

THE IMPACT OF COUNTER-TERRORISM LEGISLATION ON HUMANITARIAN ACTION: CONSEQUENCES, MITIGATING MEASURES AND LIMITATIONS



PHOTO:
Installation of the "banned weapons" flag upon arrival at the lodge in Juntas de Tamana, a disputed area between the National Liberation Army (ELN) and the Gaitanist Self-Defense Forces of Colombia (AGC) in Chocó, Colombia.

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October 2023

The articles reflect the the authors' opinions and do not necessarily necessarily represent the MSF or IECAH point of view

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INTRODUCTION

In recent years, there has been growing concern among humanitarian actors, donors and policy-makers about the impact of counter-terrorism legislation on humanitarian work. There are numerous cases in which the work of humanitarian organisations has been affected by this body of (national and international) law, whether operationally in the implementation of programmes, with financial implications or, in the most extreme cases, with legal liabilities for the organisations and/or their staff. Although these rules have gradually incorporated clearer and more direct references to international humanitarian law (IHL) and the obligation of member states to respect international law when combating terrorist violence, the reality is that the impact on humanitarian action has been and continues to be very tangible.¹

In line with other articles published in previous reports that addressed the criminalisation of the civilian population and the negative impact of counter-terrorism measures on it,² this article aims to provide an update on the main impacts of counter-terrorism legislation on humanitarian work, as well as the ways explored to circumvent them and the constraints to ensuring that humanitarian assistance does not suffer from the consequences of counter-terrorism.

It is imperative to ensure that humanitarian aid does not suffer from the consequences of counter-terrorism legislation

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THE CONFLICT BETWEEN COUNTER-TERRORISM LEGISLATION AND INTERNATIONAL HUMANITARIAN LAW

The rise of counter-terrorism legislation since the beginning of the 21st century has resulted in the establishment of an extensive regulatory regime dedicated to countering and preventing terrorism and violent extremism. The case of the United States in this evolution is the most paradigmatic in the context of its “war on terror” after 9/11, but the evolution has been global.

¹International Committee of the Red Cross, *Counter-terrorism measures can impact humanitarian action negatively*. Statement by the International Committee of the Red Cross (ICRC) at the United Nations General Assembly, 77th session, Sixth Committee Plenary Meeting on Measures to Eliminate International Terrorism. Available at: <https://www.icrc.org/en/document/counter-terrorism-measures-can-impact-humanitarian-action-negatively>. And Première Urgence Internationale, *Anti-terrorism laws threaten to paralyze humanitarian NGOs*. Available at: <https://www.premiere-urgence.org/en/anti-terrorism-laws-threaten-to-paralyse-humanitarian-ngos/>

²See, for example, Alejandro Pozo, *Civiles y culpables: impacto de las medidas antiterroristas en poblaciones estigmatizadas*, in “*Humanitarian action in 2020-2021: the pandemic delays necessary reforms*”. Available at: <https://www.msf.es/sites/default/files/documents/informe-iecrah-msf-2021.pdf>

The overlapping of legal instruments is confusing, leading to over-regulation of the organisations themselves as a protective measure

Furthermore, the counter-terrorism architecture is based on various legal instruments established by the United Nations Security Council, which include binding resolutions for member states and sanctions regimes, as well as domestic legislation derived from their transposition, each with its own peculiarities as to what is considered support to terrorist organisations or which organisations are designated as being for this purpose.³

Main legal instruments against terrorism

At global level:

- International Convention for the Suppression of the Financing of Terrorism (1999)
- Resolutions 1267 (1999), 1373 (2001) and 1390 (2002): Sanctions regime against Al-Qaeda, Islamic State and the Taliban
- UN Global Counter-Terrorism Strategy (2006)
- Resolution 1916 (2010): Al-Shabaab sanctions regime
- Resolution 2178 (2014) and Madrid Guiding Principles on foreign terrorist fighters
- Financial Action Task Force (FATF) and its guidelines

At regional level:

- EU Directive 2017/514 on combating terrorism
- EU Directive 2018/843 on terrorist financing
- EU sanctions list

At national level:

- Sanctions lists of donor countries (e.g. notably the United States and the United Kingdom) as well as the applicable rules in the countries of operation

This diverse legal architecture has an impact on humanitarian work. On the one hand, the early instruments did not include explicit mentions of international law, or at least not in operative paragraphs. On the other hand, in the absence of an internationally agreed definition of terrorism and of what acts are considered to be terrorist, it gives a wide margin for states to develop independent legislation, which increases legal uncertainty. Furthermore, **the overlapping of legal instruments results in confusion, leading to over-regulation of the organisations themselves as a protective measure.**

The increasing involvement of non-state armed groups designated as terrorists in armed conflicts is resulting in confusion with IHL and impacting the work of humanitarian organisations. IHL is relevant in relation to terrorism as it determines, inter alia, the categorisation of protected persons during an armed conflict, direct participation in hostilities by members of armed groups, detention, and has been

³Roepstorff, Kristina, et al., *Counterterrorism Measures and Sanction Regimes: Shrinking Space for Humanitarian Aid Organisations*. Centre for Humanitarian Action (CHA), p. 6. Available at: <https://www.chaberlin.org/wp-content/uploads/2020/02/2020-02-counterterrorism-en-online.pdf>

supplemented, following the creation of the International Criminal Court (ICC), with measures on criminal accountability, and the provision of a fair trial.⁴

Although the fight against terrorism is not necessarily incompatible with the application of IHL, **a constant challenge is that the existing legal framework has blurred the line between armed conflict and terrorism by considering the participation of groups designated as “terrorists” in an armed conflict to be an issue solely related to the fight against terrorism and, consequently, evading the application of international law.**⁵

The existing legal framework has blurred the line between armed conflict and terrorism

IHL regulates the conduct of parties to an armed conflict, respect for the protection of civilians and restrictions on the means and methods of warfare, and includes a number of rules and protections relating to humanitarian and medical activities, which state that:

- The role of humanitarian organisations, including their right to offer their services to the parties to the conflict (right of initiative), must be respected.
- Humanitarian relief personnel and objects used for humanitarian relief operations, as well as of medical personnel, units and transports must be protected.
- Parties to the conflict must allow and facilitate the passage of humanitarian relief to the civilian population, provided that such action is impartial, carried out without any adverse distinction and subject to the right of control of the parties to the conflict.
- Access to medical assistance for all sick and wounded persons, both from state and non-state armed groups, regardless of whether they have been designated as "terrorists" must be guaranteed.

Sources: CNULCT, *The interrelationship between counter-terrorism frameworks and international humanitarian law*. Available at: https://www.un.org/securitycouncil/ctc/sites/www.un.org/securitycouncil/ctc/files/files/documents/2022/Jan/cted_ihl_ct_jan_2022.pdf. And Alice Debarre, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework*. Available at: [https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/IPI_1809_Safeguarding-Medical-Care\(1\).pdf](https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/IPI_1809_Safeguarding-Medical-Care(1).pdf)

⁴ Saul, B. (2016). *Terrorism, counterterrorism and International Humanitarian Law*. Sydney Law School, Legal Studies Research Paper No. 16/37. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778893

⁵ Debarre, A. (2018), op. cit., p. 5.

2.1. Main points of conflict between IHL and counter-terrorism law

IHL prohibits indiscriminate violence against civilians without a military objective,⁶ protecting all persons who do not take an active part in hostilities. Despite the fact that IHL establishes proportionate attacks against military targets as legitimate, states consider any violence perpetrated by a designated terrorist group as terrorism, denying such groups their status as parties to the conflict and thus detaching them from their subjection to IHL, which has negative consequences for the security of humanitarian actors, as these groups thus have little incentive to respect international law.⁷

IHL protects all persons that are sick or wounded in an armed conflict, whether they are civilians or combatants who have ceased to be combatants, without their being considered terrorists disqualifying them from this protection. However, some counter-terrorism laws criminalise medical assistance to designated terrorist fighters and criminalise it as support for terrorism.⁸ IHL establishes protection measures for those providing humanitarian and medical assistance. **While no existing counter-terrorism law directly criminalises medical and humanitarian assistance as such, the provisions of many national counter-terrorism laws could be interpreted broadly and used to prosecute or otherwise sanction professionals providing humanitarian assistance.**

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Finally, many counter-terrorist laws violate the right of initiative of humanitarian organisations, basically recognised to the International Committee of the Red Cross (ICRC), to offer their services to parties to a conflict in order to provide essential humanitarian assistance to populations under their control. **From the moment any group designated as terrorist becomes party to an armed conflict and the de facto ruler of a territory, but is not recognised as such by states, the provision of humanitarian assistance in such contexts can be considered as supporting terrorism.** This may occur when relief goods are delivered to civilians in an area controlled by a designated terrorist group, if these goods inadvertently fall into the hands of such a group, when medical services are provided to wounded and sick combatants for such a group, or when incidental payments are made to a designated group for access to certain civilian populations.⁹ The criminalisation of this assistance violates IHL, by preventing the rapid and unimpeded passage of this aid.

⁶ Saul, B. (2016), op. cit., p. 3

⁷ Debarre, A. (2018), op. cit., p. 6; Saul, p. 14

⁸ Debarre, A. (2018), op. cit., p. 7

⁹ Ibid., p. 8.

3

HOW COUNTER-TERRORISM LEGISLATION IMPACTS ON HUMANITARIAN ACTION

According to a 2017 Harvard University survey of more than 500 humanitarian professionals, 73% of them felt that counter-terrorism legislation had affected their work and/or that of their organisation. In addition, 60% of respondents indicated that this legislation had impacted their organisation's commitment to humanitarian principles, while 69% noted that counter-terrorism measures had reduced their work, and 38% that it had resulted in the rejection, disruption or cessation of activities and programmes.¹⁰

Moreover, a recent literature review by InterAction quantified 203 impacts of counter-terrorism measures on humanitarian action between 2011 and 2018. More than half can be categorised as operational (52%), while 29% are financial and the remaining 18% are legal, reputational and security-related.¹¹ This does not mean that these non-operational impacts are minor, but that they usually manifest themselves as second or third order effects, as opposed to operational impacts that are felt immediately. Based on this review, we can classify the impact in the following categories: operational, financial, legal, security and reputational.¹²

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3.1. Operational impact: access in the spotlight

Humanitarian organisations need to negotiate access to humanitarian contexts where designated terrorist groups may operate. While this is not illegal, many donors impose clauses limiting the implementation of programmes in areas under the control of such groups or where these are the de facto government, thus preventing the provision of humanitarian assistance to people in need and violating the principle of impartiality of aid. For example, some donors have limited the implementation of programmes in areas of northwestern Syria under the control of Hayat Tahrir al-Sham (HTS).¹³

Sanctions imposed against individuals or groups designated as terrorists prevent humanitarian organisations from procuring certain goods and services because their importation is restricted or the companies that supply them are penalised. This is the case in Syria, where comprehensive sanctions against the purchase of

¹⁰ Burniske, J. S. and Modirzadeh, N. K. (2017), *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, HLS PILAC, CHE Project, Harvard University. pp.6-7. Available at: <https://dash.harvard.edu/bitstream/handle/1/42661717/Pilot-Empirical-Survey-Study-2017.pdf?sequence=1&isAllowed=y>

¹¹ InterAction (2021) *Detrimental Impacts: How Counter-Terror Measures Impede Humanitarian Action. A review of Available Evidence*. p. 5-6. Available at: <https://www.interaction.org/wp-content/uploads/2021/04/Detrimental-Impacts-CT-Measures-Humanitarian-Action-InterAction-April-2021.pdf>

¹² Ibid., p. 4

¹³ Action Against Hunger, *Counter-Terrorism Policy and Practice Review Report*, p. 6. Available at: <https://knowledgeagainsthunger.org/wp-content/uploads/2019/08/COTER-Final-Report--Design.pdf>

oil or the sanctions against the largest telephone company, Sirtatel, the only service provider in many areas of the country, prevent the implementation of programmes.

Donor requirements in relation to risk management with regard to local partners and the beneficiary population, through vetting and selection procedures, call into question the principle of impartiality, by denying humanitarian aid to people who meet the criterion of need because of their possible connections to designated terrorist groups.¹⁴ The lack of clarity of counter-terrorism legislation leads to misinformation, over-regulation and self-censorship by humanitarian organisations, sometimes beyond the requirements requested by donors, due to fear of committing violations of counter-terrorism legislation.¹⁵ In addition, there is an overload of work for organisations that must devote large amounts of time and human resources to comply with donor requirements, keep track of changing policies and laws, and complete lengthy processes to obtain the licences needed for project implementation.¹⁶

This is compounded by a flagrant lack of communication with donors about the difficulties their requirements create and the fear of a rejection of their concerns and, ultimately, the loss of funding.¹⁷ Moreover, many of the funding contracts include flow-down clauses for sub-contracted organisations that require local partners to implement the same counter-terrorism measures. **However, local NGOs often lack the capacity and ability to implement them, which can result in the loss of the contract and, consequently, the impossibility of implementing programmes in certain areas.**¹⁸

Donor requirements for local partners and the beneficiary population call into question the principle of impartiality

3.2. Financial impact

One of the most important aspects for humanitarian organisations is the financial impact resulting from "bank de-risking", whereby banks adopt a policy of refusing to conduct banking transactions to designated areas where humanitarian organisations operate. This results in considerable delays in receiving funds and in some cases the inability to receive them.¹⁹ For example, **a study on Syria before this year's earthquake estimated that this risk reduction had reduced cash**

¹⁴ International Rescue Committee, *Counterterrorism and Humanitarian Impartiality. Independent review of IRC activities in Afghanistan, Somalia, and northwest Syria*, p.8. Available at: <https://www.rescue.org/sites/default/files/document/6284/counterterrorismandhumanitarianimpartiality.pdf>

¹⁵ Norwegian Refugee Council (NRC) (2018), *Principles under pressure. The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, p. 22. Available at: https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/nrc-principles_under_pressure-report-2018-screen.pdf

¹⁶ Ibid., p. 24.

¹⁷ Ibid.

¹⁸ ACH (2018), op. Cit., p. 15.

¹⁹ Gordon, S., and El Taraboulsi-McCarthy, S. (2018). *Counter-terrorism, bank de-risking and humanitarian response: a path forward Key findings from four case studies*. Policy Brief 72, Humanitarian Policy Group, p. 2. Available at: <https://cdn.odi.org/media/documents/12368.pdf>

availability by 35%.²⁰ The problem is even greater for local organisations, which have less capacity for action than large international NGOs, and for Muslim organisations, which have encountered even greater obstacles in accessing financial services, despite the fact that many other organisations depend on them to operate in places like Afghanistan, Somalia, Syria or Yemen.²¹

This policy is contributing to war economies and the expansion of informal financing mechanisms. A widespread example in the Middle East is the use of hawala - an informal transfer system based on trust and the reputation of agents that allows money to be moved quickly and extensively. On other occasions, it is the organisations' own staff who transport large sums of cash through conflict zones. **The result is a growing risk to people's own personal security, an increase in the cost of transfers, an encouragement of corruption and fraud derived from the lack of guarantees of many of these channels and, ultimately, greater difficulty in combating the financing of terrorism.** These bureaucratic hurdles also hinder the implementation of cash transfer programmes, despite being one of the key elements of the Grand Bargain on humanitarian financing presented at the World Humanitarian Summit in 2016.²²

Many organisations have lost funding for refusing to comply with some of the requirements imposed by donors

Another financial impact is the impact of donor requirements on project implementation and on the choice of local partners and beneficiary population. **Many organisations have lost funding for refusing to comply with some of the requirements imposed, particularly the targeting of beneficiaries, which many NGOs consider a red line.** On the other hand, the cost of complying with the requirements set by donors can vary between \$45,000 and \$300,000 per year, with some organisations going as high as \$1 million in terms of salaries, licences, dedicated units and specific legal studies.²³

3.3. Legal impact

Sanctions established against groups or individuals can result in legal liabilities for organisations and, ultimately, individual workers. The diversity of sanctions regimes and lists of designated terrorist entities creates uncertainty among humanitarian organisations. In particular, **US law criminalises international organisations that maintain relations with designated terrorist groups, even if they do not receive funding from the US government.**

On the other hand, Resolution 2178 (2014) on foreign terrorist fighters calls on states to criminalise travel or attempted travel to designated territories for the purpose of "perpetrating, planning,

²⁰ Theiler, Zach (2023). *How vague money-laundering and counter-terror rules slow aid*, The New Humanitarian. Available at: <https://www.thenewhumanitarian.org/analysis/2023/05/23/how-vague-money-laundering-and-counter-terror-rules-slow-aid>

²¹ Gordon, S., and El Taraboulsi-McCarthy, S. (2018), op. Cit., p. 2.

²² VOICE (2021). *Adding to the evidence. The impacts of sanctions and restrictive measures on humanitarian action. Survey Report*, p.10. Available at: <https://voiceeu.org/publications/adding-to-the-evidence-the-impact-of-sanctions-and-restrictive-measures-on-humanitarian-action.pdf%20%20bid.,%20p.%2015>.

²³ Ibid., p. 15.

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preparing or participating in terrorist acts, or the provision or receipt of terrorist training". However, due to the difficulty of determining such purpose, **many states have criminalised entry into or staying in areas under the control of terrorist groups without taking into account other elements to be considered, creating problems for organisations operating in areas under the control of ISIL/Al-Qaeda and its affiliates or Boko Haram.**²⁴

On the other hand, national counter-terrorism legislation also has legal implications. Because each country interprets support for terrorism in its own way, organisations can be affected by operating in certain territories under the control of armed opposition groups. In Syria, the Syrian government denies operating permits to organisations implementing projects in areas in the northwest and northeast of the country controlled by opposition groups.²⁵

This issue further impacts local organisations, which are on the front line of operations and are often responsible for negotiating access to areas under the control of designated terrorist groups. As a consequence, local staff of the organisations can be criminally prosecuted in their home countries.²⁶

3.4. Security impact

Operating in contexts of armed conflict already presents risks for the staff of organisations, but counter-terrorism legislation increases security risks. For example, **donor requirements that prohibit the implementation of programmes in certain areas call into question the impartiality of organisations and put their security at risk as they may be perceived as partisan, increasing the risk that they may be targeted.**²⁷ For example, in Somalia, where there is a humanitarian exemption enabling organisations to operate in areas under Al-Shabaab control, most have been reluctant to do so due to security concerns arising from the armed group's failure to recognise the impartiality of humanitarian assistance.²⁸

3.5. Reputational impact

Last, but not least, is the impact on the reputation of organisations. On the one hand, the perception that assistance provided by an organisation may be co-opted by designated terrorist groups for their own benefit may have consequences in relation to donors, who could withdraw their funding from the organisation or blacklist it. On the other hand, **the requirements that donors impose for compliance with counter-terrorism**

²⁴ Gillard, E. C. (2021) *IHL and the humanitarian impact of counterterrorism measures and sanctions. Unintended ill effects of well-intended measures*. Research Paper, Chatham House, p. 16- 17. Available at: https://www.chathamhouse.org/sites/default/files/2021-09/2021-09-03-ihl-impact-counterterrorism-measures-gillard_0.pdf

²⁵ IRC (2021), op. cit., p. 7.

²⁶ NRC (2018), op. cit., p. 23.

²⁷ Ibid., p. 20.

²⁸ Ibid., p. 23.

legislation, particularly in relation to the vetting and selection of local partners and beneficiaries, call into question the impartiality of the organisation and its reputation among the local population, resulting in a rejection of the organisation and it being impossible for it to implement projects in remote areas where only local partners have access.

Counter-terrorism legislation increases security risks for staff of humanitarian organisations

Some examples of the impact on humanitarian work

In 2016, the Israeli government accused the director of World Vision's Gaza operations of diverting funds to Hamas. Australia, the largest donor to World Vision's Gaza programme, suspended funding to the organisation in Palestine. Both Australian government investigations and a forensic audit concluded that there was no evidence to suggest a diversion of funds.

In 2017, the American University in Beirut (AUB) reached a \$700,000 settlement with the US government after being charged under the False Claims Act with providing media training to representatives of sanctioned media outlets, considered to be providing material support to designated terrorist groups.

In 2018, Norwegian People's Aid (NPA) reached a \$2 million settlement, also under the False Claims Act, on charges of providing material support to designated terrorist groups in a democracy-building project targeting youth in Gaza between 2012 and 2016. NPA was indicted despite not having accepted US funding in the country.

In 2020, in Afghanistan, a donor asked the IRC to screen proposed beneficiaries for a project so as to comply with counter-terrorism measures, but without taking into account the humanitarian principles of impartiality, neutrality and independence. The NGO refused to change its position and the programme was not approved.

In 2021, in Cameroon, MSF staff were charged and arrested for complicity in a terrorism offence for transporting injured people and carrying out aid activities in areas controlled by groups considered to be criminal or terrorist organisations.

In 2022, Israel arrested and imprisoned Spanish aid worker Juana Ruiz, who was accused of diverting funds to the Popular Front for the Liberation of Palestine (PFLP) through her work for the Health Work Committees. The Spaniard, a resident of the West Bank, was subjected to a military judicial process and pleaded guilty to two charges, although she has always denied involvement with the PFLP.

Sources: Norwegian Refugee Committee (2018) *Principles under pressure. The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*. Available at: https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/nrc-principles_under_pressure-report-2018-screen.pdf
RTVE (2022) *La cooperante española Juana Ruiz queda en libertad tras diez meses detenida en Israel* [Spanish aid worker Juana Ruiz is released after 10 months in detention in Israel]. <https://www.rtve.es/noticias/20220207/juana-ruiz-queda-libertad/2283720.shtml>.

4

MITIGATING MEASURES TAKEN BY DONORS, LEGISLATORS AND NGOS

Growing awareness of the impact of counter-terrorism legislation on humanitarian work has led to the implementation of various measures and initiatives by the different players involved in the issue.

At the legal level, there have been a number of developments in recent years that offer some hope for an improvement in the situation. At the global level, there have been notable efforts to define clear parameters for compliance with human rights, IHL and other relevant regulations in the application of counter-terrorism measures. Since 2005, these elements have moved from being contained only in preambular paragraphs to being incorporated in the more operational parts, i.e. mandatory for member states.²⁹ **In 2019, the Security Council made the protection of humanitarian action in counter-terrorism contexts more explicit in Resolutions 2462 (2019) and 2482 (2019).** Paragraphs 24 of Resolution 2462 and 16 of Resolution 2482, respectively, encourage states to consider the "potential effects" of such measures, going beyond the obligation to ensure that such effects do not involve breaches of international humanitarian law.³⁰ In the financial sphere, in 2016, the Financial Action Task Force (FATF) reviewed its guidelines on the criminalisation of terrorist financing, revising its Recommendation 8 to ensure that its implementation is in line with a risk-based approach,³¹ and removed language describing NGOs as "particularly vulnerable" to terrorist financing.³²

In 2021, the Security Council passed Resolution 2615 allowing the processing and payment of funds, other financial assets or economic resources, and the provision of goods and services necessary to ensure the delivery of humanitarian assistance in Afghanistan.³³ Furthermore, Resolution 2664, of 2022, grants a permanent humanitarian exemption to asset freezing measures imposed by UN sanctions regimes, allowing the processing of funds and economic assets and the provision of goods and services necessary for the timely delivery of humanitarian assistance without them being considered a violation of those regimes. The provision will apply to the 1267/1989/2253 sanctions regime against ISIL (Da'esh) and Al-Qaeda for a period of two years and could be extended.³⁴

Resolution 2664, of 2022, grants a permanent humanitarian exemption to asset freezing measures imposed by UN sanctions regimes

²⁹ Gillard, E. (2021), op. cit., p. 17.

³⁰ CNULECT (2022), op. Cit., p. 27. Available at: https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2022/Jan/cted_ihl_ct_jan_2022.pdf

³¹ Financial Action Task Force (FATF), *Outcomes of the Plenary meeting of the FATF*, 19-21 October 2016. Available at: <https://www.fatf-gafi.org/en/publications/Fatfgeneral/Outcomes-plenary-october-2016.html>

³² VOICE (2021), op. cit., p. 8.

³³ UN Security Council Resolution 2615 (2021). Available at: <http://unscr.com/en/resolutions/doc/2615>

³⁴ United Nations (2022) Adopting Resolution 2664 (2022), *Security Council Approves Humanitarian Exemption to Asset Freeze Measures Imposed by United Nations Sanctions Regimes*. Available at: <https://press.un.org/en/2022/sc15134.doc.htm>

At the operational level, organisations have deployed mitigation measures and adaptation mechanisms

At the regional level, EU Directive 2017/541 limits the offence to the use of funds or property to commit or contribute to a terrorist act, and only criminalises travel for terrorist purposes directly connected to a terrorist objective. Many Member States have clauses in their legislation that protect humanitarian action from criminal liability. **In March 2023, the EU Council introduced a humanitarian exemption to 14 sanctions regimes, including the EU's autonomous listings, in line with Resolution 2664 (2022).**³⁵ In addition, numerous pieces of counter-terrorism legislation recently passed around the world include clauses to protect humanitarian action which, for reasons of space, cannot be dealt with in this article.

At the operational level, organisations have not waited for the regulatory framework to be put in place to deploy mitigation measures and adaptation mechanisms, which include:

- **Risk management approaches.** Humanitarian organisations have put in place numerous policies, procedures and systems to minimise the risk of aid diversion and other related risks. For example, **the NRC developed its *Risk Management Toolkit for Counterterrorism Measures* in 2015**, which sets out practical steps that organisations can implement to improve their risk management, always underpinned by humanitarian principles.³⁶ **The Inter-Agency Standing Committee (IASC) published its *Guidance on the Impact of Sanctions and Counter-Terrorism Measures on Humanitarian Operations* in 2021**, which sets out actions and good practices that organisations can implement to understand how they are being affected.³⁷
- **Remote management.** This is the practice of withdrawing international or at-risk staff while transferring programme responsibilities to local staff or partners. **In principle a temporary measure of last resort, it has been becoming increasingly common in recent years. Ultimately, it transfers risk to national staff and local partners, but does little to reduce the impact of counter-terrorism measures.**³⁸
- **Informal financing methods.** For organisations operating in areas where bank transfers are restricted, **the use of cash through informal methods is an alternative to meet programme costs.** However, they contribute to increased security risks for the organisations' staff and foster a corrupt and fraudulent system in which it is difficult to ensure that money is

³⁵ European Council (2023), *Humanitarian action: EU introduces exemptions to sanctions to facilitate the delivery of assistance*. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2023/03/31/humanitarian-action-eu-introduces-exemptions-to-sanctions-to-facilitate-the-delivery-of-assistance/>

³⁶ Norwegian Refugee Council (2015), *Toolkit for principled humanitarian action. Managing Counterterrorism Risks*. Available at: <https://www.nrc.no/shorthand/stories/counterterrorism-measures-and-principled-humanitarian-action/index.html>

³⁷ Inter-Agency Standing Committee (IASC) (2021) *Guidance Impact of Sanctions and Counterterrorism Measures on Humanitarian Operations*. Available at: <https://interagencystandingcommittee.org/system/files/2021-09/IASC%20Guidance%20to%20Humanitarian%20Coordinators%20-%20Impact%20of%20Sanctions%20and%20Counterterrorism%20Measures%20on%20Humanitarian%20Operations.pdf>

³⁸ NRC (2018), op. cit., p. 28.

not diverted to finance terrorism.³⁹ Meanwhile, **many organisations have stopped implementing cash-based projects due to obvious limitations.**

- **Advocacy activities.** Humanitarian organisations have launched campaigns and platforms to influence donors and legislators to bring about changes in the system to enable the delivery of humanitarian assistance. One success story has been **the establishment of the Global Coalition of Non-Profit Organisations on FATF, which has given organisations a voice in discussions and policy development related to terrorist financing.** The four core members of the coalition have a seat on the FATF private sector advisory forum, contributing to the revision of the FATF Guidelines in 2016.⁴⁰ The organisations have established dialogues not only at the UN level, but also with regional stakeholders and national governments to bring about legal and policy changes. They have also undertaken extensive research and communications activity to highlight the impact of counter-terrorism legislation and sanctions regimes on humanitarian action. A useful resource is the catalogue produced by InterAction, which includes various statistical resources and reports to better understand the issue.⁴¹

The real impact of the legal instruments depends on their incorporation into national legislation and practices

5 LIMITATIONS

Despite the progress made in recent years, there are still factors that limit the scope of the measures taken, both at the operational level by humanitarian organisations and at the legal level by governments. These include the following:

- **Lack of awareness on the part of governments and donors.** Although a number of states have led initiatives to protect humanitarian action from the impact of counter-terrorism legislation, **we cannot forget that this is a matter of national security, which generates disagreements when it comes to transposing the decisions of supranational organisations into national legislation.**
- **Limits of legal instruments.** Despite the approval of Resolution 2664 (2022) and the general humanitarian exemption it grants, there are still limitations to it. On the one hand, **its real impact depends on its incorporation into national legislation and practices, a generally long process and for which there are no guidelines,** resulting in different procedures in each jurisdiction. On the other hand, **the exemption only affects UN sanctions regimes while bilateral regimes are excluded from its**

³⁹ Ibid., p. 29.

⁴⁰ NRC (2018), op. cit., p. 30.

⁴¹ Interaction Catalogue <https://drive.google.com/drive/folders/1tfow8lq-tDqNvYUhKtaKpgT7wruZjWdK>

The use of humanitarian diplomacy can protect humanitarian actors against legal and security consequences

application.⁴² Moreover, the incorporation of this legislation may clash with other existing criminal legislation, such as the US laws on material support or the European Commission's 2022 Guidance Note, which appears to shift the burden of proof of conduct in accordance with the law to humanitarian actors.⁴³ Furthermore, **the exemption only applies to asset freezing measures and not to other types of sanctions such as travel bans and sectoral embargoes, which restrict humanitarian organisations' access to certain areas and equipment.** Finally, the resolution refers only to humanitarian assistance, but leaves out other protection activities, or the development of infrastructure necessary for the provision of that assistance, in line with the triple nexus approach, which may fall outside the scope of this resolution.⁴⁴ As the case of Somalia demonstrates, the establishment of exemptions by itself is not enough if it is not accompanied by guarantees from donors and awareness-raising efforts within organisations.

- **Domestic legislation used for other purposes.** In many cases, the development of counter-terrorism legislation hides other reasons. **In countries whose governments have a dubious record of protecting human rights, regimes in power use legal instruments to persecute the opposition, both armed and civilian, with the aim of weakening it.** Meanwhile, certain regimes have used this concern to limit humanitarian access, such as the al-Assad regime which limited access to aid in northern Syria after the earthquake.⁴⁵ In this sense, **the use of humanitarian diplomacy by donors can be an instrument that allows for access for humanitarian actors and their protection against legal and security consequences to be guaranteed.**
- **Banks' aversion to risk.** As private companies, banks and other financiers act in their own benefit. Despite the recommendations issued by the FATF and the support that donors generally provide to humanitarian organisations to help them process the financing granted, many financial entities refuse to work with NGOs or end their relationship with them in the middle of a financing process.
- **Communication problems within the humanitarian organisations themselves.** A lack of internal communication within organisations results in difficulties in implementing the counter-terrorism measures that donors request. **On many occasions, legal departments are not in contact with programme departments, especially those that are based in the field and must implement these measures in a practical way.** Despite the development of policies, procedures and tools to better understand these issues, there is a lack of internal training and support.
- **Difficulty of establishing common positions for joint advocacy.** Not all organisations have the same positions regarding the solution to be taken against the impact of counter-terrorism

⁴² Crystal, C. (2023) *Landmark UN Humanitarian Sanctions Exemption Is a Massive Win but Needs More Support*. Carnegie Endowment for International Peace. Available at: [Landmark UN Humanitarian Sanctions Exemption Is a Massive Win but Needs More Support](#)

⁴³ Fink, N. (2022) *Mind the Gap: UNSC Counterterrorism, Sanctions, and Humanitarian Action*. International Peace Institute. Available at: [Mind the Gap: UNSC Counterterrorism, Sanctions, and Humanitarian Action IPI Global Observatory](#)

⁴⁴ Crystal, C. (2023), op. cit.

⁴⁵ Ibid.

measures. **While some organisations are more vocal on the matter, others raise concerns regarding the negative consequences that an open complaint may have on their work.** For example, on the issue of humanitarian exemptions, there are organisations that believe that the adoption of these will actually limit their operations, while others prefer the exemption of specific activities, and others advocate for total exemptions.⁴⁶ There is also a lack of understanding of the reality that counter-terrorism legislation presents, as well as a reluctance to share information for fear of experiencing negative consequences on the part of donors.

Not all organisations have the same positions regarding the solution to be taken against the impact of counter-terrorism measures

6 CONCLUSIONS

The development of counter-terrorism legislation in recent decades has had and continues to have a considerable impact on humanitarian action, especially by clashing with, and sometimes not respecting, international humanitarian law (IHL) in contexts of armed conflict where groups designated as terrorists operate. In these cases, the consequences for humanitarian organisations are very negative in operational, financial, legal, reputational and security terms, and, ultimately, prevent them from being able to provide impartial humanitarian assistance.

Although recent developments aimed at facilitating the provision of humanitarian assistance are positive, especially the humanitarian exemption established by UN Security Council Resolution 2664 (2022), **more efforts need to be made to encourage the transposition of the resolution into national legislation in a way that facilitates the work of humanitarian organisations.** This should allow clear guidelines to be established that minimise the risk for financial entities in working with humanitarian organisations. At the operational level, it is equally essential that multilateral organisations and donor governments contribute to facilitating the access and delivery of humanitarian assistance, especially through humanitarian diplomacy. On the other hand, humanitarian organisations themselves must take measures to improve their processes of internal communication and capacity development in relation to counter-terrorism issues, as well as work together to establish strong alliances that can influence the issues that impact the development of their mandates and activities.

⁴⁶ NRC (2018), op. cit., p. 29.

PHOTO:
Two women walk with their children among the rubble of the crumbling houses by the earthquakes that devastated the Herat region of western Afghanistan in October 2023.

AFGHANISTAN © PAUL ODONGO

