour, constraining their behaviour, or signaling that their actions fall outside generally accepted international norms. Article 25 of the UN Charter creates a legal obligation on Member States to carry out the decisions of the UN Security Council,

including the Council’s call for sanctions under Article 41.

Members of the Security Council have redesigned and refined sanctions over time, leading to more targeted, efficient and effective versions of the tool. Two significant moments of scrutiny and change have fundamentally altered the design and approach to UN sanctions. The first involved the reforms undertaken between 1998 and 2002 in response to the devastating humanitarian impacts of comprehensive sanctions on the civilian population in the former Yugoslavia, Haiti, and Iraq. The second moment of scrutiny and change emerged as an unexpected consequence of efforts to make sanctions more targeted. As sanctions measures became more individualized and

discriminating, the procedures for listing and the process required for de-listing individuals came under increased scrutiny.² It was discovered that targeted listings were unduly impacting individuals' and entities' due processes rights, especially in the CT sphere. Reforms ensued. The UN sanctions instrument is now facing a third moment of scrutiny around the impact of current sanctions measures on the humanitarian sector's ability to consistently access and aid communities in need. Although not necessarily new for many humanitarian actors, this issue has gained momentum in the past few years, attracting attention both amongst the broader set of sanctions implementers and sanctions designers.

This history of previous challenges and processes of reform of UN sanctions present two useful lessons as we consider how to understand and subsequently address the current challenge. The first lesson is that sanctions' effectiveness is

inextricably linked to their legitimacy as a global policy tool. While the Security Council designs and adopts the measures, it relies on others to implement them.³ When left unaddressed, past challenges have hurt the legitimacy of the measures in the eyes of other States. In turn, questioning the legitimacy of sanctions has led to less willingness on the part of States to implement the measures. Accordingly, UN sanctions as a whole become less effective. Second, the previous two moments of change demonstrate that when faced with clear evidence of adverse impacts, the UN Security Council has risen to the challenge and enacted reforms.⁴ Thus, there is reason to believe that the Security Council may be moved to act in this case as well. By continuing to respond to new evidence and refine its tools, the Council helps protect both their legitimacy and their effectiveness.

III. Examining the current moment

Scrutinizing the impact of counter-terrorism measures in general and sanctions in particular on humanitarian action

Over the last decade, there has been an increasing number of reports from humanitarian organizations, UN humanitarian agencies, civil society organizations and sanctions experts raising concerns that CT measures in general, and CT-related sanctions measures in particular, are negatively impacting the ability of humanitarian organizations to carry out their activities in line with international humanitarian law provisions.⁵ Broadly speaking, CT measures consist in all of the international, regional and national laws and other regulatory measures – falling short of the use of military force – adopted and implemented by international and regional organizations, States, and private actors in the

field of CT. CT sanctions can be described as the targeted financial, diplomatic and embargo measures adopted either by the UN Security Council or by other regional organizations and States acting unilaterally in order to coerce a change of behaviour or constrain the access to resources of specific individuals and entities qualified as “terrorists.” When discussing the impacts of CT measures on humanitarian action, it is important to bear in mind that CT sanctions measures are only one aspect of the broader CT framework, and apply alongside other CT measures, such as domestic penal laws.⁶ These different layers of measures, however, are closely linked and feed off each other.⁷

Most of the research produced thus far has considered the proliferation of CT measures in general, especially measures to counter the financing of terrorism, and their impact on humanitarian organizations' ability to carry out principled humanitarian action.⁸ More specifically, research has highlighted several negative impacts on humanitarian action resulting, at least in part, from CT measures *writ large*, including financial hurdles, operational delays, as well as concrete risks for the security and safety of humanitarian actors.⁹ If found in violation of CT measures, humanitarian organizations may face risks of fines, prosecution and punishments under domestic orders.¹⁰ Humanitarian organizations are also increasingly facing overcompliance by private actors or donors, which further restricts their ability to operate.¹¹ For example, financial actors impose restrictions on, and costs for, financial services to minimize their own risks of liability. Moreover, a growing number of private actors refuse to provide services, such as bank accounts or wire transfers, to jurisdictions where targeted sanctions are imposed, regardless of the number of individuals or entities listed. This has resulted in some humanitarian organizations choosing to restrain themselves from operating in contexts under sanctions in light of the growing operational costs and challenges, as well as the ever-present risk of fines and criminal charges (the so-called "chilling effect").

These *de facto* constraints on humanitarian actors' ability to operate in certain areas, or for the benefit of certain categories of individuals, challenge the fundamental requirement under international humanitarian law (IHL) according to which humanitarian actors must operate in an impartial manner, i.e. based on needs alone and without discrimination.¹² These constraints also take a toll on the ability of humanitarian organizations to be perceived as neutral actors by the parties to the conflict.¹³ In turn, a perceived lack of impartiality and neutrality might endanger the safety and security of

humanitarian workers when operating in sensitive conflict contexts and when engaging with non-State armed groups considered as "terrorists." It is understandable that certain humanitarian actors now fear that the rationales underlying CT measures in general and CT-related sanctions in particular are eroding the normative commitments of IHL. As a result, some of the research has concluded that there is a tension between CT measures *writ large* and IHL, in particular IHL rules governing humanitarian activities, IHL rules protecting the wounded and sick as well as persons providing medical care, and IHL rules protecting humanitarian personnel.¹⁴

Moreover, recent reports have explored several ways in which sanctions measures, in particular CT sanctions measures, have constrained principled humanitarian action. For example, some reports have noted the role that sanctions can play in "dissuading donors from providing aid to certain regions, regardless of who is targeted or what derogations may be available," unless a CT clause is included in the funding agreement.¹⁵ In some cases, the presence of sanctions has dissuaded donors from even providing aid at all.¹⁶

The negative impacts of CT sanctions on humanitarian action, however, are difficult to isolate from the impacts of other international, regional and national CT measures.¹⁷ Nonetheless, research conducted to date provides initial evidence that the three main sanctions measures used in efforts to counter terrorism – asset freezes, travel bans, and sectoral embargoes – may all implicate and impede humanitarian action.¹⁸

Of the three types of measures, asset freezes put humanitarian actors most at risk. First, sometimes, incidental payments to designated entities controlling territory, or risks of diversion of relief supplies by designated entities and individuals, are an unavoidable consequence of operating in some areas controlled by groups

listed on sanctions lists. Second, the provision of certain goods or services, such as medical care to war-surgery seminars or mediation trainings to individuals under CT sanctions, might also contravene the assets freeze measure.¹⁹

Sectoral embargoes, and notably arms embargoes, also present hurdles for humanitarian action. These embargoes sometimes encompass “dual-use” objects which can be used for military purposes but are also needed to implement humanitarian activities.²⁰ When operating in regions or with parties under sanctions, humanitarian organizations

have to comply with restrictions on importing dual-use goods.²¹

Finally, travel ban measures also present some hurdles for humanitarians. They require States to prevent the entry into or transit through their territories by designated individuals. In other words, they prevent individuals from crossing borders. They can be problematic insofar as travel bans prevent humanitarian organizations from organizing protection or mediation trainings, both of which often require the presence and, hence, the international travel of designated individuals and entities.²²

Looking beyond counter-terrorism sanctions

Despite this focus on CT, only one of the current fourteen UN sanctions regimes has, as its primary objective, the countering of terrorism. The remaining thirteen aim at different purposes – mitigating conflict, abiding by a peace deal, stemming proliferation, countering non-constitutional changes of government, and deterring human rights and IHL violations. The research on the impact of sanctions on humanitarian activities in these other spheres, however, is much scarcer.

Only a few studies have focused on cases involving UN sanctions *writ large* and never in isolation from other regional or unilateral measures. Several reasons explain the difficulties in engaging in such research. First, studies have notably described the difficulty of isolating UN sanctions measures from other regional and unilateral sanctions.²³ In addition, they note that gathering evidence of impact can be a complicated task, considering the confidentiality inherent in the work of humanitarian actors. Moreover, humanitarian actors may be wary of providing information or analysis that could subject them to greater scrutiny or potentially even legal action. In some cases humanitarian actors may simply

lack information and knowledge regarding the often complex, and until more recently, rather opaque, UN sanctions regimes. In addition, the relatively limited scope of certain sanctions regimes (such as a travel ban on ten individuals in Guinea-Bissau) or the limited number of designations in other cases (e.g. four individuals in Sudan) may also make it difficult to obtain a general overview of impact. As a result of these various factors, there is a significant gap in understanding of the interplay of UN sanctions and humanitarian action beyond the CT realm.

This gap is significant given the implied international consensus around the use of UN sanctions – a consensus that is absent with regards to regional and unilateral measures.²⁴ One study to date, however, found that UN sanctions regimes relating to situations in Afghanistan, Somalia, the Democratic People’s Republic of Korea (DPRK) and Iran have each created obstacles for humanitarian organizations.²⁵ Obstacles have included denial of financial services, difficulty importing goods, and delays in obtaining exemptions.²⁶ More work needs to be done in this space, however, as most of the cases involving UN sanctions have yet to be substantially researched.

Calls for change and options for potential solutions

Academics and humanitarians have put forward several recommendations aimed at protecting impartial humanitarian action at the local, regional and international level. The changes they recommend seek to limit sanctions regimes, domestic criminal laws, and restrictive clauses in donor agreements from preventing, disrupting or restricting humanitarian activities.²⁷ The following paragraphs focus on their recommendations for sanctions designers and implementers, be they the UN Security Council or Member States. Some of their recommendations have been implemented but many have yet to be. Reports, echoing this discrepancy, have noted limited progress at the political and normative levels, while emphasizing the remaining lack of concrete measures and continued need for awareness-raising.²⁸

Past research and coalitions of actors have frequently called for humanitarian exemptions to asset freezes, travel bans and sectoral embargoes.²⁹ In theory, such exemptions can benefit all those involved in principled humanitarian action and in providing humanitarian services in relation to a listed individual or entity. In practice, however, exemptions benefiting humanitarian actors at the UN, EU and State levels are rare. Moreover, existing exemptions are often available only under specific conditions and are often restricted to specific humanitarian organizations and specific contexts. Furthermore, these exemptions are often granted solely for “humanitarian relief” or “humanitarian assistance” activities, which can lead to a restrictive interpretation, excluding protection activities otherwise permitted under IHL.

Today, only one regime contains a blanket exemption to its assets freeze measures. The 751 regime, relating to the situation in Somalia, possess what is known as a “standing exemption.” This exemption has, as its purpose: “ensur[ing] the timely delivery of urgently

needed humanitarian assistance in Somalia,” and has been reported as having “a significant impact on the ability of partners to deliver life-saving aid and protection.”³⁰ Despite being seen as the gold standard by many in the humanitarian field, it has yet to be applied in the other thirteen sanctions regimes and applies to only a subsection of humanitarian actors. Other more limited exemptions exist across all of the existing UN sanctions regimes.

UN exemptions, however, are not always transposed into domestic orders. As a result, they are not always available in practice to humanitarian actors. For example, many States have failed to incorporate the Somalia exemption into their domestic legal order, and humanitarian organizations fear that the exemption might not offer them enough protection against either legal liability or reputational harm that would, in turn, impact their ability to obtain funding and carry out life-saving humanitarian activities. Moreover, many States believe that, in the absence of existing UN exemptions in UN sanctions regimes, they are legally prevented from adopting their own exemptions when implementing these same UN sanctions regimes. There is no basis for this assumption under IHL.

Ad hoc derogations, otherwise known as exceptions, authorize the conduct of activities or the import of goods under restriction only after approval by a relevant authority. For example, all regimes at the UN level contain exemptions or derogations to the arms embargoes for protective clothing benefiting humanitarian personnel. Beyond the derogations available to listed individuals on humanitarian grounds, only three regimes currently contain derogations to allow activities for the humanitarian needs of, or humanitarian assistance to, civilian populations. The 1970 sanctions regime relating to the situation in Libya includes a derogation to the assets freeze limited to

specific Libyan entities.³¹ The 1718 sanctions regime contains a comprehensive humanitarian derogation mechanism adopted in Resolution 2397 (2017).³² The Security Council adopted the latest *ad hoc* derogation for humanitarian purposes in Yemen via Resolution 2511 (2020).³³ This derogation allows the relevant 2140 Sanctions Committee to exempt activities from sanctions measures on a case-by-case basis, if necessary, to facilitate the work of UN or other humanitarian organizations in Yemen.

Contrary to what many sanctions experts assume, many humanitarian actors tend to find *ad hoc* derogations problematic. First, processes to obtain *ad hoc* derogations are complex, time-consuming and have to be repeated, as derogations are granted on a case-by-case basis. Second, derogations are unpredictable, as there are no guarantees that a request for a derogation will be granted. Third, *ad hoc* derogations or licenses are often limited in scope, only benefiting specific actors or covering specific activities. Thus, *ad hoc* derogations processes may result in serious obstacles for an effective and rapid humanitarian response.

Perhaps most significantly, the concept of an *ad hoc* derogation contradicts the premise of IHL and fundamental humanitarian principles. Indeed, IHL already allows, delineates and protects the humanitarian activities of impartial humanitarian actors, in particular by imposing specific obligations on parties to the conflict and third States. Elaborating additional derogation procedures for humanitarian actors “allowing” them to operate in conflict contexts – let alone setting out specific procedures to apply to when, how and with whom they can operate – contradicts the pre-existing rights of humanitarian organizations and the obligations of parties to the conflict and third States under IHL. In addition, requiring that humanitarian actors seek authorizations to operate from a political body such as the Sanctions Committees, or political authorities of Member States, endangers the operational principles of

neutrality and independence enshrined in IHL. These operational principles aim to ensure that humanitarian activities are not implemented in a politicized or instrumentalized manner. They work as fundamental guarantees to enable humanitarian organizations’ access to all those in need and to protect them against accusations of political interference, which could quickly threaten their safety and their access to vulnerable populations.

Humanitarian impact assessments are not a new practice but have been rarely used since the shift to targeted sanctions. The Security Council required a humanitarian impact assessment before imposing a timber ban in Liberia and a ban on raw materials in the Democratic Republic of the Congo (DRC).³⁴ In Sudan, a pre-assessment report warning of adverse humanitarian consequences played a part in the Security Council’s decision to refrain from strengthening the existing sanctions.³⁵ In 2015, the Security Council requested the Analytical Support and Sanctions Monitoring Team of the CT sanctions regime to conduct an assessment of the impact of the existing sanctions measures in order to identify unintended consequences and unexpected challenges.³⁶ The Team reported several challenges faced by humanitarian actors including greater hesitation and caution among donors and de-risking practices, leading to the need for humanitarian organizations to use informal channels to transfer money for operations.³⁷

Inclusion of language safeguarding humanitarian activities in counter-terrorism sanctions contexts. In 2019, the UN Security Council adopted Resolution 2462 under Chapter VII of the Charter, including language safeguarding humanitarian activities and requiring compliance with IHL. Resolution 2462 is both part of the broader UN CT strategy and includes the one CT-related UN sanctions regime. Breaking new ground, this resolution “urge[d]” States to take into account the potential effect of CT measures on “exclusively

humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.” This caveat was meant to contrast with activities that are not strictly humanitarian, such as development, peace or commercial activities, and to exclude aid agencies providing support in a partial manner.³⁸ The resolutions also “demand[ed]” that States ensure that “all measures taken to counter terrorism, including measures taken to

counter the financing of terrorism”, comply with States’ IHL obligations.³⁹

This language created an important benchmark for humanitarian actors. It called on States to ensure that all of their CT measures do not interfere with IHL provisions by demanding compliance with IHL. Thus, the language in Resolution 2462 constitutes a positive step towards finding a balance between CT imperatives on the one hand, and preservation of impartial humanitarian action on the other.⁴⁰

IV. Looking ahead: a call for further scrutiny outside the counter-terrorism sphere

Research on the impact of CT measures (including CT sanctions) on humanitarian action provides an initial, crucial body of evidence. However, much remains to be understood as part of a larger effort to illustrate the varied interplay between other types of UN sanctions and humanitarian action. As described above, most of the research to date has focused on the impact of CT measures on humanitarian space. Much of this work looks at the combined impacts of a range of CT measures, including sanctions, leading to the conflation of CT sanctions with all CT measures.

In addition, very little previous research has focused on the impact of sanctions measures directed at conflict mitigation, non-constitutional changes of government, support for peace processes, and stemming violations of IHL, on humanitarian action. When research has focused on these areas, it often looks at the impact of sanctions in general on humanitarian action, and therefore considers the impact of

regional, unilateral, and UN measures together. As a result, a research gap remains regarding the particular impact of UN sanctions regimes on humanitarian action in contexts where IHL applies.

This gap matters for two reasons. First, UN sanctions are the only type of sanctions universally endorsed through the delegated authority UN Members States have given to the Security Council, under Article 25. Thus, in many ways they are held to a higher level of accountability than an individual State’s measures. And second, UN sanctions tend to be of a more limited nature than regional or unilateral measures. Yet, regional and unilateral measures often refer to the UN measures, using them as the basis for further action. As a result, if the original UN measures are found to have deleterious effects in a given case, there is a strong basis to push for a change in their design and application.

Areas of complementarity and tension

There is nothing inherently contradictory between IHL provisions and UN sanctions, as defined in Article 41 of the UN Charter. In fact, the design of sanctions regimes can be complementary to the application of IHL rules. For example, by deterring attacks on humanitarian workers or interference with the delivery of assistance, UN sanctions can help protect humanitarian space. Indeed, UN sanctions regimes applied to conflict contexts have always included language and provisions illustrating the intent or the willingness of the Security Council to use sanctions as a tool to help facilitate the delivery of humanitarian assistance and to protect humanitarian organizations from unlawful actions and abuses of the parties to the conflict.

Almost all of the Security Council resolutions underpinning the conflict-related sanctions regimes emphasize the importance of securing humanitarian access and humanitarian assistance and to protect humanitarian personnel to respond to the needs of civilians. This is not a new practice, as former sanctions regimes also often included similar language requesting full and unhindered access of relief personnel to all those in need. Current sanctions regimes include frequent and standardized language condemning the obstruction and misappropriation of humanitarian assistance; condemning the targeting of and attacks against humanitarian personnel; and recalling the corresponding obligations to ensure full, safe and unhindered humanitarian access to all those in need. In addition, in all but one of the conflict-related sanctions regimes, the Security Council insists on the obligation of parties to the conflict to comply with their obligations under IHL. These resolutions also recall the corresponding IHL obligations to ensure full, safe and unhindered humanitarian access as well as the safety and security of humanitarian personnel and supplies.

These principles are translated into action through the sanctions regimes' designation criteria. The majority of the sanctions regimes now include designation criteria on which the Security Council can act in order to prevent or put a stop to abuses and impediments to humanitarian relief. Eight of the conflict-related sanctions regimes include a general designation criterion of "violations of IHL." Moreover, six conflict-related sanctions regimes also include stand-alone designation criteria based on the obstruction of humanitarian access, impediments to the delivery or distribution of humanitarian assistance, and/or attacks against humanitarian personnel. Although only a handful of the groups and individuals have in practice been listed for obstruction of access and delivery or attacks against aid workers, the Security Council often includes language reiterating its intent to impose sanctions on those who would engage in such prohibited acts. This threefold approach demonstrates that protection of humanitarian access, assistance and personnel is one of the objectives of sanctions.

At the same time, existing tensions between IHL and sanctions measures are undeniable and have been at the forefront of the debate in recent years. For example, the unconditioned inclusion of medical-related activities as part of the listing criteria for several individuals and entities under the CT regime may not be consistent with IHL protections for impartial medical care to all wounded and sick and persons *hors de combat*. Humanitarian actors are reporting increasing incidents in contexts where aid is blocked or delayed due to the implementation of sanctions measures. Conflict-related sanctions regimes, in contrast to the CT sanctions regime, fail to explicitly remind States of their obligations to comply with IHL. This *lapsus* may lead States to prioritize their sanctions obligations over their IHL obligations when these appear to conflict.

Simultaneously, little is known regarding current best practices, modalities and tools available for mitigating the adverse impacts of conflict-related sanctions measures on humanitarian action. Additionally, there is little policy guidance for both humanitarian and sanctions practitioners on how to navigate the interplay of their fields.⁴¹

The absence of known mitigating measures and the lack of guidance for States presents to significant risks. One risk is that States and private actors might interpret their implementation obligations in a way that restricts, delays, or impedes the delivery of humanitarian activities, thus preventing organizations from fulfilling their mandate under IHL. In turn, this would limit vulnerable populations' access to life-

saving assistance and protection. The second risk is that, despite the widespread presence of language protecting and promoting humanitarian action in current UN sanctions regimes, opportunities to constructively act on this basis may be missed. Already there is some sense from corners of the humanitarian sector that such language currently serves only as a decorative flourish rather than as a substantial and tested basis for action. The development of guidance documents, in partnership with the relevant communities, could help mitigate both of these risks by standardizing regional and domestic implementation measures, capitalizing on areas for cooperation, tempering incentives to de-risk, and reducing inadvertent violations.⁴²

Comparing counter-terrorism and conflict sanctions contexts and implications for research findings

While future research should build on previous work from the CT and sanctions sphere, researchers also need to consider potential differences between CT and armed conflict settings.⁴³ There are four primary differences. First, the primary purpose of UN sanctions regimes in conflict settings remains the resolution of a conflict through a negotiated settlement – not the deterrence of terrorist affiliated groups.⁴⁴ By contrast, the one CT sanctions regime only aims to constrain ISIL-Al Qaeda and affiliated groups and not to bring them to the negotiation table and, eventually, back into the mainstream political fold. This fundamental difference in the underlying purposes of sanctions regimes in the CT and the conflict sphere might impact States' interpretation of the sanctions measures. For example, States might be more likely to scrutinize humanitarian organizations engaging with listed non-State armed groups in the CT sphere than the conflict sphere.

Moreover, while the inclusion of language defending humanitarian activities is already quite common in conflict-related sanctions

regimes, Council members only included similar references to IHL and humanitarian activities in the CT regime following an intense and hard-fought advocacy campaign. Likewise, while the CT sanctions regime tends to focus on misappropriation and abuse of aid as a source of financing of listed groups and individuals, the conflict-related regimes focus on misappropriation as one of a number of actions hindering the delivery of humanitarian relief to populations in need.⁴⁵

The CT regime emphasizes the need for States to adopt a risk-adverse approach and refers heavily to the Financial Action Task Force's (FATF) recommendations regarding "the risk of abuse of non-profit organizations by terrorist groups and networks."⁴⁶ More broadly the CT context does not tolerate risk and mostly appears as a strict liability regime where the intent of an actor is irrelevant to the offense. It does not matter whether a given humanitarian organization supported or contributed intentionally or without prior knowledge of wrongdoing to the resources of the listed entity.

By contrast, FATF recommendations do not apply, to the same extent, in conflict-related sanctions regimes. This may give the impression that financial sanctions applied in non-CT contexts may not need to be subjected to an equally rigorous review, especially regarding the risks of abuse of humanitarian aid. This difference in focus could very well lead to a differentiated interpretation of the scope of sanctions measures, especially the assets freeze and the designation criteria prohibiting support. As a result, it is conceivable that sanctions implemented in the armed conflict contexts may have fewer negative impacts on humanitarian activities.

A final significant difference between the armed conflict sphere and the CT sphere may lead to different research results. The single UN CT sanctions regime is part of a larger CT political and legal framework developed by the UN Security Council over the years

under Chapter VII. This framework imposes general and abstract rules binding on all UN Member States, a trend which started with resolution 1373 (2001). In particular, through this framework, resolutions 1373 (2001) and 2462 (2019) impose obligations on States to criminalize the financing of terrorism in their domestic orders.⁴⁷ By contrast, in non-CT settings, States have the discretion to decide the type of penalty to institute in relation to national actors' non-compliance with UN sanctions. As a result, States may be less severe regarding sanctions violations in the conflict context than in the CT context, with potential repercussions on private actors' approach to risk when working with humanitarian actors in both spheres.

In summary, all of these distinctions could nourish different interpretations and implementation practices in conflict contexts and, in turn, produce quite varied impacts on humanitarian action.

A note on combined counter-terrorism and armed conflict settings

While it is important to appreciate general differences between the armed conflict and CT contexts, in an increasing number of cases, these spheres overlap. From Somalia to Mali and from Yemen to Afghanistan, the application of UN sanctions has increasingly turned to both conflict mitigation and countering terrorism. In some of these contexts, the Security Council has updated the design of their sanctions regimes

to address this overlap.⁴⁸ In the other cases, the design has remained out of step with the way in which sanctions are being used. As a result, humanitarian space is being limited in these contexts, in large part due to the importation of CT goals into an armed conflict context, without the subsequent importation of the humanitarian safeguards that exist in the primary CT regime.⁴⁹

V. Presenting an agenda for future research

In summary, there is a pressing need to understand the impact of UN sanctions beyond the CT sphere, as only one of the current 13 UN sanctions regimes focuses exclusively on CT. Any future research agenda will need to take three elements into consideration when embarking

on further study: existing substantive gaps in knowledge, a need for more terminological and conceptual clarity, and a realistic understanding of the challenges inherent to the research methodology.

Terminology

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

1. First, future research endeavours should aim to distinguish between instances of “direct” or “primary” impact and “indirect” or “secondary” impact. While the effects on humanitarian action may be similar, the plan for mitigating impact varies considerably as well as the political coalition needed to push for change.
2. Second, within the sanctions literature, there is common reference to the term “unintended consequences.” The term is used to refer to the type of effects described in this paper. Just as a closer look at the meaning and type of “impact” would help clarify the meaning of “consequences,” a more studied look at the intentions of designers and implementers would help shine more light on what has otherwise been a long ignored or perhaps overly simplified description of the phenomenon under study.
3. Third, there is a critical issue of terminology around the use and meaning of the terms “exception” versus “exemption.”⁵⁰ The UN uses the terms as they are employed in this paper. By contrast, at the EU level, the meaning of the terms is reversed. In a similar vein, the Interlaken Manual on Targeted Financial Sanctions follows a similar approach to the EU.⁵¹ As a result, there is a general confusion of terms both within the sanctions community and amongst humanitarian practitioners. The terminological confusion has led to a tendency for past work to either mistakenly concur on points of divergence or to seek consensus where no real differences exist. Thus, there is a pressing need for future research to look for conditions which would help to generate consensus and propose a standard definition for these terms so that new work – both within and across the two fields – can speak from a common foundation of understanding.⁵²
4. Fourth, there is general confusion and lack of terminological clarity on the meaning of “impact.” To begin, there is a need to distinguish more systematically between three types of impact: first, the impact on the affected population; second, the impact on humanitarian activities and; third, the impact on the impartial and humanitarian character of the humanitarian sector. Within category two, the impact on humanitarian activities, there is also a need to parse the effects on humanitarian access on the one hand and humanitarian activities of assistance and protection on the other. Such a studied distinction in future work would help better ground arguments for further adjustments in existing international legal frameworks.
5. Fifth, and similarly, future research would do well to clarify the origins and importance of the terms “impartial” and “neutral” in descriptions of humanitarian organizations, when discussing appropriate derogations and safeguards. Most individuals in the sanctions community will not be familiar with the debates around these terms. As a result, they are less likely to appreciate the potential impact their measures may have, either in support of or in contravention to these fundamental concepts. Rather, sanctions experts and practitioners are more accustomed to considering humanitarian actors as one uniform category.

6. Finally, amongst the community of sanctions implementers on the one hand and government regulators on the other, there is a persistent terminological and conceptual debate at the heart of discussions around compliance, as well as a lack of understanding regarding the operational realities faced by humanitarian organizations. This debate centers around the question of whether or not there is

such a thing as zero risk, and, if not, what an acceptable level of risk tolerance should look like. This debate is key to any future research on potential measures for mitigating the impact of sanctions due to overcompliance and de-risking. Further terminological clarity would assist in building consensus around currently divergent approaches to risk and conceptions of acceptable risk.

Substantive areas for further research

Foremost on any future research agenda should be the primary and secondary impacts of the remaining thirteen sanctions regimes on humanitarian action, given how substantially these regimes differ from the one CT sanctions regime. However, such an analysis should not limit findings from the start by searching for only negative impacts. Rather, there is an under-researched element of sanctions regimes that sees them as one source of deterrence in efforts to uphold IHL and protect humanitarian space. Accordingly, there is a need for a dual-pronged research agenda: one that looks for a potential negative impact of sanctions measures on humanitarian action and one that looks for potential positive impacts. Both prongs will have to treat the issue of impact carefully, as described above, given previous findings that secondary impacts, which are less directly attributable to sanctions measures, can have more noticeable effects. As part of this dual-research endeavour, researchers should identify

and recommend measures that could mitigate negative impacts and amplify positive impacts identified at the sanctions design, interpretation, application and adjustment stages.

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

Methodological challenges

Future research will have to take into consideration and look to surmount two key methodological challenges. Some of these challenges are simply inherent to this field of study. Paramount amongst these is the debate

around how to most accurately and efficiently measure impact. This challenge can largely be divided into two subsequent hurdles: sourcing and validating information and establishing a causal chain.

On the first point, previous studies have relied on self-reporting by humanitarian actors, which, in turn has resulted in criticism from sanctions experts, architects, and government stakeholders, who point both to the self-reporting bias as well as to the lack of concrete details supplied to back-up anecdotal evidence.⁵³ Many humanitarian actors have often rejoined that detailed reporting is impossible given the confidentiality inherent in their work. Moreover, previous research efforts have cited challenges in reporting due to practitioners' wariness of admitting to conduct that, while covered by IHL, may nevertheless be interpreted by some States as prohibited under an existing UN sanctions regime. This, therefore, precludes cross-sectional studies on a sufficiently large scale.⁵⁴ An entity trusted by both communities could consider engaging in such a project in the future, given adequate resources and access, while noting that it may be extremely difficult to effectively undertake such an initiative in light of prevailing circumstances.⁵⁵

The second challenge exists in attempting to establish a causal link between a policy intervention and outcome. This is a challenge that has plagued many fields of applied research. It is particularly fraught in the realm of sanctions given the myriad of factors influencing the outcomes in question –

restricted access, diminished assistance, and hampered protection activities, to name a few. One current study is looking precisely at the challenge of establishing a causal chain between the application of CT measures *writ large* and the impact on humanitarian action.⁵⁶

One could consider an alternative approach that looks to use counter-factuals to gauge impact, as has been much explored in the area of conflict prevention.⁵⁷ Looking for the impact of a non-event has the advantage of simplifying contextual factors and better isolating a policy contribution. In this setting, rather than looking at the most severe instances of impeded access or diminished assistance, one could instead look at cases where UN sanctions co-exist with humanitarian activities and seek to understand what enables them to co-exist productively. Any such study will, of course, have to account for situational differences, such as the scope of the existing UN sanctions, the presence of additional non-UN sanctions, the degree of stigmatization of the actors involved, and the existence of additional measures such as UN peace operations or foreign military occupation. Lastly, the counter-factual approach could also be used to examine instances of best practices when it comes to the degree of compliance with IHL rules regulating humanitarian access and activities.

VI. Conclusion

It is important to understand what is at stake in this third moment of scrutiny of the UN sanctions tool. It is an opportunity for change. Addressing instances of negative impact effectively can serve to ensure that the legitimate end of maintaining international peace and security through sanctions is not at the expense of meeting the needs of victims

of armed conflicts, as envisaged under IHL. In the mid- to long-term, addressing frictions through careful adjustments to the sanctions tool can help maintain both the legitimacy and the effectiveness of UN sanctions. The current research demonstrates that the stakes are high – if actors feel they cannot both maintain access and protect humanitarian activities

in compliance with IHL, while implementing sanctions, it is likely that instances of non-compliance will only increase. Alternatively, humanitarian organizations, unwilling to risk non-compliance, may choose to increasingly disengage from conflicts contexts under UN sanctions. In contrast, if future research can better identify the sources of friction and suggest

actionable paths forward that both protect humanitarian action and enable compliance with UN sanctions, then there is potential for the two sets of activities to work in tandem and to ensure that compliance with sanctions is not at the expense of meeting the needs of victims of armed conflicts as envisaged by IHL.

References

- 1 United Nations, *Charter of the United Nations*, (New York: United Nations: 1945): Article 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.
- 2 James Cockayne, Rebecca Brubaker, and Nadeshda Jayakody, *Fairly Clear Risks: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures* (New York: United Nations University, 2018).
- 3 Although all States are legally required to implement all UN Security Council decisions, hence including sanctions measures, the practice does not always match the theory. In practice, some States automatically implement Security Council decisions. Other States filter the Security Council decisions through their own courts and only implement what they feel is legally sound.
- 4 In the case of challenges regarding due process safeguards, reforms were more modest and related principally to the CT sanctions regime.
- 5 Among other sources, see in particular: Alice Debarre, *Making sanctions smarter: safeguarding humanitarian action*, Policy (New York: IPI, 2019); Norwegian Refugee Council, *Principles under pressure: the impact of counter-terrorism measures and preventing/countering violent extremism on principled humanitarian action* (Oslo: NRC, 2018); Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism* (Cambridge, Mass.: Harvard Law School Program on International Law and Armed Conflict, 2015); Emanuela-Chiara Gillard, *Recommendations for reducing tensions in the interplay between sanctions, counter-terrorism measures and humanitarian action* (London: Chatham House, 2017); Emanuela-Chiara Gillard, *Humanitarian Action and Non-state Armed Groups: the international legal framework* (London: Chatham House, 2017); United Nations Security Council, "8499th meeting: The promotion and strengthening of the rule of law, with a focus on International humanitarian law," United Nations, 1 April 2019, S/PV.8499: 6-7. "In my view, the question is not whether counter-terrorism measures might adversely affect principled humanitarian action, but the scope and scale of that impact."
- 6 These laws criminalize all form of support to listed groups and individuals, or CT clauses in funding agreements.
- 7 For example, counter-terrorism sanctions taken at the international or regional levels are implemented in domestic orders, with a ripple effect into domestic legislation and implementation practices of private actors, but also come from and reflect States already existing counter-terrorism laws and policies. Counter-terrorism clauses in funding agreements often request humanitarian organizations to not engage with individuals and entities designated in UN, EU or States counter-terrorism lists.
- 8 For the purposes of these papers, the terms "humanitarian organizations" and "humanitarian actors" are used interchangeably and meant to include all non-governmental organizations, civil society actors and UN agencies operating in an impartial manner and engaging in exclusively humanitarian activities. Among other specific reports, see most recently: Tom Keatinge, *Uncharitable Behavior and Banks That Drop Nonprofit Customers* (London: RUSI, 2019); Ben Hayes, *The impact of international counter-terrorism on civil society organisations Understanding the role of the Financial Action Task Force* (Washington DC: Bread for the World, 2017); Tom Keatinge and Florence Keen, *Humanitarian Action and Non-state Armed Groups: the impact of banking restrictions on UK NGO* (London: Chatham House, 2017); Stuart Gordon, Alice Robinson, Harry Goulding, and Rawaad Mahyub, *The Impact of Bank De-risking on the Humanitarian Response to the Syrian Crisis* (London: ODI, 2018); Stuart Gordon and Sherine El Taraboulsi-McCarthy, *Counter-Terrorism, Bank De-risking and Humanitarian Response: A Path Forward: Key Findings from Four Case Studies* (London: ODI, 2018): 2; Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action* (Geneva: UNOCHA and NRC, 2013); Sherine El Taraboulsi-McCarthy with Camilla Cimatti, *Counter-terrorism, De-risking and the Humanitarian Response in Yemen: A Call for Action* (London: ODI, 2018).

- 9 See, for instance the IPI report, listing seven ways sanctions regimes can impact humanitarian action. Alice Debarre, *Making sanctions smarter : safeguarding humanitarian action* (New York: IPI, 2019) See also, Norwegian Refugee Council, *Principles under pressure: the impact of counter-terrorism measures and preventing/countering violent extremism on principled humanitarian action* (Oslo: NRC, June 2018).
- 10 Alice Debarre, *Making sanctions smarter: safeguarding humanitarian action* (New York: IPI, 2019) ; Norwegian Refugee Council, *Principles under pressure: the impact of counter-terrorism measures and preventing/countering violent extremism on principled humanitarian action* (Oslo: NRC, June 2018); Emanuela-Chiara Gillard, *Recommendations for reducing tensions in the interplay between sanctions, counter-terrorism measures and humanitarian action* (London: Chatham House, 2017).
- 11 Emanuela-Chiara Gillard, *Humanitarian Action and Non-state Armed Groups: the international legal framework* (London: Chatham House, 2017) ; Alice Debarre, *Making sanctions smarter: safeguarding humanitarian action* (New York: IPI, 2019); High Level Review of United Nations Sanctions, *Compendium* (New York: United Nations, 2015), A/69/941-S/2015/432: 66. "Some private sector actors, confused by differing unilateral, regional, and UN sanctions, or generally risk-averse and aiming at minimizing implementation costs, apply policies resulting in over-compliance, including foregoing legitimate business with entities not subject to UN sanctions, or even all business with a particular country"; Tom Keatinge, *Uncharitable Behavior and Banks That Drop Nonprofit Customers* (London: RUSI, 2019); Stuart Gordon, Alice Robinson, Harry Goulding, and Rawaad Mahyub, *The Impact of Bank De-risking on the Humanitarian Response to the Syrian Crisis* (London: ODI, 2018).
- 12 Note that IHL is applicable only in relation to situations of armed conflict. Only some, not all, sanctions are applied in relation to such situations.
- 13 Neutrality is not a required condition under IHL, but it is considered a fundamental operational principles for humanitarian action.
- 14 Emanuela-Chiara Gillard, *Humanitarian Action and Non-state Armed Groups: the international legal framework* (London: Chatham House, 2017); Naz K Modirzadeh, Dustin A. Lewis and Claude Bruderlein, "Humanitarian engagement under counter-terrorism : a conflict of norms and the emerging policy landscape," *International Review of the Red Cross* 93, 883 (2011)
- 15 High Level Review of United Nations Sanctions, *Compendium*, (New York: United Nations, 2015), A/69/941-S/2015/432: 66; Norwegian Refugee Council, *Principles under pressure: the impact of counter-terrorism measures and preventing/countering violent extremism on principled humanitarian action* (Oslo: NRC, 2018), Emanuela-Chiara Gillard, *Recommendations for reducing tensions in the interplay between sanctions, counter-terrorism measures and humanitarian action* (London: Chatham House, 2017).
- 16 Alice Debarre, *Making sanctions smarter : safeguarding humanitarian action* (New York: IPI, 2019): 11
- 17 Ibid: 8: "It is important to note that the impact of sanctions on humanitarian activities is closely linked to the proliferation of other types of counter-terrorism measures, which is also restricting the ability of humanitarian actors to operate. The coexistence of sanctions and other counter-terrorism measures in some contexts creates a restrictive environment for humanitarian actors, and their compounded effect leads to some of the challenges described."
- 18 Ibid.
- 19 Katie King, Naz K. Modirzadeh, Dustin A. Lewis, *Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action* (Cambridge, Mass.: Harvard Law School, 2016); Emanuela-Chiara Gillard, *Recommendations for reducing tensions in the interplay between sanctions, counter-terrorism measures and humanitarian action* (London: Chatham House, 2017)
- 20 Alice Debarre, *Making sanctions smarter: safeguarding humanitarian action* (London: IPI, 2019).
- 21 Where a humanitarian derogation to the restriction exists, long and tedious approval procedures often result in increased costs and operational delays. Moreover, applying for a derogation can be seen as compromising the independence of humanitarian organizations as it puts their work at the discretion of a political body or authority. Such a limitation directly contradicts humanitarians' "right of initiative" under IHL.
- 22 Katie King, Naz K. Modirzadeh, Dustin A. Lewis, *Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action* (Cambridge, Mass.: Harvard Law School, 2016): 7
- 23 Alice Debarre, *Making sanctions smarter: safeguarding humanitarian action* (New York: IPI, 2019)
- 24 Brubaker, R. and Huve, S., (forthcoming December 2020).

- 25 Alice Debarre, *Making sanctions smarter: safeguarding humanitarian action* (New York: IPI, 2019).
- 26 Ibid.
- 27 See also the work of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in that area: not least: United Nations General Assembly, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*," United Nations, 1 March 2019, A/HRC/40/52; United Nations General Assembly, "Promotion and protection of human rights and fundamental freedoms while countering terrorism," United Nations, 3 September 2020, A/75/337.
- 28 Alice Debarre, *Making sanctions smarter: safeguarding humanitarian action* (New York: IPI, 2019)
- 29 Note that there exists confusion around the terminology of "humanitarian exemption". First, there is confusion regarding the "humanitarian exemptions" available for the benefit of sanctioned individuals, and the "humanitarian exemptions" available for the benefit humanitarian organizations to allow them to provide humanitarian assistance to civilian. Second, there is also a widespread confusion around "exemptions" vs "exceptions", i.e. which are general and standing affirmations that the sanctions measures do not apply to humanitarian activities and which require humanitarian actors to apply to case-by-case authorization process decided by the Sanctions Committees. This scoping paper discusses the confusion around the terms in a following section. On the call by many actors regarding humanitarian exemptions, see the Sanctions review undertaken by Germany, Greece and al in 2015, calling for standing humanitarian exemptions: High Level Review of United Nations Sanctions, *Compendium* (New York: United Nations, 2015); Katie King, Naz K. Modirzadeh, Dustin A. Lewis, *Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action* (Cambridge, Mass.: Harvard Law School, 2016); Norwegian Refugee Council, *Principles under pressure: the impact of counter-terrorism measures and preventing/countering violent extremism on principled humanitarian action* (Oslo: NRC, 2018); United Nations General Assembly, "Promotion and protection of human rights and fundamental freedoms while countering terrorism," United Nations, 3 September 2020, A/75/337. United Nations General Assembly, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," United Nations, 1 March 2019, A/HRC/40/52.
- 30 UN Security Council Resolutions 1916 (2010) and most lately 2498 (2019), para. 22; on Somalia. The exemption in Somalia was adopted in 2010 in response to a drastic drop of humanitarian aid due to challenges in providing humanitarian assistance in areas under the control of Al-Shabaab. The positive impacts of the exemptions were most lately reported by the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, United Nations Security Council, "Letter dated 12 October 2020 from the Chair of the Security Council Committee pursuant to resolution 751 (1992) concerning Somalia addressed to the President of the Security Council," United Nations, 15 October 2020, S/2020/1004: para. 51.
For analysis and details of the Somalia exemption, see Emanuela-Chiara Gillard, *Recommendations for reducing tensions in the interplay between sanctions, counter-terrorism measures and humanitarian action* (London: Chatham House, 2017).
- 31 United Nations Security Council, "Resolution 2009, adopted by the Security Council at its 6620th meeting," United Nations, 16 September 2011, S/RES/2009. UN Security Council resolution 2009 (2011) on Libya: "The assets freeze does not apply to funds, other financial assets or economic resources of the Central Bank of Libya, the LAFB, the LIA and the LAIP *provided that* the Member State authorizes access to funds for "humanitarian needs; fuel, electricity and water for strictly civilian uses; resuming Libyan production and sale of hydrocarbons; establishing, operating, or strengthening institutions of civilian government and civilian public infrastructure; facilitating the resumption of banking sector operations, including to support or facilitate international trade with Libya." The procedure is however quite heavy: advance notification to Committee, advance consultation with Libyan authorities, no objection by Libyan authorities and absence of a negative decision by Committee.
- 32 United Nations Security Council, "Resolution 2397, adopted by the Security Council at its 8151st meeting," United Nations, 22 December 2017, S/RES/2397. UN Security Council resolution 2397 (2017), on DPRK reaffirming that the sanctions "are not intended (...) to affect negatively or restrict those activities, including economic activities and cooperation, food aid and humanitarian assistance (...) and the work of international and non-governmental organizations carrying out assistance and relief activities in the DPRK for the benefit of the civilian population", and allowing the Sanctions Committee to exempt activities from the scope of the sanctions regime on a case-by-case basis in order to facilitate the work of such organizations in the DPRK.

- 33 United Nations Security Council, "Resolution 2511, adopted by the Security Council at its 8732nd meeting," United Nations, 25 February 2020, S/RES/2511. UN Security Council Resolution 2511 (2020), on Yemen, para 3: "emphasising the importance of facilitating humanitarian assistance, decides that the Committee established in paragraph 19 of resolution 2140 (2014) (hereafter, the "Committee") may, on a case-by-case basis, exempt any activity from the sanctions measures imposed by the Security Council in resolutions 2140 (2014) and 2216 (2015) if the Committee determines that such an exemption is necessary to facilitate the work of the United Nations and other humanitarian organisations in Yemen or for any other purpose consistent with the objectives of these resolutions".
- 34 Rebecca Brubaker, "An Introduction to the Sanctions World," IPI Workshop on UN Sanctions and Humanitarian Action, New York, 9 May 2019.
- 35 David Cortright, George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner Pub, 2000): 124-125.
- 36 United Nations Security Council, "Resolution 2199, adopted by the Security Council at its 7379th meeting," United Nations, 12 February 2015, S/RES/2199: para 30.
- 37 Analytical Support and Sanctions Monitoring Team Annual for the ISIL-Al Qaeda regime reports. United Nations Security Council, "Letter dated 25 September 2015 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities addressed to the President of the Security Council," United Nations, 25 September 2015, S/2015/739; United Nations Security Council, "Letter dated 19 July 2016 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities addressed to the President of the Security Council," United Nations, 19 July 2016, S/2016/629 United Nations Security Council, "Letter dated 11 January 2017 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities addressed to the President of the Security Council," United Nations, 13 January 2017, S/2017/35.
- 38 United Nations Security Council, "Resolution 2462, adopted by the Security Council at its 8496th meeting," United Nations, 28 March 2019, S/RES/2462: para 5, 6 and 24. Before Resolution 2462, the Council regularly asked States to ensure that their measures taken to counter terrorism comply with all their obligations under IHL, but only in the preambles of resolutions; United Nations Security Council, "Resolution 2482, adopted by the Security Council at its 8582nd meeting," United Nations, 19 July 2019, S/RES/2482. Resolution 2482 contains similar language adopted by the Council (though not, in that instance, expressly under a Chapter VII authority), see para 16.
- 39 Ibid .
- 40 Other resolutions in the ISIL-Al Qaeda and Taliban regimes illustrate an intent to strike a difficult balance between risks of abuse of non-profit organizations and risks of undermining humanitarian action UN Security Council Resolution 2368 (2017) on the ISIL-Al Qaeda regime. United Nations Security Council, "Resolution 2368, adopted by the Security Council at its 8007th meeting," United Nations, 20 July 2017, S/RES/2368. "Recognizing the need for Member States to prevent the abuse of non-governmental, non-profit and charitable organizations by and for terrorists, (...) welcoming the 2016 revised international standard and guidance issued by the Financial Action Task Force (FATF) in Recommendation 8, including its recommendation for a more appropriate, risk-based approach and government engagement with the non-profit sector(...), noting that any such measures implemented by states be consistent with their international obligations, and reiterating that States should identify and take effective and proportionate actions against non -profit organizations that either are exploited by or knowingly support terrorists or terrorist organizations taking into account the specifics of the case." States should "take into account relevant FATF Recommendations and international standards (...), as well as to protect non-profit organizations, from terrorist abuse, using a risk-based approach, while working to mitigate the impact on legitimate activities through all of these mediums." Taliban: "to move vigorously and decisively to cut the flows of funds and other financial assets and economic resources to individuals and entities on the List, as required by paragraph 1 (a), taking into account relevant FATF Recommendations and international standards designed to prevent the abuse of non-profit organizations, formal as well as informal/alternative remittance systems and the physical trans-border movement of currency, while working to mitigate the impact on legitimate activities through these mediums." FATF, *Combating the Abuse of Non-Profit Organisations* (Recommendation 8) (Paris: FATF and OECD, 2015), <https://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf>.

- 41 At the UN level, 8 regimes out of 15 include some sorts of guidance documents such as implementation assistance notices, but most of them focus on assisting with implementation of arms embargoes and only 3 documents can be seen as relevant to determine the scope of the assets freeze or deal with exemptions, in the ISIL-Al Qaeda, DPRK and Iraq regimes.
- 42 United Nations Security Council, "Letter dated 25 September 2015 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities addressed to the President of the Security Council," United Nations, 25 September 2015, S/2015/739; United Nations Security Council, "Letter dated 19 July 2016 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities addressed to the President of the Security Council," United Nations, 19 July 2016, S/2016/629 United Nations Security Council, "Letter dated 11 January 2017 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities addressed to the President of the Security Council," United Nations, 13 January 2017, S/2017/35. "[I]t has become clear that further awareness-raising concerning the nature and extent of existing sanctions measures within the humanitarian sector is desirable". Such chilling effects can be "dissipated, or at least minimized, through information-sharing on sanctions, outreach to donors and coordination between stakeholders in the implementation of the sanctions and humanitarian aid agencies." See also, High Level Review of United Nations Sanctions, *Compendium* (New York: United Nations, 2015): 66. "[P]romoting a clear understanding of the requirements of UN sanctions is important to limit unintentionally broad interpretations of the scope of UN sanctions and unintended consequences", in particular over-compliance. See also, High Level Review of UN Sanctions, "Humanitarian Aspects and Emerging Challenges: Chairperson's Report," *Compendium* (New York: United Nations, 2015): 9, para. 22. "[T]here is a general lack of understanding among humanitarian actors in the field regarding what action they can and cannot take vis-à-vis sanctioned individuals, entities and states. As a result, UN humanitarian workers may have inadvertently violated UN sanctions provisions in some cases and have over-complied in others."
- 43 It is important to note that there is sometimes an overlap between these two contexts. For example in Somalia, Mali, Libya and Yemen, situations of armed conflicts also marked by efforts to counter terrorism.
- 44 James Cockayne, Rebecca Brubaker, and Nadeshda Jayakody, *Fairly Clear Risks: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures* (New York: United Nations University, 2018): 30- 35 (Table 8).
- 45 This observation can also be made for conflict-related sanctions regimes with a CT element such as 751 (relating to Somalia) and 1988 (relating to Afghanistan).
- 46 See, for example, FATF, *Combating the Abuse of Non-Profit Organisations* (Recommendation 8) (Paris: FATF and OECD, 2015), <https://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf>.
- 47 This notably includes the obligation of States to criminalize in their domestic orders violations by private actors of the sanctions measures (in particular the assets freeze measure) applicable in the ISIL-Al Qaeda regime. The obligations arising from UN Security Council resolutions on counter-terrorism adopted under Chapter VII, such as resolution 1373 (2001), and later on resolution 2462 (2019) are very similar to conventional obligations of the International Convention for the Suppression of the Financing of Terrorism. After the adoption of Resolution 1373 (2001) scholars notably wrote about the Security Council acting as a supranational legislator for the rest of the UN Member States. See for example, Stefan Talmon, "The Security Council as World Legislature," *The American Journal of International Law* 99, 1 (2005): 175-93 ; Paul Szasz, "The Security Council Starts Legislating," *The American Journal of International Law* 96, 4 (2002): 901-05.

- 48 For example, affiliation to groups designated under the ISIL-Al Qaeda regime is mentioned in the 2374 (Mali), 750 (Somalia) and 1970 (Libya) sanctions regimes as an additional basis for listing of several individuals and entities. Furthermore, States are encouraged to list individuals and entities supporting ISIL or Al Qaeda operating in Mali and Libya. In one instance, an individual was re-listed on the Somalia list after being de-listed from the 1267 list. In addition, the groups of experts affiliated with these regimes and the CT regime conducted joint analyses upon recognizing that threats and financing schemes apparent in the analysis of ISIL or Al Qaeda may also be relevant to investigations on the financing of the arms trade, armed groups or human trafficking. Most importantly, the Council's increasing imposition of a counter-terrorism framework in armed conflict settings has been shown to create challenges for humanitarian action. One of these challenges pertains to the fungibility approach, predominant in the counter-terrorism context, which might overflow into the design and implementation of conflict regimes.
- 49 For example, the majority of conflict-related sanctions regimes fail to contain any language requesting Member States to comply with IHL when implementing sanctions measures, such as the safeguards recently adopted in the CT resolutions 2462 and 2482. Furthermore, sanctions applied to armed conflict contexts do not benefit from humanitarian exemptions or humanitarian derogations, except in the cases of 750 (Somalia), 1970 (Libya) and 1718 (DPRK). To be clear, although conflict related regimes *do include* language protecting humanitarian action from external interference, these same regimes generally *do not* contain language protecting humanitarian actors who engage and conduct activities with listed individuals and non-state armed groups.
- 50 Rebecca Brubaker, "Remarks on Design", High-Level Greentree Retreat on International Humanitarian Law, UN Sanctions and Counter-Terrorism, Manhasset, New York, 3 March 2020.
- 51 Thomas Biersteker et al. *Targeted Financial Sanctions: A Manual for Design and Implementation* (Providence: Brown University, 2001).
- 52 For example, the term "exemption" used at the UN sanctions level is inverted with the term "exceptions" in the EU forum. This confusion is reproduced in the academic sector as well. For example, the IPI latest report, "Making sanctions smarter" of December 2019 and the HLS PILAC document "Understanding humanitarian exemptions" give contradictory definitions of the term "exemption."
- 53 This has been a criticism repeated several times at different workshops and conferences gathering sanctions experts and government practitioners. There is also an increase ask from governments of 'hard data' evidencing direct impacts of sanctions measures on humanitarian action.
- 54 Authors interviews.
- 55 Consultations under Chatham House Rules - 2019-2020.
- 56 Harvard Law School Program on International Law and Armed Conflict Counter-terrorism and Humanitarian Engagement Project.
- 57 See for example, Laurie Nathan, Adam Day, João Honwana & Rebecca Brubaker, *Capturing UN Preventive Diplomacy Success: How and Why Does It Work?* (New York: United Nations University, 2018).



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767 Third Avenue, Suite 35B
New York, NY 10017, USA