

# **UNDERSTANDING HUMANITARIAN EXEMPTIONS: U.N. SECURITY COUNCIL SANCTIONS AND PRINCIPLED HUMANITARIAN ACTION**

**Working Group Briefing Memorandum**

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**April 2016**

## **Note from PILAC**

This Working Group Briefing Memorandum arose out of a request raised at the November 2015 Workshop of the Senior Law and Policy Working Group of the Counterterrorism and Humanitarian Engagement (CHE) Project at Harvard Law School. Since 2012, the CHE Project, which is now part of the HLS Program on International Law and Armed Conflict, has conducted independent research on dilemmas at the intersection of humanitarian action and counterterrorism measures. Building on that ongoing analysis, the CHE Project has briefed senior decision-makers in international humanitarian NGOs, U.N. humanitarian and counterterrorism bodies, and governments. At the November 2015 Workshop, senior humanitarian operators requested additional information and analysis on so-called “humanitarian exemptions.” Without wading into broader associated debates or adopting a particular normative position, this Briefing Memorandum outlines, in a question-and-answer format, some of the foundational issues. The primary target audience is the Senior Law and Policy Working Group of the CHE Project and other humanitarian actors.

Katie King, a J.D. candidate at Harvard Law School and a PILAC Research Assistant, drafted this Working Group Briefing Memorandum, which Naz K. Modirzadeh (PILAC Director and Lecturer on Law at HLS) and Dustin A. Lewis (PILAC Senior Researcher) also contributed to. This briefing memorandum, as well as additional information about and the publications of the CHE Project, are available free of charge online at <http://pilac.law.harvard.edu>.

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## What is principled humanitarian action? What are its main activities?

Principled humanitarian action is generally defined in relation to the principles of *independence*, *impartiality* (consideration only of need, without discrimination), *neutrality* (not taking sides), and *humanity* (the alleviation and prevention of human suffering). The term “principled” is used to distinguish humanitarian action that is instructed by those values from action that is not. For example, an actor who provides food and shelter in order to support one party militarily over another in an armed conflict would not qualify as “principled humanitarian action.”

The main intended beneficiaries of principled humanitarian action are civilians, as well as (other) people not or no longer participating in hostilities. Its primary activity is the provision of medical care, food, water, and other supplies indispensable for survival. In pursuing that goal, actors engaged in principled humanitarian action may need to negotiate access to their intended beneficiaries and, in doing so, may be required by domestic or other (de facto) authorities (who, for instance, control territory where civilians are located) to pay a registration fee. Principled humanitarian action typically occurs in areas affected by armed conflict as defined in international humanitarian law (IHL), though it may also take place in relation to natural disasters or other forms of emergencies.

## What Security Council-imposed sanctions regimes implicate humanitarian actors?

In recent decades, the United Nations Security Council has instituted an increasingly broad set of sanctions. The power to develop those sanctions derives from the authority granted in the UN Charter to the Security Council in matters of international peace and security.

UN Security Council decisions are legally binding primarily on member states. As a matter of international law, those decisions are typically considered not to be capable in general of legally binding UN funds, agencies, and bodies;<sup>1</sup> non-governmental organizations; or individuals. However, as a matter of policy, UN funds, agencies, and bodies consider themselves bound to comply with Security Council resolutions, where applicable.<sup>2</sup> And, in order to carry out a particular decision of the Security Council, a member state may consider it necessary to implement domestic measures requiring that NGOs, individuals, and others act in conformity with the underlying obligation. Through that domesticization process, the sanctions regimes might become binding on humanitarian NGOs.

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1. UN Charter art. 25, 48.

2. See, e.g., United Nations Development Program, *Procurement Ethics*, CONTRACT AND PROCUREMENT (Jan. 31, 2008), <https://info.undp.org/global/popp/cap/pages/ethics.aspx>.

Some elements of principled humanitarian action could potentially be implicated by thirteen of the sanctions regimes established by the Security Council. These regimes cover certain actions related to:

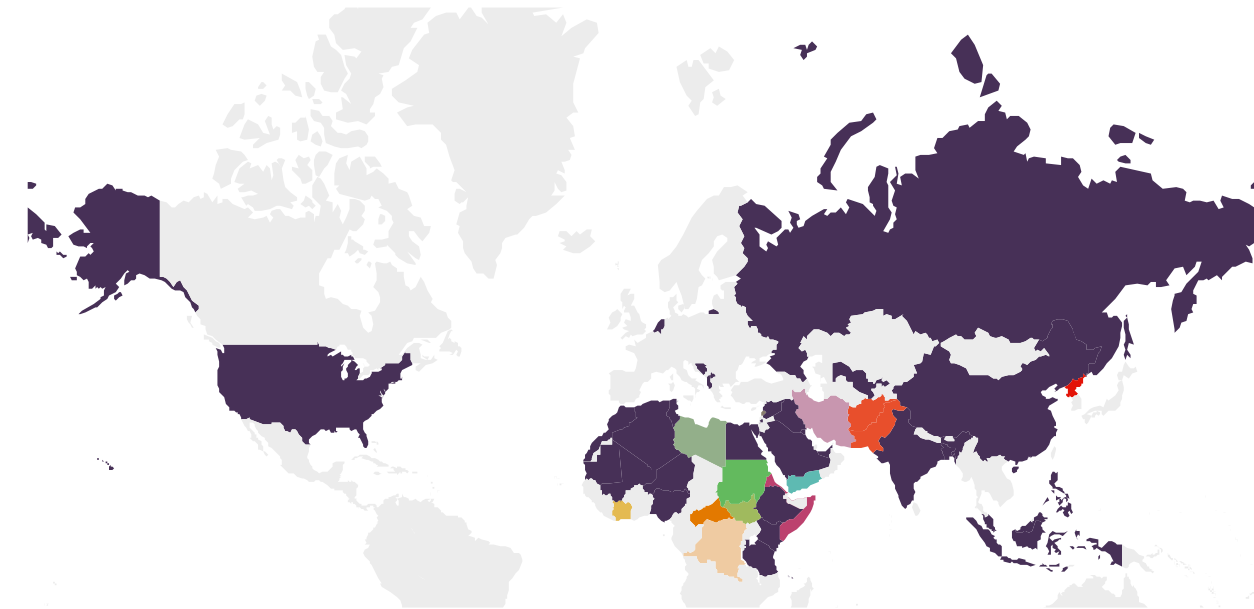
- The Democratic Republic of the Congo (Res. 1493 and subsequent resolutions);
- Côte d'Ivoire (Res. 1572 and subsequent resolutions);
- Sudan (Res. 1591 and subsequent resolutions);
- Lebanon (Res. 1636);
- North Korea (Res. 1718 and subsequent resolutions);
- Iran (Res. 1737 and subsequent resolutions);
- Somalia and Eritrea (Res. 1916 and subsequent resolutions);
- Libya (Res. 1970 and subsequent resolutions);
- Central African Republic (Res. 2127 and subsequent resolutions);
- Yemen (Res. 2140 and subsequent resolutions);
- South Sudan (Res. 2206);
- Al-Qaeda, the so-called Islamic State of Iraq and the Levant (ISIL), and designated associates (Resolutions 1267/1989 and subsequent resolutions); and
- The Taliban and designated associates (Res. 1988 and subsequent resolutions).

(Under the respective sanctions regime, associates of ISIL and al-Qaeda and of the Taliban can include both individuals and organizations.)

With respect to each sanctions regime, member states are required to, among other things, ensure that “their nationals or any persons within their territories” do not make available “any funds, financial assets or economic resources” to or for the benefit of certain individuals and entities enumerated by the relevant Security Council body. The al-Qaeda sanctions regime goes further than most in elaborating on the meaning of this restriction. For instance, UNSCR 2161 (2014) provides that “costs incurred with respect to transportation and lodging” count as proscribed economic resources concerning al-Qaeda and its associates.

The Security Council has crafted these obligations so broadly as to potentially implicate some activities of individuals and organizations engaged in principled humanitarian action. Since humanitarian organizations’ members and leadership will typically qualify as nationals or persons within the territory of some state, the asset freeze could be applied

# UN Security Council Sanctions That Potentially Implicate the Work of Principled Humanitarian Actors\*



- Res. 1267/1989 et seq. (ISIL & al-Qaeda) & Res. 1988 et seq. (Taliban) ● Res. 1267/1989 et seq. (ISIL & al-Qaeda)
- Res. 2127 et seq. (Central African Republic) ● Res. 1572 et seq. (Cote d'Ivoire) ● Res. 1493 et seq. (Democratic Republic of the Congo)
- Res. 1267/1989 et seq. (ISIL & al-Qaeda) & Res. 1916 et seq. (Somalia/Eritrea) ● Res. 1988 (Taliban) et seq. & Res. 1737 (Iran)
- Res. 1718 et seq. (North Korea) ● Res. 1267/1989 et seq. (ISIL & al-Qaeda) & Res. 1636 (Lebanon)
- Res. 1267/1989 et seq. (ISIL & al-Qaeda) & Res. 1970 et seq. (Libya) ● Res. 2206 (South Sudan)
- Res. 1267/1989 et seq. (ISIL & al-Qaeda) & Res. 1591 et seq. (Sudan)
- Res. 1267/1989 et seq. (ISIL & al-Qaeda) & Res. 2140 et seq. (Yemen)

\*This map reflects information culled by PILAC researchers from the websites of UN Security Council sanctions bodies as of March 2016. We did not include all UNSC sanctions regimes but rather focused on those through which, for example, member states are required to ensure that “their nationals or any persons within their territories” do not make available “any funds, financial assets or economic resources” to or for the benefit of certain individuals and entities enumerated by the relevant UNSC body. Hence, we did not, for instance, include the Guinea Bissau or Liberia sanctions regimes, nor the sanctions concerning to the assets of the former Iraqi government and the assets of Saddam Hussein, senior Iraqi government officials, and their family members. The territories listed for the state-specific sanctions regimes are the territories of the states that are the primary subject of the relevant sanctions regime. The territories listed for the ISIL/Al-Qaeda sanctions and for the Taliban sanctions are those territories where the relevant Security Council sanctions body has identified either an address or an operational presence of the sanctioned entity. Some territories are not only subject to a state-specific sanctions regime but are also listed as the address or operational presence, according to the relevant Security Council sanctions body, of (entities associated with) ISIL/Al-Qaeda or the Taliban. The boundaries and names shown and the designations used on this map do not imply endorsement or acceptance by PILAC or any other entity.

in relation to them. Under a literal reading of the Security Council decision, the fees, tolls, and taxes that a humanitarian organization may deem it necessary to pay in order to access civilians in need of assistance would qualify as “funds, financial assets or economic resources.” In that case, if the authority to whom the humanitarian organization pays the fees is subject to the sanctions, then the humanitarian organization would be susceptible to punishment or other consequences under the domestic measures implemented to carry out the UN sanctions regime. At least in relation to al-Qaeda, covering the cost of travel of an individual on the sanctions list—for example, in order to facilitate negotiations aimed at accessing civilian beneficiaries—would contravene the UN sanctions. Organizations relying on government donors might face additional related challenges: many major humanitarian government donors insert into their grant agreements a requirement of compliance with Security Council resolutions.<sup>3</sup>

In relation to most sanctions regimes (though not all, as will be addressed below), the relevant Security Council decisions do not expressly exclude humanitarian actors from the reach of the economic proscriptions. The lack of an explicit exclusion means that the domestic measures implementing those sanctions regimes may implicate the conduct of those humanitarian actors.

Security Council-mandated sanctions regimes also commonly include arms embargos and travel bans. Yet, in certain respects, those regimes seem to permit some types of activities involved in humanitarian response or, at least, may be interpreted as minimizing a sanction-induced “chilling effect” on humanitarian organizations. For example, some of those sanctions regimes exempt from the arms embargos non-lethal military equipment and protective clothing so long as the equipment and clothing are intended solely for humanitarian use.<sup>4</sup> Moreover, while asset-freeze provisions generally require states to prevent their nationals and persons within their territory from violating the asset freeze, travel-ban provisions do not; the latter require that states “take the necessary measures” to prevent sanctioned individuals from entering their territory. This difference allows states some discretion in crafting their travel bans. Thus, states’ efforts to prevent travel do not need to involve penalizing a humanitarian actor who extends an invitation to a negotiation session to a sanctioned individual. Instead, the state could, for example, take administra-

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3. See, e.g., Counterterrorism and Humanitarian Engagement Project, *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts*, Research and Policy Paper 22 (2014), [http://blogs.harvard.edu/cheproject/files/2013/10/CHE\\_Project\\_-\\_Counterterrorism-related\\_Humanitarian\\_Grant\\_Clauses\\_May\\_2014.pdf](http://blogs.harvard.edu/cheproject/files/2013/10/CHE_Project_-_Counterterrorism-related_Humanitarian_Grant_Clauses_May_2014.pdf).

4. See, e.g., U.N. Security Council Resolution 1333 para. 6 (2000); U.N. Security Council Resolution 1493 para. 21 (2003).

tive measures to prohibit the individual's entry and penalize the individual if he or she attempts to circumvent those measures. However, in the course of implementing these travel bans domestically, states could interpret the UN requirements broadly and prohibit actors from facilitating the travel of sanctioned actors. States could insert provisions into grant agreements, for example, requiring humanitarian actors not to facilitate such travel. Finally, even if the humanitarian organization itself did not risk punishment or loss of donations through facilitating travel arrangements, travel bans could inhibit the organization's ability to engage in mediation, negotiation, or training that requires the sanctioned party to travel.

### **In what other ways might principled humanitarian action be restricted by sanctions regimes?**

Many states' domestic laws criminalize the provision of material support of terrorism, though the terminology might differ. In addition to the previously mentioned cases of paying taxes, registration fees, or checkpoint fees—which could potentially violate material-support laws if the authority to which the fee was paid was a proscribed terrorist organization or an affiliate of one—other activities of humanitarian organizations might violate these counterterrorism laws. An International Committee of the Red Cross report suggested that those activities might include:

visits and material assistance to detainees suspected of or condemned for being members of a terrorist organization; facilitation of family visits to such detainees; first aid training; war surgery seminars; IHL dissemination to members of armed opposition groups included in terrorist lists; assistance to provide for the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and largescale assistance activities to internally displaced persons, where individuals associated with terrorism may be among the beneficiaries.<sup>5</sup>

### **What is a humanitarian exemption?**

The term "humanitarian exemption" is not a term of art, and it might relate to at least two different concepts.

First, "humanitarian exemption" is sometimes used to describe exemptions for *individuals*—especially "bad actors" who, due to their designation, may need an exemption to obtain life-saving goods or services. In other words, these are "exemptions designed to allow...

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5. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 52 (2011), <https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>.

individuals [on UN sanctions lists] to receive assistance on a case by case basis in response to specific humanitarian needs.”<sup>6</sup> For example, a sanctioned individual might be permitted to travel to another country in order to receive medical assistance or to participate in peace negotiations. He or she might be given access to his or her funds in order to pay for legal assistance.

Second, a different type of so-called “humanitarian exemption,” and the focus of this briefing memorandum, is an exemption for humanitarian organizations and their actors—in other words, for the “good actors” who constitute the *sector* of principled humanitarian actors. This sectoral type of humanitarian exemption carves out a space in sanctions and counterterrorism regimes for forms of principled humanitarian action, allowing humanitarian actors to deliver their services without the risk of contravening those regimes. For example, this sectoral type of humanitarian exemption could specify that, if a principled humanitarian actor engaged in a certain course of conduct and took particular precautions in doing so, the person would not have violated the relevant UN sanctions regime.

Thus humanitarian exemptions for individuals and for the principled humanitarian sector are different. Most basically, individual exemptions are directed towards individuals whom the relevant Security Council body has designated. Sectoral exemptions are designed to help good-faith humanitarian actors avoid punishment for activities within the scope of their mission. Also, the relevant UN Sanctions Committee grants a humanitarian exemption for an individual typically in response to a specific need that has arisen—that is, on a case-by-case basis. Though sectoral humanitarian exemptions could also be granted on such a case-by-case basis (for example, to a specific organization), another option is a standing sectoral exemption. The main benefit of such a standing exemption is that it would provide advance approval for humanitarian action, without the organization and individual humanitarian actors needing to seek authorization before each intervention.

### **What is the debate surrounding sectoral humanitarian exemptions?**

Proponents of sectoral humanitarian exemptions believe that such exemptions are necessary in order to provide legal clarity to help facilitate the provision of humanitarian assistance. By definition, principled humanitarian actors want to ensure that aid goes to needy individuals. Those actors have therefore developed internal policies and procedures to help prevent or at least mitigate diversion of assistance. Further, proponents generally believe that even in the event that some money does go to sanctioned or otherwise

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6. High Level Review of United Nations Sanctions, *UN Sanctions: Humanitarian Aspects and Emerging Challenges – Working Group 3 Chairperson’s Report 5* (2015), [http://www.hlr-unsanctions.org/HLR\\_WG3\\_report\\_final.19.1.15.pdf](http://www.hlr-unsanctions.org/HLR_WG3_report_final.19.1.15.pdf).



proscribed individuals and entities, it will be minimal when seen within the broader context and will be offset by the alleviation of human suffering the humanitarian organizations will offer. Proponents have also argued that the sectoral humanitarian exemptions that do exist are too limited in scope; are too ad hoc in nature; and are insufficiently clear.

Objections to sectoral humanitarian exemptions fall along two main lines. First, some critics fear that exemptions will ultimately limit humanitarian action. The underlying concern is that the creation of explicit humanitarian exemptions will imply that exemptions are always necessary. Under that logic, the absence of an explicit exemption would mean that no (other) sufficient authorization already exists. According to this line of thinking, if past sanction regimes are not revised or addressed by future sectoral humanitarian exemptions or if sectoral humanitarian exemptions are difficult to negotiate in certain situations, humanitarian organizations could end up feeling more restricted. Thus interpreting silence as the lack of authorization, principled humanitarian organizations may ultimately decide not to act, resulting in fewer people in need receiving assistance from those organizations. Additionally, critics argue that requesting exemptions will suggest that existing provisions and rules of IHL as well as commitments to humanitarian action by the United Nations and donor states are not currently strong enough to fully support humanitarianism. Further, some humanitarian actors have expressed the concern that an exemption would be seen as an endorsement of them by the exempting state or body. Such an endorsement, under this reasoning, would risk tarnishing the humanitarian actors' reputation for neutrality and independence. Since its reputation is one of the main currencies of a principled humanitarian organization, being perceived as non-principled in these ways may ultimately inhibit the organization's access to people in need.

Second, some opponents object to humanitarian exemptions on the grounds of state security. They argue that exemptions could be used as a loophole to enable people masquerading as principled humanitarian actors to funnel financial support to sanctioned individuals and entities. Moreover, this line of argument holds that, if humanitarian actors are permitted to provide assistance to a particular location, terrorists themselves might even pretend to be humanitarian actors as a cover for their terrorist activities. Finally, there is a concern in this connection that sectoral humanitarian exemptions will be interpreted as permission to engage in bribery, thus expanding the degree to which bribes are paid.

### **What models of sectoral humanitarian exemptions exist?**

Sectoral humanitarian exemptions can, in principle, vary widely in what they cover in terms of their in geographic, material, personal, and temporal scope. For example, the exemption

might apply only in relation to situations of armed conflict. An exemption could be limited to covering only certain humanitarian activities or covering activities that take place only in certain territories. Additionally, an exemption might apply only to certain actors, such as UN agencies (as is the case with the Somalia exemption discussed below), or only for a certain time frame (as was initially the case for the Somalia exemption). Beyond matters of scope, there are different options for the creation and the form of sectoral humanitarian exemptions.

### *International Models*

So far, UN Security Council practice has demonstrated one form of (partial) sectoral humanitarian exemptions: the decision-specific exemption. The most discussed example applies to Somalia and Eritrea and was established in UNSCR 1916 (2010). Though the exemption was initially limited to one year, the Security Council has renewed it each time the issue has arisen.<sup>7</sup> The exemption establishes that “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” will not result in an asset freeze.<sup>8</sup> On its terms, this exemption does not cover all humanitarian organizations.

Another decision-specific example, albeit one addressed to states, comes from UNSCR 2009 (2011), which pertains to the Libya sanctions. Under this decision, the asset freeze does not apply to economic resources connected with the Central Bank of Libya, the Libyan Arab Foreign Bank, the Libyan Investment Authority, and the Libyan Africa Investment Portfolio if the acting state’s intent is to direct one of those entities towards certain purposes. Those purposes include “humanitarian needs,” “fuel, electricity and water for strictly civilian uses,” and “establishing, operating, or strengthening institutions of civilian government and civilian public infrastructure.”<sup>9</sup>

Any model that relies on a Security Council decision could face some difficulties, as it would likely require domestic codification (or the equivalent, depending on the jurisdiction) in order to be effective. (As an example, Security Council decisions have mandated that states establish certain terrorist acts as serious criminal offenses in domestic laws and

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7. UN Security Council Resolutions 1972 (2011), 2060 (2012), 2111 (2013), 2182 (2014), 2244 (2015).

8. UN Security Council Resolution 1916 para. 5 (2010).

9. UN Security Council Resolution 2009 para. 16 (2011).

regulations,<sup>10</sup> sometimes with success.<sup>11</sup>) Further, Security Council action in this area could be conceptualized as a way to help ensure states fulfill a preexisting obligation, where applicable, to permit certain forms of humanitarian assistance.<sup>12</sup> Nevertheless, although legally obliged to carry out decisions of the Security Council, in practice sometimes a state does not expressly incorporate the obligations entailed in those decisions into its domestic law. For example, the United States has not incorporated the humanitarian exemption imposed by the Security Council in UNSCR 1916 (2010) into U.S. domestic laws and regulations.<sup>13</sup> Without sufficient national-level guarantees, humanitarian actors are not fully legally protected.

### *Domestic Models*

Even absent a Security Council mandate to do so, a state could on its own initiative promulgate a sectoral humanitarian exemption into domestic laws and regulations. In the United States, certain such exemptions arguably exist—though they are limited in scope and do not establish a general sectoral humanitarian exemption, including from counterterrorism laws and regulations. In parallel with the existing Security Council exemptions that apply only in relation to the decisions that contain them, U.S. sectoral humanitarian exemptions take the form of provisions within specific laws that apply only to those specific laws. Moreover, those U.S. sectoral humanitarian exemptions are also subject to further limitations. The U.S. material-support law, in addition to exempting “medicine [and] religious materials,”<sup>14</sup> includes a requirement that support be provided “knowingly” to a proscribed organization (either a designated terrorist organization or an organization that “has engaged or engages in terrorist activity”) in order to violate the statute.<sup>15</sup> That knowledge element could conceivably protect humanitarian actors who unknowingly provide prohibited resources to such organizations. However, it bears emphasis that the Supreme Court has affirmed that whether a person intends to support terrorist activities is irrelevant.<sup>16</sup>

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10. See, e.g., UN Security Council Resolution 1373 para. 2(e) (2001).

11. See, e.g., Kim Lane Scheppele, *The International Emergency after 9/11*, 6 *INSIGHTS ON L. & Soc’y* 1, 3–4 (2006) (describing how Mexico and Venezuela dropped their initial domestic legal objections to a UNSC-mandated counterterrorism policy).

12. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 23 (for international armed conflicts).

13. See Kate Mackintosh, *Holder v. Humanitarian Law Project: Implications for Humanitarian Action: A View from Médecins Sans Frontières*, 34 *SUFFOLK TRANSNAT’L L.R.* 507, 514 (2011); 80 Fed. Reg. 191932015.

14. 18 U.S.C § 2339A (2009).

15. 18 U.S.C § 2339B (2015).

16. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010).

In addition, the U.S. material-support statute allows for the Secretary of State, in concurrence with the Attorney General, to “approve the provision of “personnel,” “training,” and “expert advice and assistance” that might otherwise qualify as material support.<sup>17</sup> Yet the protection offered by the Secretary of State-approved exemption is also limited. It cannot apply to “the provision of any material support that may be used to carry out terrorist activity,”<sup>18</sup> as defined in another statute.<sup>19</sup> Further, some humanitarian actors have objected to the Secretary of State-approved exemption’s case-by-case nature on three grounds. First, it may prevent prompt responses in emergency situations. Second, it provides no guiding criteria for when applications for exemption should be approved. And third, due to its exclusion of food, water, and medical aid (other than medicine itself, which is already exempted under the statute), the Secretary of State-approved exemption is too narrow. This U.S. law thus does not contain the sort of exemption envisioned by proponents of a sectoral humanitarian exemption.

The International Emergency Economic Powers Act (IEEPA) is another U.S. law that authorizes the President to freeze assets—in this case in connection with individuals or groups listed by the President or the Department of the Treasury as “specially designated global terrorists.” IEEPA establishes an exemption for “donations...of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering.”<sup>20</sup> This exemption is subject to the qualification that the President is authorized to freeze even those donations if they would “seriously impair” his or her ability to respond to the emergency, are a result of coercion, or would endanger U.S. military forces engaged in hostilities.<sup>21</sup> In practice, since the issuance in 2001 of Executive Order 13224, the President has repeatedly instituted such freezes in executive orders related to armed groups or terrorism.<sup>22</sup>

Australia has adopted a similar model of including within a relevant law that might (otherwise) restrict principled humanitarian action a sectoral humanitarian exemption to that law. Under that Australian exemption, a person will not be found to have impermissibly associated with a terrorist organization, or committed one of certain other criminal violations, if he or she “engages in conduct solely by way of, or for the purposes of, the provision of aid of a humanitarian nature.”<sup>23</sup>

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17. *Id.*

18. 18 U.S.C. § 2339B (2015).

19. 8 U.S.C. § 1182(a)(3)(B)(iii) (2013).

20. 50 U.S.C. § 1702 (2001).

21. *Id.*

22. See Antonio Galli, *The U.S. Humanitarian Assistance Facilitation Act: Maintaining Humanitarian Space in U.S. Legislation*, 5 J. INT’L HUMANITARIAN LEGAL STUD. 130, 133 (2014).

23. See, e.g., Criminal Code Act 12 of 1995 s. 102.8 (Austl.).

Besides a statute that contains an exemption with respect to its own provisions, another potential model for domestic exemptions is the issuing of agency rules and guidance or individual exemptions, irrespective of whether a statute requires that exemption. The U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) has taken one step in this direction by amending its regulations on Sudanese and Iranian sanctions to issue general licenses that authorize the exportation of food or medicine (or both) to certain areas.<sup>24</sup> In an attempt to help alleviate some NGOs' concerns, OFAC has also issued policy guidance to NGOs providing humanitarian assistance by recognizing that in "a dangerous and highly unstable environment combined with urgent humanitarian need...some humanitarian assistance may unwittingly end up in the hands of members of a designated group. Such incidental benefits are not a focus for OFAC sanctions enforcement."<sup>25</sup> However, this guidance does not have the force of law.

### **Could a humanitarian exemption be broader-based and more long-lasting than the models implemented thus far?**

In addition to exemptions contained within sanction-creating laws or resolutions and exemptions created through administrative action, states and intergovernmental organizations, such as the United Nations, could consider another option: a standing, all-purpose, sector-wide humanitarian exemption. If implemented through domestic action, such an exemption would likely need to be a law (at least for the purpose of U.S. jurisdiction). In the United Nations, such an exemption may be established, for example, as a decision forming part of an omnibus Security Council resolution. As conceptualized by the proponents of such a measure, an omnibus resolution would need to extend the exemption so that it encompasses all relevant humanitarian actors and thus not only UN actors and their implementing partners, which is one of the limitations currently entailed in the Somalia and Eritrea humanitarian exemption. Moreover, according to its proponents, such an omnibus resolution would need to apply the exemption without geographic restrictions. In order to be practical and politically feasible, though, the resolution would likely also have to address some of the previously mentioned concerns, including that an insufficiently tailored exemption may risk facilitating bribery or support for terrorism.

Proposed U.S. legislation, the Humanitarian Assistance and Peacebuilding Protection Act, sits between an omnibus exemption and an exemption to a statute contained in that statute: it would amend the material-support law and IEEPA to allow communication with sanctioned

24. 31 C.F.R. 538, 560 (2015).

25. U.S. Department of the Treasury, Office of Foreign Assets Control, Guidance Related to the Provision of Humanitarian Assistance by Not-for-Profit Non-Governmental Organizations (2014), [http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ngo\\_humanitarian.pdf](http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ngo_humanitarian.pdf).

individuals in order “to prevent or alleviate the suffering of a civilian population” and would prevent the President from “restrict[ing]... transactions with [sanctioned] person[s] that are customary, necessary, and incidental to the donation or provision of goods or services... to prevent or alleviate the suffering of civilian populations,”<sup>26</sup> if the humanitarian actors perform due diligence. However, this bill has not been introduced to Congress.

### **What elements can be built into an exemption to help ensure it is not abused?**

As mentioned above, there are two main types of concerns about sectoral humanitarian exemptions. First, they might function in ways that would actually restrict humanitarian action. And second, they might exacerbate preexisting or create new security risks for states.

In terms of the first concern (restricting humanitarian action), proponents of the earlier-mentioned models would want to avoid the possibility that the creation of additional or broader exemptions could be used as a pretext to deny humanitarian action in situations where there were no exemptions. This concern might be partially addressed by including in any new exemption a reference to the exemption’s existence not prejudicing humanitarian access and assistance in situations without a clear exemption. That tactic would not necessarily resolve the issue entirely, though. Over time, controlling politically based decisions might not be possible. Further, if in practice many states began to adopt more sectoral humanitarian exemptions without sufficient safeguards, an argument might be put forward that a customary international law norm requiring an exemption to authorize humanitarian action was beginning to emerge.

To help address the other main concern (security risks), exemption proponents would likely need to craft mechanisms to protect a sectoral humanitarian exemption from being abused for the purpose of supporting terrorism. Doing so would likely be particularly important for an omnibus sectoral humanitarian exemption. Still, in order for an exemption to be useful, it would need to be crafted in a way that does not impose unworkable measures on humanitarian actors. Additionally, some humanitarian actors might object to any process that they believed would create the perception that they are constrained by or aligned with a particular state or a specific regional or multilateral body.

Some of the existing exemptions provide illustrations of forms of protective mechanisms that could be used to help ameliorate such concerns. For example, UNSCR 1916 (2010) required the United Nations Humanitarian Aid Coordinator for Somalia to report on the implementation of the decision’s exemption to the Security Council every 120 days,

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26. Humanitarian Assistance and Peacebuilding Protection Act (2015), [http://www.charityandsecurity.org/system/files/files/2015HAPPA-May29%202015\(1\).pdf](http://www.charityandsecurity.org/system/files/files/2015HAPPA-May29%202015(1).pdf).



including humanitarian organizations' requests and "any impediments to the delivery of humanitarian assistance in Somalia."<sup>27</sup> The Emergency Relief Coordinator (ERC) is currently responsible for these reports, which the most recent Security Council decisions have requested on an annual basis.<sup>28</sup> According to the ERC's reports, UN agencies in Somalia have adopted risk-mitigation measures such as external audits of NGO-funded projects (including field visits); a minimum standard for the collection of partner information;<sup>29</sup> and the creation of a Risk Management Unit,<sup>30</sup> which operates according to the International Organization for Standardization's 31000 standards.<sup>31</sup> The Unit has been bolstered over time through the establishment of a Risk Management Team in Mogadishu and the inclusion of an Investigations Liaison Officer from the UN Office of Internal Oversight Services.<sup>32</sup> The Unit provides risk-management advice and training and offers risk assessments to existing or potential partners. It also manages and analyzes a database containing contractor information (which it updates as new entities are sanctioned by the Security Council or otherwise flagged by the World Bank, the International Criminal Police Organization, and the Somalia and Eritrea Monitoring Group). The Unit does not plan to confine its activities solely to UN organizations and staff. It intends to roll out its introduction to risk management course to the wider NGO community and already offers advice to several NGOs on their due diligence measures.<sup>33</sup>

In keeping with broader UN humanitarian policies, the ERC indicated in the most recent report that he expects that country-based pooled funds (in which multiple donors combine

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27. UNSCR 1916, *supra* note 8, at para. 11.

28. See UNSC 2244, *supra* note 7, at para. 24; UNSCR 2182, *supra* note 7, at para. 42.

29. See Chairman of the Security Council Committee pursuant to resolutions 751 & 1907, Letter dated Sep. 18, 2015 from the Chairman of the Security Council Committee pursuant to resolutions 751 & 1907 to the President of the Security Council, U.N. Doc. S/2015/731 (Sep. 21, 2015), [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2015/731](http://www.un.org/ga/search/view_doc.asp?symbol=S/2015/731).

30. See, e.g., Chairman of the Security Council Committee pursuant to resolutions 751 & 1907, Letter dated Nov. 9, 2011 from the Chairman of the Security Council Committee pursuant to 751 & 1907 to the President of the Security Council, U.N. Doc. S/2011/694 (Nov. 10, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/583/54/PDF/N1158354.pdf?OpenElement>.

31. See Chairman of the Security Council Committee pursuant to resolutions 751 & 1907, Letter dated March 10, 2014 from the Chairman of the Security Council Committee pursuant to resolutions 751 & 1907 to the President of the Security Council, U.N. Doc. S/2014/177 (March 14, 2014), [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2014/177](http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/177).

32. See Chairman of the Security Council Committee pursuant to resolutions 751 & 1907, Letter dated Nov. 19, 2012 from the Chairman of the Security Council Committee pursuant to resolutions 751 & 1907 to the President of the Security Council, U.N. Doc. S/2012/856 (Nov. 20, 2012), [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2012/856](http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/856).

33. See Chairman, *supra* note 29.

their funds targeted at a specific country and the ERC manages the combined amount<sup>34</sup>) will be useful in preventing diversion due to its risk-management framework.<sup>35</sup> This framework includes “risk-based grant management,” which involves assessing the capacity of potential NGO partners (and updating those assessments over time to include performance). Then, the type of implementing partner (for example, a UN agency or an NGO), the partner’s risk level if it is an NGO, and the project’s duration and value affect the use of some combination of the following “assurance mechanisms”: the number and percentage of disbursements, a funding ceiling, field monitoring visits, financial spot checks, narrative and financial reporting requirements, and a partner audit.<sup>36</sup> Partners are also expected to have their own internal monitoring mechanisms.

Whether separate from or alongside the above-mentioned risk-management frameworks, another potential modality to help prevent an exemption from being used to support terrorism would be to adopt due diligence measures. First, the appropriate due diligence requirements would need to be devised. One model is the UN’s human rights due diligence policy. This policy lays out steps UN entities must take before providing support to non-UN security forces.<sup>37</sup> The U.N. entity must perform a risk assessment that includes certain factors; develop an implementation framework that includes monitoring mechanisms; and report on these efforts and challenges. The policy itself could likely not be imported unaltered into the humanitarian exemption context, however: different criteria would need to be considered. And, if the exemption went beyond UN actors, it is not clear that those other actors would always have the capacity and authorization to perform a similar level of oversight. However, elements of this model could conceivably be adapted to create a due diligence policy for humanitarian action. Another option would be to adapt the Financial Action Task Force’s due diligence recommendations for states<sup>38</sup> to a streamlined list that is relevant to those individuals and organizations seeking to engage in principled humanitarian action.

After the appropriate due diligence requirements were selected, the consequences of due diligence would need to be decided. In other legal regimes, the effect of performing due

34. *Country-Based Pooled Funds*, UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, <http://www.unocha.org/what-we-do/humanitarian-financing/country-based-pooled-funds> (last accessed March 1, 2016).

35. See Chairman, *supra* note 29.

36. UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, OPERATION HANDBOOK FOR COUNTRY-BASED POOLED FUNDS 22-35 (2015), <https://www.ochaopt.org/documents/globalerfguidelines.pdf>.

37. U.N. Secretary-General, Letter dated Feb. 25, 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, U.N. Doc. A/67/775 (March 5, 2013).

38. See FINANCIAL ACTION TASK FORCE, THE FATF RECOMMENDATIONS: INTERNATIONAL STANDARDS ON COMBATTING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION (2012).



diligence varies. For example, U.S. authorities may be merely disinclined to take action against “voluntarily disclosed and remediated conduct” that violates the Foreign Corrupt Practices Act,<sup>39</sup> while the U.S. Securities Act absolves liability for non-issuers involved with securities with false registration statements if the non-issuer “had no reasonable ground to believe and did not believe” the registration was false.<sup>40</sup> The entity creating the sectoral humanitarian exemption would need to choose the level of protection that due diligence would afford, keeping in mind the balance between the safety from misdirected funds offered by high regulation and the need to avoid an overly onerous burden that limits access to aid more than is necessary and feasible. Still, requiring humanitarian actors to perform due diligence in order to qualify for an exemption would be one option to minimize the likelihood that organizations would deliberately fund acts of terrorism or would be perceived as having a free pass to engage in unconsidered bribery.

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39. U.S. DEPARTMENT OF JUSTICE & SECURITIES & EXCHANGE COMMISSION, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 28 (2012), <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

40. Securities Act, 15 U.S.C. § 77k (1998).

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