

Safeguarding Humanitarian Action in Sanctions Regimes

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Introduction

In recent decades, sanctions have increasingly been used as a foreign policy tool. They are imposed for a variety of reasons, including to push for political change, for nonproliferation, and as a counterterrorism measure. Following the devastating impact of sanctions in Iraq on the civilian population, they are now, for the most part, meant to be targeted or “smart.” This means that sanctions measures such as travel bans, embargoes, or assets freezes are imposed only on specific individuals and entities.

There are currently fourteen sanctions regimes imposed by the UN Security Council through Chapter VII resolutions, which member states are legally required to implement. The implementation of UN sanctions regimes is monitored by sanctions committees composed of the fifteen members of the Security Council and supported by independent panels or groups of experts. Member states, as well as regional organizations, have also instituted their own sanctions regimes, which are separate from but sometimes influenced by the UN’s.

Most UN sanctions regimes are country-specific, and the vast majority apply to countries experiencing armed conflict or serious humanitarian crises.¹ The UN has also imposed sanctions on several non-state armed groups: the Taliban, the Islamic State (or IS, referred to by the UN as ISIL or Da’esh), al-Qaida, and associated individuals, groups, undertakings, and entities. For the most part, therefore, these sanctions regimes are implemented in contexts in which humanitarian actors operate. Where the context is one of armed conflict, international humanitarian law outlines obligations to protect the provision of and access to principled humanitarian action, meaning humanitarian action that is neutral, independent and impartial.

Despite efforts to institute more targeted sanctions regimes, these regimes continue to have unintended consequences, including impeding or preventing the provision of humanitarian assistance and protection.² In 2014, the UN initiated a High-Level Review of UN Sanctions, which included a working group on humanitarian aspects and emerging challenges. The working group’s report contains important recommendations that have yet to be effectively implemented.³

1 There are country-specific UN sanctions regimes for the Central African Republic, the Democratic People’s Republic of Korea, the Democratic Republic of the Congo, Guinea-Bissau, Iraq, Lebanon, Libya, Mali, Somalia, Sudan, and Yemen.

2 This issue brief focuses on the humanitarian sector, but it is important to note that the work of development and peacebuilding organizations is also being impacted by sanctions regimes.

3 UN High-Level Review on Sanctions, Working Group III, “UN Sanctions: Humanitarian Aspects and Emerging Challenges,” Chairperson’s Report, January 19, 2015.

The impact of sanctions on humanitarian action is closely linked to the proliferation of counterterrorism measures more broadly, which is also adversely impacting the ability of humanitarian actors to operate.⁴ The coexistence of sanctions and other counterterrorism measures in some contexts creates a restrictive environment for humanitarian actors, and their compounded effect leads to some of the challenges described in this issue brief. Like most counterterrorism measures, sanctions regimes rarely contain safeguards or carve-outs for humanitarian action, often described as “exemptions” and “exceptions.”

This issue brief explains the various ways in which sanctions regimes can impact humanitarian action. Acknowledging that this is not a new issue—though one that may be of increasing concern—it identifies several factors that make it challenging to resolve. Finally, it lays out some avenues for progress, pointing to existing efforts and highlighting where more could be done.

How Can Sanctions Regimes Impact Humanitarian Action?

Sanctions regimes can impact humanitarian action both directly and indirectly in a number of ways. In some cases, it is relatively easy to point to the direct causal impact a specific sanctions regime has on humanitarian activities. In most cases, however, this is difficult. In some cases, the difficulty comes from the fact that multiple sanctions regimes coexist, each with a different scope and standards and few concrete implementation guidelines demarcating their limits. In other cases, a sanctions regime may be one among many drivers of the challenges humanitarian actors face. This section captures the types of impacts sanctions regimes can have on humanitarian action and explains the causal link between the two.

LISTING OF HUMANITARIAN ORGANIZATIONS

The most immediate and direct risk is the possibility that a principled humanitarian organization or one of its staff members is put on a sanctions list due to their activities, which would trigger sanctions on that organization or individual. In UN sanctions regimes, such a listing would require all fifteen members of a sanctions committee to agree. This has never occurred and is an unlikely possibility.⁵ It should be noted, however, that the ability to list organizations that present themselves as humanitarian but have ties to sanctioned entities or are set up by sanctioned entities or individuals to avert sanctions is an important tool for countering terrorist financing.⁶

Nonetheless, the criteria for individuals or entities to be listed on the UN’s ISIL (Da’esh) and al-Qaida sanctions list, for example, are broadly defined. They include not only supplying, selling, or transferring arms but also “otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof.”⁷ Such a broad definition risks being interpreted by implementing member states as including impartial humanitarian assistance or protection. Moreover, regional organizations and states can create their own separate sanctions regimes based on their own listing criteria, adding another layer of risk for humanitarian actors.

COSTS AND DELAYS CAUSED BY EXEMPTION PROCEDURES

Some sanctions regimes allow humanitarian actors to request exemptions in order to operate without the risk of violating sanctions. Although in theory these exemptions are meant to ensure that humanitarian activities can continue unimpeded, humanitarian organizations have to invest time and resources in understanding and properly going through the application process. The implementation of such a system can also delay the humani-

4 See, for example, Alice Debarre, “Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework,” International Peace Institute, September 2018.

5 However, the ISIL (Da’esh) and al-Qaida sanctions committee has referenced medical activities as part of the basis for listing two individuals and two entities. UN Security Council ISIL (Da’esh) and Al-Qaida Sanctions Committee, “Narrative Summaries of Reasons for Listing,” available at www.un.org/sc/suborg/en/sanctions/1267/qa_sanctions_list/summaries. See also: Dustin Lewis, Naz Modirzadeh, and Gabriella Blum, “Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism,” Harvard Law School Program on International Law and Armed Conflict, September 2015, available at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:22508590>.

6 One example of such an organization is the Wafa Humanitarian Organization. See www.un.org/securitycouncil/sanctions/1267/qa_sanctions_list/summaries/entity/wafa-humanitarian-organization. The charitable arms of designated terrorist organizations are also designated as aliases under the UN’s ISIL (Da’esh) and al-Qaida sanctions regime and therefore fall under sanctions.

7 UN Security Council Resolution 2368 (July 20, 2017), UN Doc. S/RES/2368.

tarian response, as the entity approving a request may take time to do so. Under the UN DPRK sanctions regime, for example, humanitarian organizations continue to face challenges requesting exemptions and delays in receiving them.⁸

These challenges are compounded in contexts where multiple sanctions regimes apply and where humanitarian actors have to request exemptions from multiple authorities with different requirements and processes. US-based organizations operating in the DPRK, for example, also need to apply for a special license from the US Office of Foreign Assets Control (OFAC) for virtually all shipments of aid.⁹ Exemptions also require close interaction with member states, challenging the ability of humanitarian actors to be neutral or perceived as such.

In a number of contexts, humanitarian organizations simply do not use the exemption processes available. This is particularly true where an emergency response is needed, as the process would take too long and the approval, if granted, may arrive too late to ensure an effective response.¹⁰ As a result, individual staff members take on considerable personal and legal risk.

DE-RISKING

One of the key challenges humanitarian actors face in contexts in which sanctions regimes apply is “de-risking” by banks.¹¹ This refers to a bank’s decision to “reduce the lines of business they operate, shed clients, and limit their willingness to provide loans and credit to companies and facilitate transactions.”¹² With respect to the topic at hand, de-risking relates to banks’ perception that both

humanitarian actors and contexts where sanctions regimes are in place are high-risk, and that servicing humanitarian organizations in such contexts exposes them to fines and potential reputational damage. Under sanctions regimes and various other regulatory frameworks, banks are legally bound to apply due diligence measures, as well as “know your customer”—and in some cases “know your customer’s customer”—procedures and to monitor transactions. Complying with the targeted nature of sanctions regimes is resource-intensive, and the lack of clarity as to the scope of these regimes makes it difficult for banks to ensure they will not incur any liability for a particular transaction. Because humanitarian organizations do not generate enough profit for banks to justify the investment and risk, banks often simply de-risk.

For humanitarian organizations, de-risking has led to restrictions on receiving and transferring funds, the freezing or closing of accounts, and declined requests to open new accounts.¹³ This has a direct impact on their ability to operate, causing programs to be delayed, scaled back, or even closed. In some contexts, humanitarian organizations have been unable to pay their vendors and local implementation partners, creating security risks for staff on the ground. Complying with bank due diligence measures increases operating costs for organizations. Humanitarian actors may also be unwilling or unable to provide sensitive information requested by banks, for example when it puts local contacts at risk.¹⁴

Numerous studies have documented these challenges in many contexts, including Syria and the DPRK.¹⁵ Humanitarian organizations are

8 These are comprehensively laid out in the panel of experts’ 2019 report. UN Security Council, *Letter Dated February 21, 2019 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council*, UN Doc. S/2019/171, March 5, 2019.

9 See US Department of the Treasury, “North Korea Sanctions Regulations,” March 5, 2018, available at www.federalregister.gov/documents/2018/03/05/2018-04113/north-korea-sanctions-regulations#sectno-reference-510.501.

10 Interviews with humanitarian representatives, February to May 2019.

11 Note that sanctions regimes are one among many drivers of de-risking. Banks’ secrecy regulations, anti-money laundering measures, and counterterrorist funding requirements also drive de-risking, as they increase not only the risk of criminal and civil enforcement but also the cost of compliance.

12 Tom Keatinge, “Uncharitable Behavior,” Demos, 2014, p. 54.

13 *Ibid.*, p. 41.

14 Ministry of Finance of the Netherlands, the Human Security Collective, and the World Bank Group, “International Stakeholder Dialogue: Ensuring Financial Services for Non-Profit Organizations,” February 15, 2018, available at http://fatplatform.org/wp-content/uploads/2018/02/Ensuring-Financial-Access-for-Non-profit-Organizations_Final-Report.pdf.

15 See, for example, Stuart Gordon and Sherine El Taraboulsi-McCarthy, “Counter-Terrorism, Bank De-risking and Humanitarian Response: A Path Forward: Key Findings from Four Case Studies,” Humanitarian Policy Group, Policy Brief 72, August 2018, available at www.odi.org/sites/odi.org.uk/files/resource-documents/12368.pdf; Tom Keatinge and Florence Keen, “Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs,” Chatham House, April 2017, available at www.chathamhouse.org/publication/humanitarian-action-and-non-state-armed-groups-impact-banking-restrictions-uk-ngos; Sue Eckert, Kay Guinane, and Andrea Hall, “Financial Access for US Nonprofits,” Charity and Security Network, February 2017, available at [www.charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20\(2\).pdf](http://www.charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20(2).pdf); Sangeeta Goswami, “De-risking and Civil Society: Drivers, Impact and

unable to transfer money into Syria, mainly as a consequence of comprehensive US and EU financial sanctions against the Syrian government.¹⁶ UN and other counterterrorism sanctions against ISIL and al-Qaida add another layer of complexity, further increasing the risk for banks. There is reportedly only one bank in Syria that humanitarian organizations can use.¹⁷ Significant de-risking increasingly drives humanitarian actors to run cash-based operations, which heightens the risk of inadvertently financing terrorism and therefore undermines the central aim of counterterrorism financing measures.

Sanctions regimes in the DPRK and subsequent de-risking resulted in the collapse of the banking channel for humanitarian actors in September 2017, and attempts to reestablish one have been unsuccessful.¹⁸ It is difficult to disaggregate the specific impact of the UN financial sanctions against the DPRK from that of unilateral sanctions and regulations. Regardless, humanitarian organizations are running out of money, and they increasingly have to rely on staff carrying large amounts of cash on their person when they travel to the country.¹⁹ Some organizations have had to permanently close certain projects.²⁰

It is important to note that de-risking practices are not limited to banks. Humanitarian organizations also report difficulties accessing insurance, online payment services such as PayPal, online donation websites, and credit cards.²¹

RESTRICTIONS ON IMPORTING GOODS

In some cases, sanctions regimes can delay or even

block the import of goods needed to implement humanitarian activities. This usually happens when one of the sanctions regime's measures is an embargo.

Restrictions on dual-use items in sanctions regimes have had a direct impact on humanitarian activities.²² For example, one humanitarian organization had to remove nail clippers from hundreds of hygiene kits in order for them to be allowed inside the DPRK due to the UN sanctions regime's ban on the import of metal.²³ In 2018 in Syria, a large Syria-based humanitarian organization had difficulty importing medical devices due to US and EU sanctions.²⁴ One Syrian doctor also described challenges importing the spare parts necessary for CT scans under EU sanctions.²⁵ One humanitarian organization reported facing similar issues in the Democratic Republic of the Congo.²⁶

In addition, embargoes can also lead both suppliers and transit countries to adopt risk-averse approaches to imports, causing delays for humanitarian actors. Suppliers may also be reluctant to import items due to onerous procedures, delays in port clearance, higher expenses, or reputational risk. This can mean that humanitarian actors are only able to engage with a limited number of suppliers, which can increase their costs.²⁷

RESTRICTIVE CLAUSES IN DONOR AGREEMENTS

In an attempt to comply with sanctions regimes, as well as other counterterrorism measures, donors have increasingly been including restrictive clauses in their funding agreements that impose often

Possible Solutions," Human Security Collective, 2017, available at <https://dochas.ie/blog/blog-derisking-and-civil-society-drivers-impact-and-possible-solutions>; Justine Walker, "Study on Humanitarian Impact of Syria-Related Unilateral Restrictive Measures," prepared for the United Nations Economic & Social Commission for Western Asia, May 2016, available at <https://assets.documentcloud.org/documents/3115191/Hum-Impact-of-Syria-Related-Res-Eco-Measures-26.pdf>.

16 UN General Assembly, *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on His Mission to the Syrian Arab Republic*, UN Doc. A/HRC/39/54/Add.2, October 8, 2018, pp. 8-9.

17 Interview with humanitarian representative, New York, April 2019.

18 United Nations DPRK Humanitarian Country Team, "2019 DPR Korea Needs and Priorities," March 2019, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/DPRK%20NP%202019%20Final.pdf>.

19 UN Security Council, *Letter Dated February 21, 2019 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council*, Annex 85.

20 Interview with humanitarian representative, New York, February 2019.

21 Interview with humanitarian representative, New York, April 2019; Keatinge, "Uncharitable Behavior," p. 42.

22 This refers to products or technology that are primarily used for civil or commercial purposes but can also have military or weapons applications.

23 Phone interview with humanitarian representative, March 2019. The organization received an exemption later in March.

24 UN General Assembly, *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on His Mission to the Syrian Arab Republic*.

25 Skype interview, April 2019.

26 Phone interview with humanitarian representative, February 2019.

27 See, for example, United Nations DPRK Humanitarian Country Team, "2019 DPR Korea Needs and Priorities."

extensive reporting and other requirements. Having the right due diligence and risk management procedures in place is important to ensure aid reaches people in need—an objective shared by donors and humanitarian organizations. However, donors' increased risk aversion has resulted in the inclusion of increasingly restrictive clauses in their agreements, creating challenges for humanitarian organizations.²⁸ Complying with these clauses is onerous and time-consuming, requiring considerable resources and limiting flexibility and responsiveness. This is especially challenging when humanitarian actors are funded by multiple donors with different requirements and processes. Negotiations over restrictive clauses can also delay the signing of contracts and the implementation of projects. In some cases, organizations have to make the difficult decision to refuse certain grants.²⁹

Restrictive clauses can also make it harder for organizations to act in accordance with the humanitarian principles of neutrality and impartiality.³⁰ For example, requirements that aid be delivered impartially may conflict with requirements related to counterterrorism, such as asking implementing partners to vet beneficiaries before providing them with relevant services—a red line for many organizations.³¹ Some donors have also started asking humanitarian organizations to respect all sanctions regimes applicable in a particular context, which is not only highly resource-intensive but can also be a direct challenge to operating in a principled manner.

Restrictive clauses in donor agreements put the risk of operating in contexts in which sanctions or counterterrorism measures apply entirely on humanitarian actors. Donors are reluctant to provide funds for organizations to set up robust compliance systems.³² Humanitarian organizations also describe donor agencies refusing to provide

guidance on how to comply with their requirements.³³ Those most affected by restrictive donor requirements are smaller NGOs that do not have the same resources and capacity as UN agencies or bigger NGOs, particularly local NGOs that often cover the last mile in delivering aid in difficult contexts.

FINES AND PROSECUTION

Violating sanctions can lead to fines, as well as civil or criminal prosecution, by states. Asset freezes are of particular concern for humanitarian actors, as the scope of potential liability for violating them is generally broad and can include payments made to groups to obtain access to vulnerable populations.

The risk of humanitarian actors being fined or prosecuted for sanctions violations depends on how sanctions regimes are implemented and enforced by states. In giving effect to UN Security Council resolutions, states have adopted different approaches and sometimes implement measures that are more restrictive than what is legally required.³⁴ Where states make the violation of sanctions a criminal offense and have strict enforcement standards and a strong enforcement apparatus, the risk is higher. Non-UN humanitarian actors are more exposed to this risk, as, unlike UN agencies, they are subject to national laws. So far, this has not been a widespread issue, although there have been reports of the US government winning a multimillion-dollar payout from Norwegian People's Aid in April 2018 for the organization's interaction with US-sanctioned groups in the Palestinian territories.³⁵

CHILLING EFFECT

The complex regulatory framework and high risks associated with violating those regulations have led humanitarian actors to err on the side of caution in many contexts, sometimes self-regulating beyond

28 See, for example, Counterterrorism and Humanitarian Engagement Project, "An Analysis of Contemporary Counterterrorism-Related Clauses in Humanitarian Grant and Partnership Agreement Contracts," May 2014.

29 Ibid.

30 See, for example, Kate Mackintosh and Patrick Duplat, "Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action," July 2013, UN OCHA and the Norwegian Refugee Council; Norwegian Refugee Council, "Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violence Extremism on Principled Humanitarian Action," Norwegian Refugee Council, 2018.

31 Interviews with humanitarian representatives, February to May 2019.

32 Ibid. See also: Abby Stoddard, Monica Czwarno, and Lindsay Hamsik, "NGOs and Risk: Managing Uncertainty in Local-International Partnerships," *InterAction and Humanitarian Outcomes*, March 7, 2019, p. 25.

33 Interviews with humanitarian representatives, February to May 2019.

34 Emanuela-Chiara Gillard, "Humanitarian Action and Non-state Armed Groups: The International Legal Framework," Chatham House, February 2017.

35 Ben Parker, "A Q&A with the Pro-Israel US Lawyer Ratting NGOs on Counter-Terror Compliance," *The New Humanitarian*, September 25, 2018.

what is legally or contractually required.³⁶ This has been described as the “chilling effect” and directly challenges the ability of humanitarian actors to operate in a principled manner. For example, organizations may decide not to engage in a particular area or to implement particular activities. This has a direct effect on populations in need, in particular those living in areas controlled by sanctioned groups, as they will be cut off from services that, in many such contexts, are only provided by humanitarian actors.

In Somalia, the chilling effect of the UN and US sanctions regimes triggered in 2008 is reportedly still pervasive, despite the UN’s inclusion of an exception for certain humanitarian actors. Humanitarian organizations continue to engage in excessive self-regulation in al-Shabab-controlled areas. Even organizations covered by the exception reportedly have concerns about using it due to the reputational risks of even an isolated incident of aid being diverted to al-Shabab.³⁷ In Afghanistan, humanitarian actors are reportedly unclear whether or not, and to what extent, they can engage with the Taliban.³⁸ In some contexts, the UN’s political leadership has decided that it cannot engage with groups listed under a sanctions regime, even though it is not prohibited by the regime itself. Where the political leadership of the UN makes this decision, it has a chilling effect on UN humanitarian agencies.³⁹

Why Is This Still an Issue?

The adverse impact sanctions regimes can have on humanitarian action is not a new issue. In 1998, the UN Office for the Coordination of Humanitarian Affairs (OCHA) reported how UN sanctions regimes hampered the capacity of humanitarian actors to operate in countries such as the former Yugoslavia, Haiti, Iraq, Burundi, and Sierra

Leone.⁴⁰ In the two decades since, the number of sanctions has multiplied, in particular those related to counterterrorism, further constricting the space for humanitarian action. This section lays out some of the key obstacles stakeholders must grapple with.

COMPLEXITY AND LACK OF UNDERSTANDING

Sanctions regimes are complex to understand, implement and operate under for several reasons. First, each of the UN’s fourteen sanctions regimes differs in scope, context, and purpose (e.g., counterterrorism, nonproliferation, conflict resolution, or political change). As a result, there is a lack of coherence between the sanctions regimes. Understanding them requires expertise, and the UN provides little guidance. Furthermore, because UN Security Council resolutions are a product of compromise, they can be ambiguous, legally incoherent, and sometimes even contradictory.⁴¹ Second, there are also sanctions regimes at the regional and national levels that need to be grappled with. Third, as discussed in the previous section, sanctions regimes can impact humanitarian action in a number of ways, both direct and indirect. Finally, it is difficult to disentangle the ways in which a specific sanctions regime impacts the humanitarian sector given the numerous UN, regional, and national sanctions regimes and counterterrorism measures.

As a result of this complexity, there is a lack of understanding of sanctions regimes among the various stakeholders. Humanitarian organizations often do not know what is allowed under various sanctions regimes or where to go for trustworthy advice.⁴² Those implementing the sanctions often lack sufficient understanding of—or are not willing to acknowledge—how sanctions regimes harm humanitarian action, in particular given the shift to more targeted sanctions.⁴³ More generally,

36 Katie King, Naz Modirzadeh, and Dustin Lewis, “Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action,” Harvard Law School Program on International Law and Armed Conflict, April 2016, p. 6; Mackintosh and Duplat, “Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action”; Jessica Burniske, Naz Modirzadeh, and Dustin Lewis, “Counter-Terrorism Laws and Regulations: What Aid Agencies Need to Know,” Humanitarian Practice Network, November 2014, p. 7.

37 Norwegian Refugee Council, “Principles under Pressure,” p. 15

38 Interview with humanitarian representative, New York, May 2019.

39 Interview with UN representative, New York, April 2019.

40 Claude Bruderlein, “Coping with the Humanitarian Impact of Sanctions: An OCHA Perspective,” OCHA, 1998, available at https://reliefweb.int/sites/reliefweb.int/files/resources/677CE646930621C7C1256C22002C7B7F-OCHA_dec1998.pdf.

41 Interview with member-state representative, New York, February 2019.

42 Interview with UN humanitarian representative, New York, April 2019.

43 Interview with UN sanctions representative, New York, March 2019.

expertise on sanctions mostly resides in finance or trade ministries, central banks, and the private sector.⁴⁴ Indeed, a number of interviewees pointed out that member-state diplomatic missions to the UN often have limited expertise and capacity on sanctions, in particular among the elected members to the UN Security Council.

PERCEIVED RISK AND LACK OF TRUST

A concern oft-repeated by sanctions experts is that humanitarian aid could be diverted to or abused by sanctioned entities or individuals.⁴⁵ They fear that explicitly safeguarding humanitarian action in sanctions regimes risks making humanitarian aid an unregulated financial stream that sanctioned entities and individuals may try to capture.⁴⁶ Relatedly, there is a persistent and fundamental mistrust of humanitarian actors among states, donor agencies, and financial institutions.⁴⁷

This results in the perception that the humanitarian sector is high-risk, even though the reality is more nuanced. In 2015, the Financial Action Task Force (FATF) on money laundering recommended a risk-based approach to the regulation of nonprofit organizations to prevent terrorist financing.⁴⁸ This was a shift from its previous assumption that the entire nonprofit sector was highly vulnerable to the risk of terrorist abuse.⁴⁹ The FATF now stresses that nonprofit organizations should not be viewed as high-risk simply because they may “operate in cash-intensive environments or in countries of great humani-

tarian need.”⁵⁰ However, member states and private sector stakeholders such as global financial institutions have not been consistently implementing this risk-based approach, there is a lack of engagement on existing risk assessment and management measures, and the perception of risk and mistrust remains.⁵¹

THE REQUEST FOR EVIDENCE AND HUMANITARIAN RETICENCE

Member states regularly ask for stronger evidence that sanctions have an adverse impact on humanitarian operations—a task that mostly falls to humanitarian actors themselves.⁵² However, humanitarian actors are reluctant to speak about this impact openly and in concrete terms. One reason is that talking directly about sanctions endangers the perception of humanitarian actors as neutral and impartial. Another reason is that it is sometimes difficult to disentangle the precise impact of a particular sanctions regime. In contexts where humanitarian actors are operating in a gray area on a “don’t ask don’t tell” basis, they are also concerned that sharing specific information may open them up to increased scrutiny and risk, such as loss of funding or even legal liability. One interviewee described humanitarian actors as needing to balance the risk of sharing information with the benefit, which is often nothing or not enough.⁵³ However, there appears to be an increasing recognition within the humanitarian sector of the need to be more vocal about the impact of sanctions to prevent further restrictions.

44 For an interesting argument on the sidelining of US and EU diplomats in the design, implementation, and enforcement of economic sanctions, see Sascha Lohmann, “Diplomats and the Use of Economic Sanctions,” in *New Realities in Foreign Affairs: Diplomacy in the 21st Century*, Volker Stanzel, ed., (Berlin: Stiftung Wissenschaft und Politik, 2018).

45 See, for example, US Department of the Treasury, “Resource Center: Protecting Charitable Organizations,” available at www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-index.aspx.

46 Interview with sanctions expert, New York, February 2019.

47 UN High-Level Review on Sanctions, “UN Sanctions: Humanitarian Aspects and Emerging Challenges,” p. 7.

48 The Financial Action Task Force is an independent intergovernmental organization founded in 1989 at a G7 Summit. It was originally mandated to develop and promote policies to protect the global financial system against money laundering, terrorist financing, and the financing of proliferation of weapons of mass destruction; its counterterrorism mandate was introduced after 9/11. In 2012, it published the “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations.” Recommendation 8 states: “Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse, including: (a) by terrorist organisations posing as legitimate entities; (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations,” p. 11.

49 Debarre, “Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework,” p. 19.

50 Financial Action Task Force, “Best Practices: Combating the Abuse of Non-profit Organisations,” Recommendation 8, June 2015, p. 28.

51 Norwegian Refugee Council, “Principles under Pressure,” p. 25. Note that the Global NPO Coalition on FATF is currently working on national implementation of the revised Recommendation 8 with FATF regional bodies.

52 A lot of research has been produced about this impact, and therefore an increasingly robust evidence base exists. See, for example, Mackintosh and Duplat, “Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action”; Jessica S. Burniske and Naz K. Modirzadeh, “Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action,” Harvard Law School Program on International Law and Armed Conflict, March 2017; Norwegian Refugee Council, “Principles under Pressure”; Gordon and El Taraboulsi-McCarthy “Counter-Terrorism, Bank De-risking and Humanitarian Response.”

53 Interview with UN humanitarian representative, New York, February 2019.

POLITICAL DYNAMICS AND INTERESTS

Sanctions regimes are a political tool and are wielded with foreign policy priorities in mind. At the UN, almost all sanctions regimes have political implications and are hence polarizing. One expert described sanctions being used as a “tactical device” by member states.⁵⁴ As a result, “It is difficult to have a factual conversation on the unintended consequences of sanctions,” as another expert put it.⁵⁵ Some member states are critical of UN sanctions in general and may not have an interest in making them more coherent or effective. Others may point to their adverse impact on humanitarian action in the context of their broader political opposition to sanctions. Some may also ignore the impact of sanctions on humanitarian action for political reasons in one context and raise it as a problem that needs to be resolved in another. Illustrating this challenge, there was a strong backlash against including a section on the impact of the sanctions regime on the humanitarian response in the 2019 report of the DPRK panel of experts.

The political dynamics in the UN Security Council are further compounded by the council’s power imbalance. The permanent members wield considerable power, in part because they have been working on UN sanctions for much longer. The United States in particular, given its extensive and long-standing use of bilateral sanctions and elaborate sanctions infrastructure, sets the tone.⁵⁶ Elected members come in for two years and often lack the capacity and resources to effectively tackle the sanctions files.⁵⁷ Furthermore, while they are required to chair sanctions committees during their membership—a time-consuming, largely administrative role—they are often insufficiently prepared and resourced to do so.

The lack of coherence and the complexity of UN sanctions therefore plays into the hands of the permanent members and those elected members

with sufficient resources. As one expert from a member-state mission described, these states “may not have an interest in making [sanctions regimes] more coherent.”⁵⁸ These dynamics may be undermining the legitimacy of sanctions in the eyes of states that have limited ownership of the issue and hence do not invest in it.⁵⁹ Nonetheless, unified and concerted efforts by elected members of the Security Council have resulted in progress—albeit incremental and slow—on addressing due process and transparency concerns in sanctions regimes.⁶⁰

What Are the Avenues for Progress?

Efforts to find consistent and effective ways to lessen the adverse impact of sanctions regimes on humanitarian aid face considerable obstacles. Nonetheless, there are avenues for progress that are being or could be further explored.

SAFEGUARDS FOR HUMANITARIAN ACTION IN SANCTIONS REGIMES

One way forward is to include safeguards for humanitarian action in sanctions regimes. There is precedent for sanctions regimes including either exemptions or exceptions for humanitarian action at the UN, regional, and national levels, allowing humanitarian actors to operate without falling under these regimes. While usage of these terms is inconsistent, for the purposes of this issue brief, an exemption refers to a provision allowing humanitarian actors to apply for permission to conduct their activities. An exception is a provision that carves out legal space for humanitarian actors, activities, or goods within sanctions measures without any prior approval needed.

The UN Security Council first introduced humanitarian exemptions to a travel ban and commodity interdictions in 1968 within the Southern Rhodesia sanctions regime.⁶¹ Later, in the

54 Phone interview with UN sanctions expert, March 2019.

55 Interview with UN sanctions expert, New York, April 2019.

56 Phone interview with sanctions expert, March 2019. See “United States Sanctions Tracker, 1994–Present,” Enigma, available at <https://labs.enigma.com/sanctions-tracker/>.

57 The five permanent members of the Security Council reportedly refer to the elected members as “tourists.” Interview with sanctions expert, New York, February 2019.

58 Interview with member-state expert, New York, February 2019.

59 Interview with UN sanctions representative, New York, March 2019.

60 For example, narrative summaries listing the review procedures were introduced, and an ombudsperson structure was established in the ISIL (Da’esh) and al-Qaida sanctions regime. Both of these efforts were pushed for by non-permanent members.

61 UN Security Council Resolution 253 (May 29, 1968), UN Doc. S/RES/253.

1990s, a number of sanctions regimes provided for humanitarian exemptions.⁶² Currently, the DPRK sanctions regime provides for exemptions to a number of sanctions measures for humanitarian activities. A number of sanctions regimes also provide exemptions for designated individuals from travel bans on the grounds of humanitarian need, or from assets freezes for basic or extraordinary expenses.⁶³

The Security Council decided in 2000 that the Afghanistan sanctions committee would maintain a so-called “white list” of preapproved organizations to whom the prohibition on authorizing flights to and from areas controlled by the Taliban would not apply—a form of limited exception.⁶⁴ The first and only UN sanctions regime to include a broader exception for humanitarian actors is the Somalia regime.⁶⁵ Other UN sanctions regimes provide exceptions in arms embargoes for equipment intended solely for humanitarian use.⁶⁶

In the EU, sanctions regimes (called restrictive measures) provide for exemptions for humanitarian action rather than exceptions.⁶⁷ In the United States, the US Office of Foreign Assets Control (OFAC) can provide either general licenses (exceptions) or specific licenses (exemptions) to US sanctions regimes.⁶⁸ In Canada, domestic sanctions regimes provide exceptions for any goods made available or services provided to or by certain

entities for the purpose of safeguarding human life, disaster relief, democratization, stabilization, or certain other activities.⁶⁹

As described in the first section, exemptions granted on a case-by-case basis create challenges for humanitarian organizations. Where such a system is in place, it should be streamlined as much as possible. The better approach would be to institute exceptions, which can come in different forms. Exceptions could be broad, applying across all sanctions regimes to all humanitarian actors for all humanitarian activities. At the UN, this would take the form of a stand-alone resolution that would apply to all UN sanctions regimes. Exceptions can also be country-specific, area-specific, organization-specific, item-specific, activity-specific, or a combination of these. These limited exceptions, however, necessarily exclude certain aspects of a humanitarian response. In Somalia, for example, the UN exception applies only to certain humanitarian actors. Exceptions for humanitarian assistance exclude humanitarian prevention and protection activities. Limited exceptions also create risks with respect to what they do not cover. A “white list” of authorized organizations or items, for example, risks creating a “black list” of excluded organizations or items.

Each renewal of a UN sanctions regime is an opportunity to be creative and negotiate language

62 For example, the UN sanctions regimes for Sierra Leone, Iraq, and Libya.

63 These include the UN sanctions regimes for Somalia, UN Security Council Resolution 1844 (2008); ISIL (Da’esh) & Al Qaeda, Resolution 1452 (2002); the Democratic Republic of the Congo, Resolutions 2078 (2012) and 1807 (2008); Sudan, Resolution 1591 (2001); the Taliban, Resolution 2255 (2015); Guinea-Bissau, Resolution 2048 (2012); the Central African Republic, Resolution 2399 (2018); Yemen, Resolution 2140 (2014); South Sudan, Resolution 2206 (2015); Mali, Resolution 2374 (2017); and Libya, Resolution 1970 (2011). The Libya sanctions regime also provides an exemption from the assets freeze for certain designated entities on the basis of humanitarian needs in Resolution 2009 (2011).

64 “Decides further that the Committee shall maintain a list of approved organizations and governmental relief agencies which are providing humanitarian assistance to Afghanistan, including the United Nations and its agencies, governmental relief agencies providing humanitarian assistance, the International Committee of the Red Cross and non-governmental organizations as appropriate, that the prohibition imposed by paragraph 11 above shall not apply to humanitarian flights operated by, or on behalf of, organizations and governmental relief agencies on the list approved by the Committee.” UN Security Council Resolution 1333 (December 19, 2000), para. 12.

65 “The obligations imposed on Member States... shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners.” UN Security Council Resolution 1916 (March 19, 2010). This exception has been renewed every year, most recently in Resolution 2444 (2018).

66 UN sanctions regimes for the Democratic Republic of the Congo, UN Security Council Resolution 1807 (2008); Sudan, Resolution 1556 (2004); Libya, Resolution 2095 (2013); the Central African Republic, Resolution 2399 (2018); and South Sudan, Resolution 2428 (2018).

67 See, for example, European Commission, “EU Restrictive Measures in Syria—FAQs,” Service for Foreign Policy Instruments, available at https://ec.europa.eu/fpi/what-we-do/sanctions/eu-restrictive-measures-syria-%E2%80%93-faqs_en. “Funds and economic resources, including cash assistance, may be made available to a designated person where such funds or economic resources are necessary solely for the purpose of providing humanitarian relief in Syria or assistance to the civilian population in Syria, after having obtained an authorisation from the competent authority “under the general and specific terms and conditions it deems appropriate.”

68 US Department of Treasury, “OFAC FAQs: General Questions,” Resource Center, at https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_general.aspx.

69 See Special Economic Measures (Syria) Regulations, SOR/2011-114, available at: <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2011-114/FullText.html>; Special Economic Measures (Zimbabwe) Regulations SOR/2008-248, available at <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2008-248/FullText.html>; Special Economic Measures (Democratic People’s Republic of Korea) Regulations, SOR/2011-167, available at <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2011-167/FullText.html>; Special Economic Measures (Burma) Regulations, SOR/2007-285, available at <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2007-285/FullText.html>.

that would safeguard humanitarian action. Some member states, however, are concerned that exceptions, especially broad ones, would create a loophole and open the door to aid diversion and the misuse of the charitable sector by nefarious actors. Another challenge is that even if an exception were passed in a UN resolution, its effectiveness would depend on proper implementation at the regional and national levels. For example, not all member states have implemented the exception in the UN's Somalia sanctions regime, creating a legal gray area that has a chilling effect on humanitarian action.⁷⁰ To avoid this problem, UN Security Council resolutions containing an exception for humanitarian action could explicitly request member states to set up clear national implementation procedures, provide more detailed guidance on implementation of the exception, and request monitoring of and regular reporting on implementation.⁷¹ It is also important to note that as long as there are no exceptions at the UN level, there is no legal avenue for exceptions in the implementation of UN sanctions regimes at the regional or national levels.⁷²

INCREASED AND IMPROVED GUIDANCE

Many of the adverse impacts of sanctions regimes on humanitarian action stem from the way in which they are interpreted. As such, progress can be made by increasing and improving guidance on the functioning and scope of sanctions regimes. A number of UN sanctions committees have produced such guidance.⁷³ For example, in 2018, the DPRK sanctions committee published an implementation assistance notice on how to obtain

exemptions for the delivery of humanitarian assistance, following requests for guidance by a number of NGOs.⁷⁴ The exemption process remains cumbersome, but the guidance was positively received and seen as an improvement.

UN guidance also supports member states in implementing sanctions regimes. For example, the ISIL (Da'esh) and al-Qaida sanctions committee approved an "explanation of terms" of the assets freeze, which notes that "member states are strongly encouraged to put into place measures to prevent the abuse of [non-profit organizations] while ensuring that the conduct of legitimate business through these channels is not undermined."⁷⁵ However, even where there is guidance, it can still be insufficiently precise. More concrete, detailed, and consistent guidance would enable more coherent and effective implementation. Commentary on the sanctions measures adopted, for example, might be useful in laying out their scope and intent. However, non-binding guidance from the UN ultimately still leaves the interpretation of sanctions regimes to individual member states.

Guidance at the regional and national levels can help humanitarian actors navigate both UN and non-UN sanctions regimes. At the regional level, the European Commission has produced an FAQ on sanctions in Syria following uncertainty in the humanitarian sector as to how to obtain exemptions.⁷⁶ At the national level, the UK and US have published guidance for NGOs.⁷⁷

Financial institutions also require more clarity on standards and thresholds for sanctions compliance, due diligence, and "know-your-customer" and

70 Norwegian Refugee Council, "Principles under Pressure," p. 15.

71 UN High-Level Review on Sanctions, "UN Sanctions: Humanitarian Aspects and Emerging Challenges," p. 7.

72 See, for example, Council of the European Union, "Sanctions Guidelines—Update," General Secretariat of the Council, May 4, 2018, available at <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>.

73 All UN sanctions regimes have committee guidelines explaining how the sanctions committee function and detailing how to apply for the various exemptions the regime provides for. Some sanctions regimes have additional guidance in the form of implementation assistance notices (Somalia, Sudan, Libya or the DPRK), and one has due diligence guidelines (Democratic Republic of Congo).

74 Implementation Assistance Notice No. 7, Guidelines for Obtaining Exemptions to Deliver Humanitarian Assistance to the Democratic People's Republic of Korea, August 6, 2018.

75 Al-Qaida Sanctions Committee, "Assets Freeze: Explanation of Terms," February 24, 2015, available at https://www.un.org/securitycouncil/sites/www.un.org/securitycouncil/files/eot_assets_freeze_-_english.pdf.

76 European Commission, "EU Restrictive Measures in Syria—FAQs."

77 United Kingdom HM Treasury Office of Financial Sanctions Implementation, "Frequently Asked Questions: Factsheet for Charities and Other Non-Governmental Organisations (NGOs)," available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/653168/OFSI_Charity_FAQ_web.pdf; US Department of the Treasury, "Guidance Related to the Provision of Humanitarian Assistance by Not-for-Profit Non-Governmental Organizations," available at www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ngo_humanitarian.pdf. This guidance did not, however, deal with the most challenging issue—that of payments demanded by designated entities necessary in order for humanitarian assistance to be delivered. Keatinge, "Uncharitable Behavior," p. 69. OFAC also has an FAQ page that provides answers to questions related to humanitarian assistance in countries like Somalia, Syria, South Sudan, Sudan, the DPRK, and Venezuela, available at www.treasury.gov/resource-center/faqs/sanctions/pages/faq_other.aspx#syria_whole.

“know-your-customer’s-customer” procedures to ensure they are not over-complying at the expense of humanitarian actors. However, guidance, where it exists, is generally informational rather than legal. For financial institutions, it will therefore often be insufficient to justify taking on what they perceive as high levels of risk. For humanitarian actors, guidance also creates the risk of crystallizing financial practices that further restrict their operations beyond the strict legal requirements.

Overall, government policymakers and regulators need to display greater leadership on and take greater ownership of their sanctions policies. When humanitarian actors or financial institutions request specific guidance or assurances from government representatives, they often do not (or cannot) provide it.⁷⁸ One government representative explained that the sanctions team could not issue guarantees of non-prosecution, as prosecution was the responsibility of another government department.⁷⁹ A former US government official noted that the US Treasury does not like providing clarity on sanctions regimes, and although it will occasionally provide letters stating that a particular activity is not illegal and prosecution will not be pursued, this is the exception rather than the norm.⁸⁰

MORE SYSTEMATIC MONITORING AND REPORTING

There is a need for more systematic monitoring of and reporting on the impact of sanctions regimes on humanitarian action. At the UN, monitoring and reporting have been ad hoc and insufficient, despite long-standing discussions and recommendations on the need to conduct humanitarian impact assessments of sanctions.⁸¹ This is partly due to the UN Security Council’s reluctance to provide explicit mandates in this area.

Monitoring of and reporting on the impact of

sanctions on humanitarian action has not been systematized within the UN Secretariat. The UN Security Council has, on rare occasions, requested humanitarian impact assessments from OCHA before deciding on the modalities of some sanctions regimes.⁸² For the Somalia sanctions regime, the Security Council specifically requests the emergency relief coordinator to report “on the delivery of humanitarian assistance in Somalia and on any impediments to the delivery of humanitarian assistance in Somalia.”⁸³ In addition to responding to such explicit mandates, OCHA reports on humanitarian impact in an ad hoc manner to sanctions committees and member states. Similarly, the UN Security Council Affairs Division (SCAD), which houses the sanctions team, does not conduct systematic assessments. The UN’s Office for Legal Affairs used to brief sanctions committees on these issues but is now reportedly much less engaged.⁸⁴

The UN Security Council could request the UN Secretariat to conduct systematic humanitarian impact assessments both prior to and during the implementation of any UN sanctions regime. Alternatively, it could make it a practice to request such assessments when renewing existing sanctions regimes or establishing new ones. Such an avenue could also be pursued by the General Assembly.⁸⁵ Even without explicit requests from the UN Security Council or General Assembly, it is within the scope of OCHA’s work to monitor and report on the impact of sanctions on humanitarian action, and OCHA could do so more systematically. Other parts of the Secretariat that can contribute to this monitoring and reporting include the Office of the UN High Commissioner for Human Rights and its special rapporteurs—some of which have, in the past, done extremely thorough reporting—and the UN secretary-general.⁸⁶

78 Interviews with humanitarian representatives, February to May 2019.

79 Interview, New York, April 2019.

80 Phone interview, April 2019.

81 Such assessments are generally understood to include the impact of sanctions both on the humanitarian situation in countries affected by those sanctions and on the ability of humanitarian actors to provide assistance and protection.

82 In 1996, the UN Security Council requested an assessment before imposing a flight ban against Sudan (Resolution 1070), and in 1997, it did the same before imposing sanctions against Sierra Leone (Resolution 1132).

83 UN Security Council Resolution 2444 (November 14, 2018), UN Doc. S/RES/2444.

84 Interview with former UN official, February 2019.

85 In 1997, the UN General Assembly requested that the Secretariat coordinate the organization and conduct of assessments of humanitarian needs and vulnerabilities at the time of the imposition of sanctions and during their implementation. UN General Assembly Resolution 51/242 (September 26, 1997).

86 See, for example, UN General Assembly, *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on His Mission to the Syrian Arab Republic*; UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights*

Groups of independent experts are appointed to assist the sanctions committees in monitoring implementation. Many are mandated to give recommendations on improving the effectiveness of the sanctions regimes,⁸⁷ and the ISIL (Da'esh) and al-Qaida monitoring team is specifically mandated to report on any unintended consequences.⁸⁸ Arguably, it is therefore within their mandate to report on the adverse impact of sanctions on humanitarian action. However, barring a few exceptions, these groups of experts have not extensively done so. In one recent exception, the panel of experts for the DPRK sanctions regime directly addressed the issue in its 2019 report, which has an annex extensively detailing the challenges facing humanitarian actors.⁸⁹ This was strongly criticized by some member states as being beyond the panel's mandate.⁹⁰ The monitoring team for the ISIL (Da'esh) and al-Qaida sanctions regime has also explicitly reported on challenges related to de-risking.⁹¹

Some have recommended that groups of experts' mandates include regular, standardized, and evidence-based assessments of and reporting on the impact of sanctions on humanitarian activities.⁹² However, this would open up the issue to likely contentious negotiations. Moreover, such a mandate for one group of experts would risk being interpreted as suggesting that other groups of experts do not have this mandate. Groups of experts can nonetheless be encouraged by member states to interpret their mandate to include monitoring and reporting on this issue. A key challenge is that groups of experts have increas-

ingly limited resources and time to produce reports, face access constraints in a number of countries, and already have overloaded mandates. If they are expected to engage more strongly on this issue, they need more support, capacity, and expertise. Another challenge is that humanitarian actors may be reluctant to engage with groups of experts in certain contexts, as it could create the perception that they are providing evidence to sanctions monitors.

Sanctions committees also have a role to play. They can make detailed inquiries regarding the impact of sanctions on humanitarian action to groups of experts or other UN entities. They can organize briefings with humanitarian actors, as the Netherlands did as chair of the DPRK sanctions committee.⁹³ Chairs of sanctions committees could also look at this issue during country visits—although this would also create risks for humanitarian actors perceived to be providing evidence.⁹⁴

Ensuring systematic monitoring of and reporting on the impact of sanctions on humanitarian action may require a specific mechanism. This could take the form of a special unit within the Secretariat that would collect information and standardize and coordinate efforts. Such a unit, however, would require a mandate and additional resources from the UN Security Council. In the past, there was an Inter-Agency Standing Committee Task Force on the Humanitarian Consequences of Sanctions, which, among other things, undertook assessment missions on the humanitarian impact of sanctions.⁹⁵ The task force published a handbook and guidelines for such assessments but is no

and Fundamental Freedoms while Countering Terrorism on the Role of Measures to Address Terrorism and Violent Extremism on Closing Civic Space and Violating the Rights of Civil Society Actors and Human Rights Defenders, UN Doc. A/HRC/40/52, February 18, 2019; UN Security Council, *Report of the Secretary-General in Pursuance of Paragraph 13(a) of Resolution 1343 (2001) Concerning Liberia*, UN Doc. S/2001/939, October 5, 2001.

87 See the panel of experts mandates for Somalia, UN Security Council Resolution 2444 (2018); the Democratic Republic of Congo, Resolution 2360 (2017); Sudan, Resolution 1591 (2005); the DPRK, Resolution 1874 (2009); and Libya, Resolution 1973 (2011).

88 UN Security Council Resolution 2199 (February 12, 2015), UN Doc. S/RES/2199.

89 UN Security Council, *Letter Dated 21 February 2019 from the Panel of Experts Established Pursuant to Resolution 1984 (2009) Addressed to the President of the Security Council*, UN Doc. S/2019/171, March 5, 2019, Annex 85. This was not the first time this was reported on in the DPRK context, but it was the first time it was looked at so extensively.

90 Interview with sanctions expert, New York, February 2019.

91 See UN 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*, UN Doc. S/2016/629, July 19, 2016; and UN 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*, UN Doc. S/2017/35, January 13, 2017.

92 Compliance & Capacity Skills International, "Best Practices Guide for Chairs and Members of UN Sanctions Committees," December 2018; UN High-Level Review on Sanctions, "UN Sanctions: Humanitarian Aspects and Emerging Challenges."

93 Interview with sanctions expert, New York, February 2019.

94 The UN High-Level Review on Sanctions recommended this in "UN Sanctions: Humanitarian Aspects and Emerging Challenges."

95 Bruderlein, "Coping with the Humanitarian Impact of Sanctions."

longer active.⁹⁶ This type of task force could be revived or replicated.

This section has focused on efforts that could be deployed at the UN level, but regional organizations and member states also need to ensure that they have appropriate processes in place to monitor and report on the impact of their sanctions regimes. Humanitarian organizations themselves need to more systematically collect evidence of sanctions' impact on their operations. To help these organizations overcome their reticence to speak openly about the challenges they face, any reporting system needs to ensure there is a safe space—for example, a space that allows for information to be anonymized—that addresses their legitimate concerns.

Finally, there is a regular refrain from member states on the need for better or more evidence of the impact of sanctions on humanitarian action. Unfortunately, this is often presented as a precondition for efforts to address an issue that has already been extensively documented. Ensuring more systematic monitoring and reporting is important, but it should not obscure the responsibility of member states to ensure that sanctions regimes do not hinder humanitarian action.

BETTER RISK MANAGEMENT SUPPORT AND RISK SHARING

Humanitarian actors are currently shouldering much—if not all—of the risk that stems from operating in contexts in which sanctions regimes apply. Most large international NGOs undertake considerable due diligence measures on their programs, international and local partners, and staff and heavily invest in complying with sanctions obligations.⁹⁷ One humanitarian representative pointed out that ensuring humanitarian neutrality in some ways overlaps with sanctions objectives: humanitarian actors do not want goods or materials to be used by armed groups.⁹⁸

However, smaller or local NGOs often cannot afford to meet the high standards required. Even

for bigger organizations, the complex regulatory environment makes risk management challenging. As such, humanitarian actors could benefit from risk management support. Donors could ensure their funding agreements provide for an adequate risk management budget. In Somalia and Afghanistan, the UN has set up risk management units to help the UN, its partners, and donors better understand and mitigate the risks of working in those contexts. In Somalia, one of the core functions of the unit is to support NGOs by providing risk management advice and capacity building.⁹⁹ This type of set-up could be used to support organizations in complying with sanctions regimes. An interesting model at the national level is the Charity Commission for England and Wales, an independent government department that provides a compliance toolkit to help charities manage risk.¹⁰⁰

However, risk management support does not address some of the challenges humanitarian actors face, particularly related to their ability to provide principled humanitarian services. One humanitarian representative explained that their organization is considering planning the types of activities it engages in based on the potential that beneficiaries are part of or associated with sanctioned armed groups.¹⁰¹ This is risk management, but it is not principled. With some member states enforcing zero-tolerance approaches to any diversion of aid, humanitarian actors may decide it is not worth the risk to engage in particular areas or with particular populations. In the US, for example, the enforcement standard for sanctions is strict liability, meaning that no amount of due diligence or good faith by organizations (or banks) would help if a violation is found.

Exemptions or exceptions in sanctions regimes, as well as better guidance, would help alleviate some of the risk. There is also a need to further consider what risk-sharing measures could be taken. For example, the special rapporteur on the negative impact of unilateral coercive measures on

96 Manuel Bessler, Richard Garfield, and Gerard McHugh, "Sanctions Assessment Handbook: Assessing the Humanitarian Implications of Sanctions," October 2004, available at <https://interagencystandingcommittee.org/humanitarian-consequences-sanctions/documents-public/iasc-sanctions-assessment-handbook-assessing>.

97 See, for example, Joel Charny, "Counter-Terrorism and Humanitarian Action: The Perils of Zero Tolerance," War on the Rocks, March 20, 2019.

98 Skype interview with humanitarian representative, April 2019.

99 See UN Somalia, "Risk Management Unit: Services to NGOs," available at www.uninsomalia.org/service-to-ngos.

100 Charny, "Counter-Terrorism and Humanitarian Action."

101 Skype interview with humanitarian representative, April 2019.

the enjoyment of human rights recommended the creation of a specialized UN procurement office in Syria with full authority to obtain humanitarian goods and services and manage financial transfers in compliance with sanctions.¹⁰² In Sudan, a UN-run procurement office for medicines was created, permitting exporters and financial intermediaries to have certainty that humanitarian transactions were not violating any sanctions.¹⁰³

Regarding de-risking, financial institutions need stronger, more explicit, or more formal guarantees from member states that sanctions will not be enforced if they are providing services to humanitarian actors with proper risk management procedures in place. Other avenues to explore include providing banks incentives to work with humanitarian actors or indemnity against fines for providing services to principled humanitarian actors if they are following a pre-determined standard for compliance procedures. More thought could also be given to developing humanitarian banking channels, or even a stand-alone humanitarian bank.

Finally, regional organizations and member states could ensure that enforcement standards are proportionate.¹⁰⁴ For example, the European Council has made clear that persons or bodies shall not be liable for violating sanctions in Syria “if they did not know, and had no reasonable cause to suspect, that their actions would infringe the prohibitions in question.”¹⁰⁵ In the UK, the Office of Foreign Assets Control states that it considers whether organizations self-disclosed violations when deciding what action to take following a breach.¹⁰⁶ Under the UK’s 2010 Bribery Act, a company found to be connected to an act of bribery is not guilty if it can show it had adequate procedures in place to prevent people associated with it from undertaking the act.¹⁰⁷ This approach

could be transposed to sanctions regimes.¹⁰⁸

INCREASED DIALOGUE AND AWARENESS RAISING

When famine was looming over Somalia in 2010, humanitarian actors joined forces to successfully advocate for an exception for humanitarian action in the UN sanctions regime in order to work in al-Shabab-controlled areas.¹⁰⁹ Today, however, the humanitarian sector lacks a strong, consistent, and unified voice. Even within organizations, some acknowledge that there is no unity of doctrine or approach.¹¹⁰

More effective advocacy efforts require a more systematic approach from the humanitarian sector. One model is the Global NPO Coalition on FATF, which successfully influenced the Financial Action Task Force’s (FATF) recommendations and guidance on how to engage with nonprofit organizations on efforts to combat money laundering and terrorism financing. The humanitarian sector should consider creating a global platform, network, or task force to engage and exchange ideas on the challenges caused by counterterrorism measures and sanctions regimes. At UN headquarters in New York, a working group could be established to develop agreed language to submit to member states, identify opportunities to influence resolutions and policies and establish advocacy strategies.

There is also a need for more systematic engagement between the counterterrorism, sanctions, humanitarian, and private sector communities. This will help build trust, improve understanding of the challenges facing each community, and ultimately arrive at solutions. For example, by better communicating the risk management measures they take to financial institutions, donor agencies, and member states, humanitarian actors could build trust in the humanitarian sector. At the

102 UN General Assembly, *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on His Mission to the Syrian Arab Republic*.

103 Ibid.

104 In line with FATF Recommendation 35.

105 European Council Regulation 36/2012, *Concerning Restrictive Measures in View of the Situation in Syria and Repealing Regulation (EU) No 442/2011*, January 18, 2012, Article 28.

106 UK Office of Financial Sanctions Implementation, “Frequently Asked Questions: Factsheet for Charities and Other Non-governmental Organisations (NGOs).”

107 UK Ministry of Justice, “The Bribery Act 2010: Guidance about Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing,” p. 6.

108 Keatinge, “Uncharitable Behavior,” pp. 20-21.

109 Recent negotiations on UN Security Council Resolution 2462 (2019) also show how collective advocacy can be effective. Nathalie Weizmann, “Painting within the Lines: The UN’s Newest Resolution Criminalizing Financing for Terrorists—Without Imperiling Humanitarian Activities,” *Just Security*, March 29, 2019.

110 Interview with UN humanitarian representative, New York, April 2019.

UN, OCHA and other humanitarian organizations meet with or brief the UN Security Council Affairs Division (SCAD), sanctions committees, and groups of experts on an ad hoc basis. The 2015 High-Level Review of UN Sanctions was the first UN forum for exchanges between the sanctions and humanitarian communities, but it was a temporary process. The Inter-Agency Working Group on Sanctions created during this process is reportedly dormant and could be revived as a forum for continued exchange. Humanitarian actors should also engage more systematically with member-state missions, which themselves need to break internal silos between sanctions, counterterrorism, and humanitarian experts. SCAD and various expert groups already convene meetings with the private sector, which sometimes tackle humanitarian concerns and could more systematically include humanitarian actors.

Countries like the UK and the Netherlands have organized dialogues on sanctions between the government, private sector, and NGOs. The World Bank and Association of Certified Anti-Money Laundering Specialists also cosponsored a dialogue on de-risking, but progress has been slow due to lack of robust participation by key government stakeholders.¹¹¹ At the EU, there is ongoing dialogue on compliance in Syria between NGOs,

the financial sector, donors, and government regulators. Where buy-in from government stakeholders is lacking, humanitarian actors and financial institutions should proactively engage with each other to foster understanding of how their respective procedures work and address mutual concerns. In that vein, the World Bank is currently developing guidance for NGOs and financial institutions to clarify how procedures on each side work.

* * * *

There is a continued need for raising awareness of how sanctions regimes impact humanitarian action. Given that these regimes are mostly targeted and that member states are bound to uphold the principles in the UN Charter and international humanitarian law (where it applies), sanctions should protect and not inhibit humanitarian action. Where sanctions hinder aid, the impact on civilian populations is immediate, and efforts to backtrack will always come too late. Going forward, member states, the UN, financial institutions and humanitarian actors should proactively and preventively tackle this problem. While the most effective courses of action will require political will, stakeholders at all levels can take incremental steps to help mitigate the impact.

¹¹¹ Charity and Security Network, "Comments and Suggestions for Update of the U.S. National Terrorist Financing Risk Assessment," June 11, 2018, available at www.charityandsecurity.org/system/files/CSN%20Comments%202018%20NTFRA.pdf.

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