



Humanitarian topics explained

UNDERSTANDING COUNTERTERRORISM AND HUMANITARIAN ACTION TO GO

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Abstract

Counterterrorism measures on all jurisdictional levels are rapidly increasing. Over the last years, more and more humanitarian organisations are expressing their concern about the (unintended) impacts and consequences of these measures on their work.¹ This paper provides some clarity on the matter by contextualising the legal protection of principled humanitarian action, mapping out relevant counterterrorism regulations and developments on the multiple jurisdictional levels and studies its impacts and threats. Lastly, it gives a brief overview of options to relieve current frictions between counterterrorism measures and principled humanitarian action.

I. Counterterrorism and principled humanitarian action

Terrorism and terrorist groups have become progressively involved in conflict. With the events of 9/11 serving as a catalyst, the worldwide strengthening of existing counterterrorism legislation, as well as the increase of new measures adopted by states and intergovernmental bodies under the banner of the 'war on terror', has skyrocketed.² It gave rise to an exceptionally wide range of counterterrorism efforts, consisting of international, regional and national legislation, (forcible) measures through sanction regimes³, listing procedures, financial (donor) requirements and other measures aimed directly or indirectly towards countering terrorism⁴. Hence, counterterrorism includes all efforts to prevent and combat terrorism, as well as addressing the conditions conducive to the spread thereof.⁵

As principled humanitarian action is often conducted in areas where counterterrorism measures apply, both frameworks are currently conflicting and, at times, even opposing. The rapid increase of counterterrorism regulations has brought many questions to the forefront regarding the legal protection and liability of those providing principled humanitarian action to civilians in territories controlled by designated terrorist groups, or to (members of) designated terrorist groups and their families.⁶ Thus, the current multi-levelled counterterrorism framework is increasingly identified⁷ as having severe (though often unintended) implications on humanitarian operations⁸, obstructing the general provision of humanitarian activities.⁹ **It thereby leaves the space for action increasingly contested¹⁰ or even shrinking¹¹.** This complicates and endangers the work of relief personnel in the field and thus negatively affects the protection of people in need.¹²

The relationship between counterterrorism efforts and principled humanitarian action (PHA) is further complicated by the unpolitical nature of the latter. Where PHA is guided by the humanitarian principles of humanity, neutrality, impartiality and independence, counterterrorism efforts are often highly political and sometimes even employed to justify actions questionable under international law.¹³ This poses an abundance of ethical, legal, as well as practical and operational challenges for the execution of principled humanitarian action as rooted in international humanitarian law (IHL) and beyond.¹⁴

II. Legal frameworks for humanitarian action

The international legal framework is an important tool for ensuring humanitarian access, as well as providing an important negotiating basis thereto.¹⁵ As the provision of principled humanitarian action is very broad, takes place in a large and expanding variety of settings¹⁶ and differs in peace- or wartime, its protection manoeuvres within several legal frameworks of public international law. Because the protection of principled humanitarian action covers many elements, only the most salient protections will be highlighted.¹⁷

In situations of armed conflict

International humanitarian law is the branch of law that seeks to impose limits on the effects of armed conflict and hence offers a framework for PHA. During international and non-international armed conflicts (IAC/ NIAC), IHL specifies the rights and obligations of conflict parties, as well as for humanitarian actors and third states, identifying conditions for humanitarian actors to gain access to people in need.¹⁸ This framework has a very firm legal basis and is well-established through state practice, making this field of law most authoritative and prominent.¹⁹

During peacetime

Other branches of international law incorporating or relating to PHA are, most prominently, international human rights law (IHRL)²⁰ and international criminal law (ICL)²¹. Other examples include international refugee law (IRL), international disaster response law (IDRL) and the notion of the responsibility to protect (R2P)²². As these bodies of law (or international norms) sometimes operate simultaneously with IHL, the general legal protection for PHA is relatively comprehensive.

III. Legal frameworks for counterterrorism measures

The legal bases for counterterrorism measures (legislation, sanctions and listing procedures) are to be found on the international²³, regional and domestic judicial layer, the latter of which is sometimes of extraterritorial reach²⁴:

Legislation

- international**
 - United Nations Security Council (UNSC) (landmark resolutions 1267, 1373)
 - International conventions giving several (and contesting) definitions and understandings of what constitutes financial and material support to designated or listed entities.
- regional**
 - A multitude of regional instruments aimed at countering terrorism (e.g. treaties and conventions of the Association of Southeast Asian Nations, African Union, Council of Europe, European Union).
- domestic**
 - Obligations stemming from international, regional and/or multilateral institutions, if member thereto.
 - Separate domestic criminal and civil state penalties and administrative regulations apply.
 - Extraterritorial jurisdiction, where a state has criminal jurisdiction over offences committed in another state by individuals who are not nationals of the claiming state, can have far-reaching consequences for international staff.

Sanctions & listing procedures

- Currently 14 ongoing designation and listing procedures for non-state armed groups and individuals by the UNSC.
- Most prominently: EU sanctions ('restrictive measures') and separate listing procedures. See the illustrating map with highlighted countries on p. 7.
- These regimes are either additional to or autonomous from UN (Currently 2 non-UN regimes in place).
- Several states, e.g. the US, UK, Canada and Australia, individually list or designate (international) groups or entities as terrorist or associated thereto.
- The universally applying UN resolutions function merely as a threshold.
- States may therefore employ more stringent rules.²⁵

IV. Legal liability

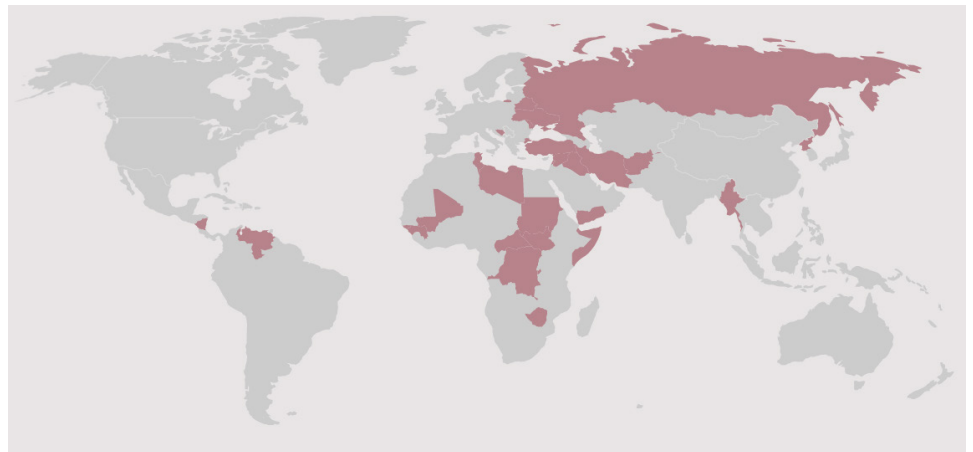
Counterterrorism legislation, which differs per jurisdiction, criminalises engagement with²⁶, as well as financial or material support to designated terrorist organisations or activities. This all makes for an increasingly tense relationship between principled humanitarian action, its protective legal frameworks and counterterrorism legislation. **Many humanitarian actors and organisations currently verbalise their fear of prosecution and criminal liability under (inter)national counterterrorism laws, sanctions and regulations.** A recent example of this is the 2019 counterterror claim against Oxfam, which allegedly contravened US counterterrorism laws by providing material support to a designated terrorist group during its humanitarian activities in Gaza²⁷. Laws and measures of counterterrorism also apply to humanitarian organisations, as they must comply with the previously set out legislation and sanctions, as well as with other requirements such as donor clauses.²⁸ It also highly affects the financial capabilities of humanitarian organisations, which can delay and further endanger their work.

Non-compliance with counterterrorism obligations as laid down in administrative, civil and criminal law can be penalised by a broad range of measures, varying from fines²⁹ to imprisonment, whilst non-fulfillment of obligations in donor agreements could lead to restitution or termination of the contract.³⁰ Generally, this jeopardises the flow of humanitarian aid and compromises the humanitarian principles. Whereas the humanitarian principles oblige humanitarians to exercise a needs-based response, obligations under counterterrorism can prevent this through criminalisation and prosecution.³¹ There are several examples where counterterrorism legislation and measures have impacted the needs-based and independent approach of humanitarian action significantly, such as in Nigeria, Somalia and Iraq.³² In terms of legal liability, there is a multitude of actors involved that decide what (legal and non-legal) measures apply:

Actors involved

Areas of operation, receiving countries	Financial institutions and donors	Humanitarian organisations	Extraterritorial laws and sanctions
<i>Measures including</i> International, regional and domestic laws, sanctions, other policies and measures;	<i>Measures including</i> International, regional and domestic laws (also anti-money laundering laws), sanctions, clauses and regulations of banks, insurance companies, wire services, other policies, measures and additional financial requirements;	<i>Measures including</i> Domestic laws of base country of humanitarian organisation, country of origin of individual humanitarian staff, (e.g. if a staff member has American citizenship, US sanctions and regulations apply);	<i>Measures including</i> Laws that apply to foreign nationals; extraterritorial sanctions, e.g. US-OFAC; some states have invoked justifications subject to counterterrorism efforts in order to engage in extraterritorial enforcement operations;

In defining what counterterrorism measures apply, the vastly increasing and highly differentiating sets of applicable laws, sanctions, regulations and policies of all the abovementioned actors must be taken into account. Hence, the applicability of counterterrorism measures widely varies in scope and differs per situation. With certain states having laws or sanctions of extraterritorial reach³³ in place, foreign nationals can also be included and become criminally liable. This is specifically alarming for staff of international organisations working in areas where many counterterrorism measures are put in place.³⁴ Only in recent years, UN-resolutions have started mentioning the compliance with and respect for IHL, addressing potential effects on the execution of principled humanitarian action and passing resolutions involving (specific) humanitarian exemptions.



Overview of countries with active sanctions or restrictive measures implemented by the EU Member States. See <https://sanctionsmap.eu> for all lists of persons, groups and entities subject to the EU restrictive measures. Source: <https://sanctionsmap.eu/#/main>.

V. Challenges, impacts, developments

There are many areas of concern for humanitarian organisations regarding the effect of counterterrorism measures on the continued exercise of principled humanitarian action.³⁵ This affects all humanitarian organisations, but most prominently local and/or Muslim or Islamic faith-based charities and NGOs, which face greater scrutiny from financial institutions and certain states as they are perceived to be of 'higher risk'.³⁶ Clearly, this also applies to countries in which terrorist activities take place. An overview of the most pressing impacts:

Compliance requirements

The large array of legal, sanctional and procedural requirements and risk-management frameworks requiring vetting and due diligence procedures leads to costly administrative procedures and a compliance burden. This slows down project implementation and operations.

Financial requirements

Compliance with extensive donor requirements (USAID, OFAC) and de-risking / risk-averting strategies such as anti-money laundering regulations slows down project funding. It also increases transfer costs.

Endangerment of staff

The use of informal and unregulated financial channels and methods directly endangers staff. The multitude of measures also fuels fear of individual liability and uncertainty as to what rules apply.

Criminalisation

Principled humanitarian action becomes increasingly criminalised through stringent counterterrorism sanctions and legislation.

Chilling/curtailing effect

Risk aversion or avoidance through anti-diversion policies, including risk transfer to local actors. This is further problematised by selfregulation/censorship, also out of fear for reputational harm.

Pressure on principled approach

The avoidance of constraints overrules humanitarian needs and endangers the principled, needsbased approach.

Transparency issues

Humanitarian organisations apply a 'Don't ask don't tell'-policy, leading to a lack of transparency within and between organisations.

Blurring of lines

The unclear separation of political military, political and humanitarian objectives constraints the neutral perception of humanitarian organisations and complicates the engagement with affected local populations.

VI. Options and ways forward

To relieve the current tensions between counterterrorism measures and principled humanitarian action, several options and recommendations could be considered:

Multi-stakeholder dialogue and joint advocacy

In addressing both internal issues – curbing the current lack of transparency and external issues, dialogue must be facilitated. Collective and joint advocacy contributes to more systematic monitoring and reporting mechanisms, laying bare problematic regulations and language in laws, policies and donor clauses. Reports on systematic infringements on the humanitarian space and frictions between humanitarian action and counterterrorism measures could lead to stronger awareness and prevention of this current stalemate in the future. This could also prevent humanitarian organisations from further becoming trajectories for political narratives and strategies. A successful example of joint advocacy comes from the United Kingdom, where it resulted in the

inclusion of a humanitarian exemption in a 2019 Parliament bill³⁷, safeguarding presence in certain terrorist-controlled areas. It must also be kept in mind that this is a multi-stakeholder matter and thus not an issue that is solely to be solved by humanitarian organisations;

Harmonisation of laws and regulations

Harmonisation, towards more universal convergence, could reduce friction between the different jurisdictional levels and take away uncertainties for humanitarian organisations as to what regulations apply;

Humanitarian exemptions, exceptions or saving clauses

General exemptions and more specific exceptions are increasingly used in sanction regimes, multilateral policy, and legislation. However, so far these exemptions are not legally binding and the presence of such clauses therefore still strongly differs per jurisdiction. More so, most states make no mention of exemptions at all. Ideally, exemptions would be mandatory within national jurisdictions and of broad scope. Hence, malpractice and the utilisation of counterterrorism measures for political (state) interests, clouding obligations under international law, could be easier established and consequently averted

Issuance of comfort letters

Advocate for more regulated ways to provide a (not legally binding) 'guarantee' for humanitarian organisations to not run afoul of donor requirements whilst providing principled humanitarian action by means of comfort letters, licenses and waivers. In Germany, both the Federal Office for Economic Affairs and Export Control (BAFA) and the Bundesbank are authorised to grant the above-mentioned exceptions and comfort letters, depending on the context.

Improvement of dedicated humanitarian payment methods

The use of dedicated payment methods includes a risk transfer where transactional information is checked by authorities. This could reduce the risk for humanitarian workers in multiple ways, mainly by relieving humanitarian actors from fear of non-compliance with legal obligations and preventing them from having to resort to unregulated financial channels. It would also relieve financial institutions and improve the timeliness of project financing. Two recently developed channels, which are currently employed are the EU's Instrument in Support of Trade Exchanges (INSTEX) and the Swiss Humanitarian Trade Involvement (SHTA).

Further reading and materials

Introductory

Counterterrorism Measures and Sanction Regimes: Shrinking Space for Humanitarian Aid Organisations; Roepstorff, Faltas & Hövelmann (2020) <https://www.chaberlin.org/wp-content/uploads/2020/02/2020-02-counterterrorism-en-online.pdf>

Anti-Terrorismusmaßnahmen und humanitäre Hilfe - ein Überblick über Sanktionsregime und Gesetzgebungen; VENRO (2020) (Video in German) <https://www.youtube.com/watch?v=KnVE25XV5jA>

European Union Sanctions Map <https://sanctionsmap.eu/#/main>

Risk mitigation and management

NRC Toolkit: Principled Humanitarian Action: Managing Counterterrorism Risks NRC (2020) <https://www.nrc.no/toolkit/principled-humanitarian-action-managing-counterterrorism-risks>

Risk Management Principles Guide for Sending Humanitarian Funds into Syria and Similar High-Risk Jurisdictions; Walker (2020) https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200526-risk-management-guide_en_0.pdf

Terrorist Diversion: A Guide to Prevention and Detection for NGOs; May & Curwell (2020) (Book) <https://www.routledge.com/Terrorist-Diversion-A-Guide-to-Prevention-and-Detection-for-NGOs/May-Curwell/p/book/9781138338081>

Impacts

Workshop Report: The Impact of EU Sanctions and Restrictive Measures on Humanitarian Action; VOICE EU (2019) <https://voiceeu.org/publications/voice-workshop-report-the-impact-of-eu-sanctions-and-restrictive-measures-on-humanitarian-action.pdf>

Learning Stream on Risk Management in Practice: The Impact of Bank De-Risking on Humanitarian Action ICVA and PHAP (2020) <https://phap.org/PHAP/Events/OEV2020/OEV201022.aspx>

Endnotes

1 See, for example, the positioning paper of the Norwegian Refugee Council (NRC), 2019, on counterterrorism measures, (available at: https://www.nrc.no/globalassets/pdf/position-papers/counterterrorism-measures_position-paper.pdf, [accessed 12-02-2020]) and this Humanitarian Congress panel interview in The New Humanitarian by Elliott & Parker, 2019, (available at: <https://www.thenewhumanitarian.org/feature/2019/11/26/balancing-act-anti-terror-efforts-and-humanitarian-principles> ([accessed 12-02-2020]).

2 Despite the definitional lacune revolving 'terrorism'. See Lewis et al., 2015, p. 101, Burniske et al., 2014, p. 2.

3 Lewis et al., 2015, p. 100.

4 E.g. military initiatives, cooperation mechanisms, administrative tools, surveillance systems. See Humanitarian Foresight Think Tank, 2016, p. 1.

5 As defined in the UN Global Counter-Terrorism Strategy and annexed Plan of Action, adopted by the United Nations General Assembly, A/RES/60/288, 8 September 2006.

6 Lewis, Modirzadeh & Blum, 2015, p. iv.

7 See e.g. Pantuliano et al., 2011, Collinson & Elhawary, 2012, Mackintosh & Duplat, 2013, Mackintosh & McDonald, 2013, Lewis et al., 2015, O'Leary, 2018.

8 Mackintosh & McDonald, 2013, p. 23.

9 Previous studies have found that counterterrorism efforts can potentially hinder or even prevent the execution of PHA where it is most needed. See, e.g., O'Leary, 2018, p. 12, who also mentions Egeland, Harmer & Stoddard, 2011.

10 This term borrowed from Collinson & Elhawary, 2012.

11 NRC, 2019, p. 1.

12 See the foreword of Jan Egeland in O'Leary, 2018, p. 7.

- 13** I wrote a blogpost on the politicised and criminalised contexts of counterterrorism, see Faltas, 2020 (available at <https://www.chaberlin.org/blog/the-politicised-and-criminalised-contexts-of-counterterrorism/>)
- 14** Burniske, Modirzadeh & Lewis, 2014, pp. 1, 11, O'Leary, 2018, p. 8.
- 15** Schwendimann, 2011, p. 995-996.
- 16** Such as during man-made or natural crises, within IAC and NIAC or under occupation, see Haider, 2013, p. 6.
- 17** Lewis et al., 2015, p. 69.
- 18** Schwendimann, 2011, p. 996.
- 19** Haider, 2013, p. 6.
- 20** IHRL enshrines the general obligations of states to ensure a minimum level of essential (and therefore non-derogable) rights, such as (for example) within the International Covenant on Economic, Social and Cultural Rights (ICESCR), which also offer a form of legitimacy for the provision of humanitarian access. However, IHRL also incorporates many derogable provisions which are (or can be) suspended during situations of IAC/NIAC. Despite the enshrinement of certain rights in the ICESCR, the relation between IHRL and the right to humanitarian aid is quite unclear, with the major IHRL instruments not specifically referring to humanitarian access or assistance. The quality of the substantial protection offered by IHRL in relation to IHL therefore remains debated. See further: Schwendimann, 2011, Haider, 2013.
- 21** In relation to PHA, ICL mainly revolves around prohibitions regarding violations of rules to safeguard and execute PHA and individual criminal liability for international crimes. See Lewis et al., 2015, p. 65.
- 22** However, the R2P is not a legal concept but rather an international norm or commitment.
- 23** International legislation, sanction and listing stemming from the UNSC, especially when adopted under Chapter VII of the UN Charter, are binding upon all Member States and therefore has a 'trickle-down' effect.
- 24** Extraterritorial jurisdiction is where a state has criminal jurisdiction for offences committed in another state by individuals who are not nationals of the claiming state, as justified by the universal jurisdiction principle. See Mackintosh & Macdonald, 2013, p. 25, O'Leary, 2018, p. 8, 14.
- 25** Lewis et al., 2015, p. 111.
- 26** However, the prohibition of engagement was identified to not directly obstruct the execution of PHA, see Mackintosh & Duplat, 2013.
- 27** Parker, 2019, available at: <https://www.thenewhumanitarian.org/news/2019/09/12/NGO-counter-terrorism-Gaza-Palestine-oxfam-lawsuit>.
- 28** O'Leary, 2018, p. 8.
- 29** O'Leary, 2018, p. 14.
- 30** Faltas, 2020.
- 31** O'Leary, 2018, p. 16, see also Macintosh & Duplat, 2013.
- 32** O'Leary, 2018, p. 21.
- 33** Mackintosh & Macdonald, 2013, p. 25, O'Leary, 2018, p. 8, 14.
- 34** Pantuliano et al., 2011, p. 6, Lewis et al., 2015, p. 112.
- 35** This list of impacts is not complete but aimed to address the most pressing issues. Impacts are identified by O'Leary, 2018, as structural, operational and internal.
- 36** Mackintosh & Macdonald, 2013, p. 24, O'Leary, 2018, p. 10.
- 37** United Kingdom's Counter-Terrorism and Border Security Act 2019, Chapter 1, Section 4, Subsection 5(a).

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