

Making Sanctions Smarter: Safeguarding Humanitarian Action

ALICE DEBARRE



Cover Photo: Emergency supplies are loaded into a UN helicopter that will deliver them to flood-affected communities in Belet Weyne, Somalia, October 31, 2019. UNSOM.

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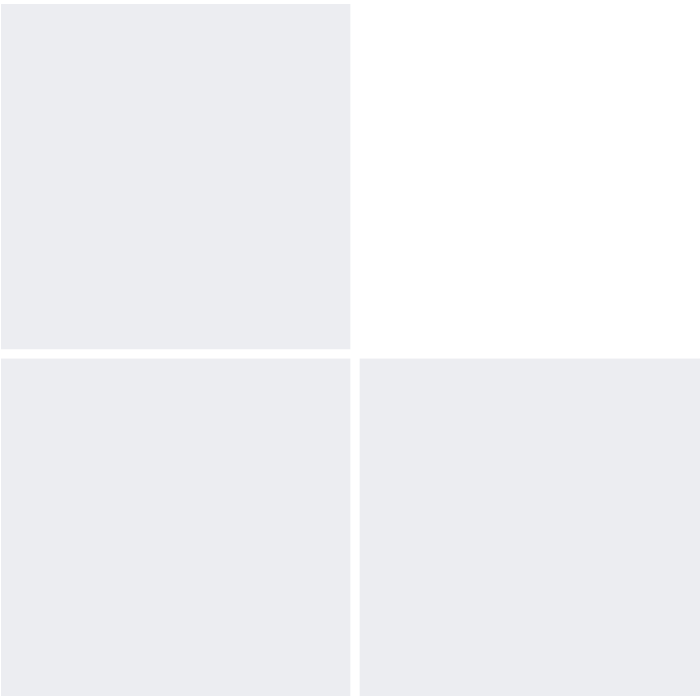
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Abbreviations

ACAMS	Association of Certified Anti-Money Laundering Specialists
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of the Congo
FATF	Financial Action Task Force
IAN	Implementation Assistance Notice
IASC	Inter-Agency Standing Committee
IHL	International humanitarian law
INTSTEX	EU Instrument in Support of Trade Exchanges
MoU	Memorandum of understanding
OCHA	UN Office for the Coordination of Humanitarian Affairs
OFAC	Office of Foreign Assets Control
RMU	Risk-management unit
SCAD	UN Security Council Affairs Division
UAE	United Arab Emirates
UNVIM	UN Verification and Inspection Mechanism for Yemen
USAID	US Agency for International Development

Executive Summary

In recent decades, sanctions have increasingly been used as a foreign policy tool. The UN Security Council has imposed fourteen sanctions regimes alongside those imposed autonomously by the EU, the US, and other countries. Despite efforts to institute more targeted sanctions regimes, these regimes continue to impede or prevent the provision of humanitarian assistance and protection.

There are four case studies that are particularly useful for exploring the impact of these sanctions regimes: the Democratic People's Republic of Korea (DPRK), Syria, Afghanistan, and Somalia. In each of these countries, humanitarian actors have struggled with the impact of UN sanctions, as well as of sanctions imposed by the US and the EU. These cases reveal seven ways sanctions regimes can impact humanitarian action:

- **Listing of humanitarian organizations:** The most direct and immediate risk is the possibility that a humanitarian organization or one of its staff members is put on a sanctions list, though this has not happened yet.
- **Exemption procedures:** Applying for exemptions requires a significant investment of time and resources and can create challenges for the principled delivery of aid. In the DPRK and Syria in particular, exemption procedures for UN, US, and EU sanctions are onerous and not widely understood. The UN Somalia sanctions regime is the only one with an exception rather than an exemption—a provision that is helpful, albeit limited, in its scope and not systematically implemented by member states.
- **De-risking:** In seeking to mitigate their risk, banks and other private sector actors sometimes restrict or refuse to provide services to humanitarian organizations. In the DPRK, for example, there is no banking channel for humanitarian actors, and humanitarian actors in Syria also face difficulties in accessing financial services.
- **Restrictions on importing goods:** Restrictions on dual-use items, in particular, can delay or block imports of humanitarian goods. This is a problem in the DPRK and Syria, where suppliers, shippers, and authorities in transit countries are taking a risk-averse approach.

- **Restrictive clauses in donor agreements:** Such clauses can increase costs, limit flexibility, and challenge the impartiality of humanitarian operations. Due to concerns over sanctions and terrorism, donors are particularly risk-averse in Syria and Afghanistan, imposing restrictions that create difficulties for humanitarian actors.
- **Fines and prosecution:** Humanitarian actors risk being fined or prosecuted for violating sanctions, though this has not been a prevalent problem so far.
- **Chilling effect:** The above challenges often lead humanitarian actors to err on the side of caution, self-regulating beyond what is legally or contractually required. In Afghanistan and Somalia, for example, humanitarian organizations have avoided working in the large swathes of the country outside of government control in part due to their fear of violating sanctions.

While there are no straightforward solutions to these problems, stakeholders could consider a number of ways forward:

- **Including language that safeguards humanitarian activities in sanctions regimes:** This would help ensure that these regimes are implemented in a way that aligns with their intended purposes and, where applicable, with international humanitarian law.
- **Raising awareness and promoting multi-stakeholder dialogue:** More understanding is needed of what sanctions regimes are and how they affect the humanitarian sector.
- **Conducting better, more systematic monitoring of and reporting on the impact of sanctions on humanitarian activities:** Information on this impact is important to understand, track, and appropriately respond to these challenges.
- **Developing more and improved guidance on the scope of sanctions regimes:** Better guidance would help ensure humanitarian actors, donors, and the private sector do not interpret sanctions regimes to be broader or more restrictive than they actually are.
- **Improving risk management and risk sharing:** Humanitarian actors should not be left to shoulder all the risk that stems from operating in contexts in which sanctions regimes apply.

Introduction

In recent decades, sanctions have increasingly been used as a foreign policy tool. They are imposed for a variety of reasons, including to push for political change or as a tool for nonproliferation or global counterterrorism. Following the devastating impact of sanctions in Iraq on the civilian population in the 1990s, they are now, for the most part, meant to be targeted or “smart.” This means that sanctions measures such as travel bans, embargoes, or asset freezes are imposed only on specific individuals and entities that are added to a sanctions list.

There are currently fourteen sanctions regimes imposed by the UN Security Council through Chapter VII resolutions, which member states are legally required to implement. The implementation of UN sanctions regimes is monitored by sanctions committees composed of the fifteen members of the Security Council and supported by independent panels or groups of experts. Regional organizations, as well as individual states, have also instituted their own sanctions regimes, which can be influenced by those of the UN. Despite efforts to institute more targeted sanctions regimes, these regimes continue to have unintended consequences, including impeding or preventing the provision of humanitarian assistance and protection. Asset freezes, which prohibit making funds or other assets directly or indirectly available to sanctioned individuals or entities, have been particularly problematic for humanitarian actors.

This policy paper focuses on the impact of sanctions regimes in four different countries—the Democratic People’s Republic of Korea, Syria, Afghanistan, and Somalia. In each of these countries, humanitarian actors have struggled with the impact of sanctions imposed by both the UN and other actors. The case studies also look at the impact of other sanctions regimes, notably those imposed by the US and the EU, which have been of particular concern because of their *de facto* global impact. In many cases, it is difficult to point to the direct causal impact of a specific sanctions regime

on humanitarian activities. In some cases, the difficulty comes from the fact that multiple sanctions regimes coexist, each with a different scope and standards and few concrete implementation guidelines demarcating their limits. In other cases, a sanctions regime may be one among many drivers of the challenges humanitarian actors face. The first section of this paper captures the adverse impact that sanctions regimes have had on humanitarian activities in these four countries and, where possible, points to the causal link between the impact and the sanctions.

This paper aims to assist the Security Council, relevant UN organs, UN member states, humanitarian actors, and other stakeholders in ensuring that humanitarian activities are safeguarded in contexts in which sanctions regimes apply. For this purpose, this paper lays out five areas in which further progress is needed: the development of safeguarding provisions; awareness raising and multi-stakeholder dialogue; monitoring and reporting; improved guidance; and risk-management support and risk sharing. Each of these areas should be worked on concurrently. This policy paper is based on a combination of desk research, over ninety interviews and conversations with key informants carried out between January and October 2019, and an expert meeting that brought together key stakeholders and experts on counterterrorism, sanctions, and humanitarian affairs.¹

It is important to note that the impact of sanctions on humanitarian activities is closely linked to the proliferation of other types of counterterrorism measures, which is also restricting the ability of humanitarian actors to operate.² The coexistence of sanctions and other counterterrorism measures in some contexts creates a restrictive environment for humanitarian actors, and their compounded effect leads to some of the challenges described in this paper. However, this paper focuses principally on the impact of sanctions regimes and does not specifically look at issues related to other types of counterterrorism measures, including national counterterrorism laws.

¹ IPI convened an expert workshop on “UN Sanctions Regimes and Humanitarian Action: Challenges and Ways forward” in New York City on May 9, 2019.

² See, for example, Alice Debarre, “Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework,” International Peace Institute, September 2018.

The Impact of Sanctions Regimes on Humanitarian Action

Sanctions regimes can impact humanitarian action both directly and indirectly in a number of ways.³ There are seven categories of challenges that humanitarian actors may face when sanctions regimes exist in the countries in which they operate: listing of humanitarian organizations, challenges related to exemption procedures, de-risking, restrictions on importing goods, restrictive clauses in donor agreements, fines and prosecution, and the chilling effect.

The most direct and immediate risk is the possibility that a humanitarian organization or one of its staff members is put on a sanctions list due to their activities. Although this would be unlikely to happen at the UN level, it could happen at the national level. For example, in 2014, the cabinet of the United Arab Emirates (UAE) approved a list of designated terrorist organizations, which included the NGO Islamic Relief UK.⁴ This particular example does not involve a sanctions regime, but it does highlight the risk that humanitarian actors face.

The second type of challenge occurs when sanctions regimes provide for an exemption procedure, whereby humanitarian actors must apply for an exemption in order to operate without the risk of violating sanctions. This increases operational costs for humanitarian organizations because it requires investing time and resources into understanding and properly going through the application process. It can also cause delays to their operations and reduce their flexibility to respond to emergencies or adapt to changing situations or needs while their request is processed. This may prevent them from responding to those in greatest need, thereby affecting the impartiality of the response. Having to request exemptions from

political bodies may also affect the perceived independence of humanitarian actors.

Third, the broader phenomenon of “de-risking” by the private sector, and in particular by financial institutions, has created challenges for the humanitarian sector. Banks and other private sector actors de-risk because of the perception that servicing humanitarian actors in contexts where sanctions regimes are in place comes with a high risk of sanctions violations and exposes them to fines and potential reputational damage. This leads them to restrict, or even refuse to provide, services, which directly affects the ability of humanitarian organizations to operate.⁵ Furthermore, significant de-risking by banks is increasingly driving humanitarian actors to work through informal payment channels or to use cash.⁶ This not only creates security risks for humanitarian actors, it also makes the money harder to trace and increases the risk of extortion and misuse or diversion of funds to finance terrorism, undermining one of the central aims of sanctions measures.

Fourth, sanctions regimes can delay or even block the import of goods needed to implement humanitarian activities, particularly when they contain restrictions on dual-use items.⁷ The implementation of these measures by risk-averse transit countries or suppliers can also delay or block the import of humanitarian items.

The fifth type of challenge relates to donors’ inclusion of increasingly restrictive clauses in grant agreements aimed at ensuring compliance with sanctions regimes, as well as other counterterrorism and regulatory measures. Such clauses often impose extensive requirements that are onerous and time-consuming to comply with, thereby increasing costs and limiting the flexibility of humanitarian operations. In multi-donor environments, this can lead to a complex web of restrictions, mandatory checks, and reporting requirements, including competing or even contradictory provisions. Some clauses, such as those requiring

³ Alice Debarre, “Safeguarding Humanitarian Action in Sanctions Regimes,” International Peace Institute, June 2019.

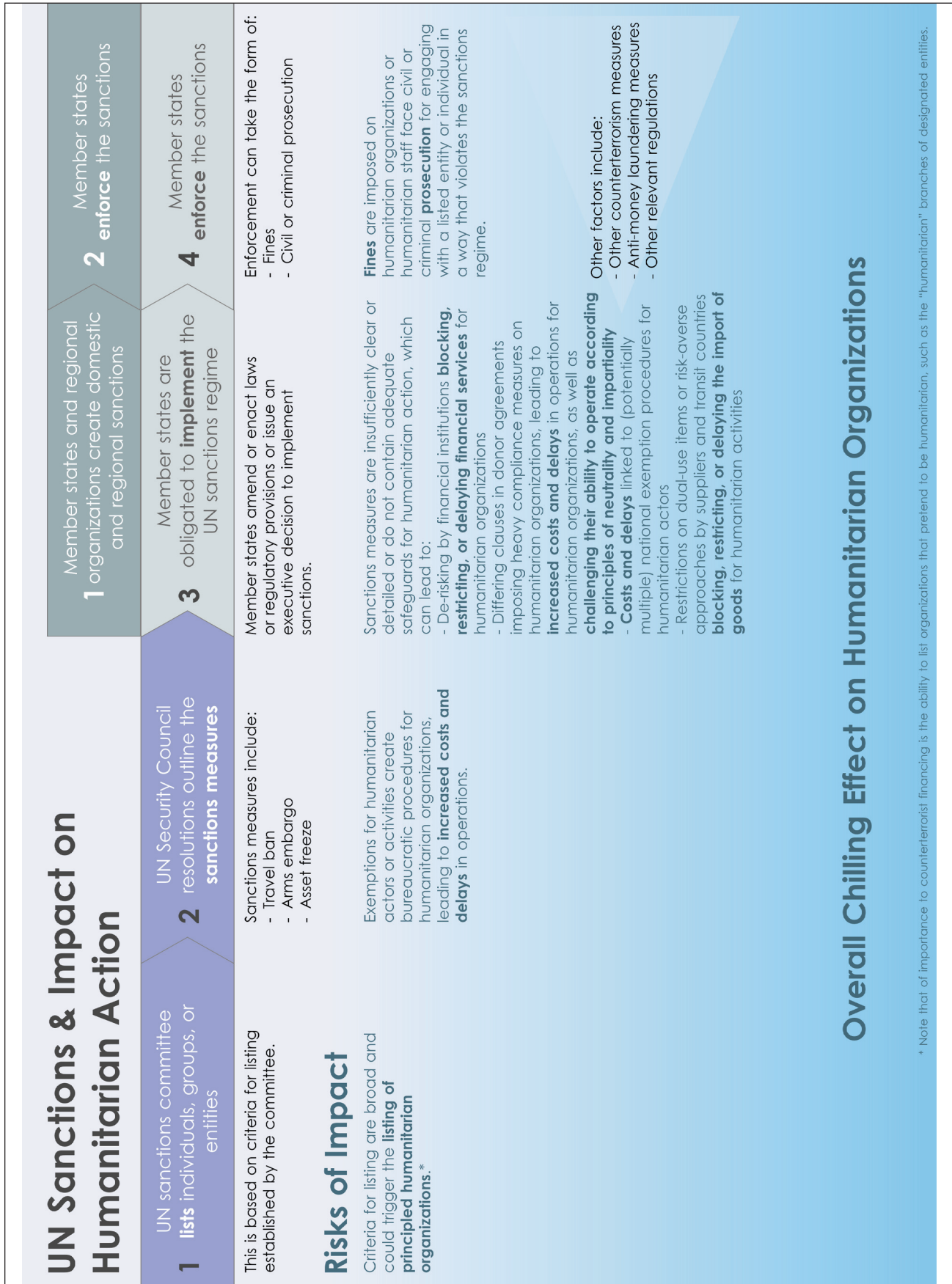
⁴ “List of Groups Designated Terrorist Organisations by the UAE,” *The National*, November 16, 2014.

⁵ Tom Keatinge and Florence Keen, “Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs,” Chatham House, April 2017; Tom Keatinge, “Uncharitable Behavior,” *Demos*, 2014, p. 54.

⁶ This is a distinct and separate issue from the increasing use of cash-transfer programs in the humanitarian sector, which evidence has shown is not riskier than in-kind assistance. See, for example: Laura Gordon, “Risk and Humanitarian Cash Transfer Programming: Background Note for the High Level Panel on Humanitarian Cash Transfers,” Overseas Development Institute, May 2015.

⁷ Dual-use items are products or technology that are primarily used for civil or commercial purposes but can also have military or weapons applications.

Figure 1. The impact of UN sanctions on humanitarian action



recipients to vet beneficiaries prior to providing them with services, also challenge organizations' ability to operate in accordance with the humanitarian principles of neutrality and impartiality.

Sixth, humanitarian actors risk being fined or prosecuted for violating sanctions. This risk increases when sanctions measures are broadly defined, when there is strict liability—or a low threshold—for sanctions violations, and when the relevant state has a strong enforcement apparatus.

Finally, the complex regulatory framework, high risks associated with violating those regulations, and the challenges described above have led humanitarian actors to err on the side of caution in many contexts, sometimes self-regulating beyond what is legally or contractually required. This is often described as the “chilling effect,” and it directly challenges the ability of humanitarian actors to operate in a principled manner. For example, organizations may decide not to engage with a particular non-state actor, thereby foregoing their ability to access areas under that actor's control.

Assessing the Impact in Specific Countries

Sanctions regimes in the Democratic People's Republic of Korea, Syria, Afghanistan, and Somalia have had an adverse impact on humanitarian activities in these countries. The four case studies below outline the sanctions landscape in these countries, with a focus on UN, EU, and US sanctions, and highlight whether they include exemptions or exceptions for humanitarian activities. While usage of these terms is inconsistent, for the purposes of this paper, an exemption refers to a provision allowing humanitarian actors to apply for permission to conduct their activities. An exception is a provision that carves out legal space for humanitarian actors, activities, or goods within sanctions measures without any prior approval needed. This section also looks at the impact these sanctions have on the humanitarian response.

THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA (DPRK)

Sanctions Landscape

UN Security Council Resolution 1718 imposed the first UN sanctions on the DPRK in 2006 to prevent the country from acquiring nuclear weapons. This resolution requires member states to implement a long list of sanctions measures, including an asset freeze, financial measures, a travel ban, and an embargo on arms and related material.⁸ In 2017, the Security Council added a ban on coal, various minerals, food and agricultural products, machinery, electrical equipment, and other items.

The Security Council has made clear that the sanctions regime is not intended to “affect negatively or restrict those activities, including... food aid and humanitarian assistance, that are not prohibited by [the sanctions regime], and the work of international and non governmental organizations carrying out assistance and relief activities in the DPRK for the benefit of the civilian population of the DPRK.”⁹ It has also created a humanitarian exemption, whereby the sanctions committee can, on a case-by-case basis, “exempt any activity from the measures imposed by these resolutions if the committee determines that such an exemption is necessary to facilitate the work of such organizations in the DPRK or for any other purpose consistent with the objectives of these resolutions.” It also seemingly creates an exception to the asset freeze, specifying that it “shall not apply with respect to financial transactions with the DPRK Foreign Trade Bank or the Korea National Insurance Corporation if such transactions are solely for the operation of... humanitarian assistance activities that are undertaken by, or in coordination with, the United Nations.”¹⁰

With respect to financial measures, it “calls upon all Member States and international financial and credit institutions not to enter into new commitments for grants, financial assistance, or concessional loans to the DPRK, except for humanitarian and developmental purposes directly addressing

8 1718 Sanctions Committee, “Fact Sheet Compiling Certain Measures Imposed by Security Council Resolutions,” April 17, 2018; UN Security Council, *Report of the Security Council Committee Established Pursuant to Resolution 1718 (2006) Prepared in Accordance with Paragraph 5 of Resolution 2375 (2017)*, UN Doc. S/2017/829, October 2, 2017.

9 UN Security Council Resolution 2397 (December 22, 2017), UN Doc. S/RES/2397, para. 25.

10 UN Security Council Resolution 2371 (August 5, 2017), UN Doc. S/RES/2371, para. 26.

the needs of the civilian population.”¹¹ The sanctions committee has also issued a communication on this.¹² In addition, the embargo on arms and related material does not apply if a member state notifies the sanctions committee that a particular item will be used exclusively for humanitarian purposes and informs it of measures taken to prevent the diversion of the item for prohibited purposes.¹³

UN member states and regional organizations are required to implement the UN’s DPRK sanctions regime. The EU, Japan, South Korea, and the US have also imposed autonomous sanctions against the DPRK. The US sanctions are particularly restrictive. On paper, they provide NGOs with a general license to conduct “activities to support humanitarian projects to meet basic human needs in North Korea.”¹⁴ In the North Korea Sanctions and Policy Enhancement Act of 2016, the US Congress found it necessary to achieve the peaceful disarmament of the DPRK “to enforce sanctions in a manner that does not significantly hinder or delay the efforts of legitimate United States or foreign humanitarian organizations from providing assistance to meet the needs of civilians facing humanitarian crisis, including access to food, health care, shelter, and clean drinking water, to prevent or alleviate human suffering.”¹⁵ However, since the issuance of a new executive order in 2016, US NGOs are now required to obtain specific licenses from the Office of Foreign Assets Control (OFAC) for virtually every shipment of life-saving aid.¹⁶

Challenges for the Humanitarian Response

Humanitarian organizations working in the DPRK face serious challenges, such as the denial of financial services, difficulty importing goods, and delays in obtaining exemptions, particularly because of UN, EU, and US sanctions.

In 2017, the UN and the US put the DPRK Foreign Trade Bank on their sanctions list.¹⁷ Despite the UN sanctions regime’s exception for financial transactions made solely for humanitarian assistance activities, this listing led to a collapse of the only banking channel humanitarian actors could use.¹⁸ Even prior to the collapse, the World Food Programme had reached out to the UN Security Council Affairs Division (SCAD), alerting it that it was a month away from having to shut down operations due to issues with banking channels. In response, SCAD collaborated with the US Agency for International Development (USAID) and the US Treasury Department to find alternatives, and another Security Council member offered a national bank as an intermediary, with a US guarantee that there would be no consequence. This was reportedly an effective, albeit unsustainable, work-around to this problem.¹⁹

Since 2017, attempts to find a replacement channel have been unsuccessful. Banks are not willing to service humanitarian actors, as they fear the associated reputational risks and the long reach of US sanctions.²⁰ Some organizations have resorted to omitting mention of where money is

11 UN Security Council Resolution 1874 (June 12, 2009), UN Doc. S/RES/1874, para. 19.

12 UN Security Council, “Security Council 1718 Sanctions Committee Underlines Humanitarian Exemptions Pursuant to Paragraph 26 of Security Council Resolution 2375 (2017),” December 8, 2017.

13 UN Security Council Resolution 2270 (March 2, 2016), UN Doc. S/RES/2270.

14 US Office of Foreign Assets Control, US Doc. 83 FR 9182, March 5, 2018, para. 510.512.

15 North Korea Sanctions and Policy Enhancement Act of 2016, HR 757, February 18, 2016, Sec. 101.

16 Licenses are not required for food and medicine, but most organizations do not send shipments that contain only food and medicine. Executive Order 13722, March 15, 2016.

17 UN Security Council Resolution 2371 (August 5, 2017), UN Doc. S/RES/2371; US Department of the Treasury, “Treasury Sanctions Banks and Representatives Linked to North Korean Financial Networks,” September 26, 2017.

18 This banking channel was from Commerzbank to Sputnik Bank and finally to the Foreign Trade Bank. UN OCHA, “DPR Korea Needs and Priorities,” March 2019; UN Security Council, *Letter Dated 21 February 2019 from the Panel of Experts Established Pursuant to Resolution 1984 (2009) Addressed to the President of the Security Council*, UN Doc. S/2019/171, March 5, 2019, Annex 85.

19 Interview with sanctions expert, New York, April 2019.

20 Interviews with humanitarian representatives and sanctions experts, March–April 2019.

going in bank invoices to ensure their transactions are not blocked. This, however, exposes them and the cooperating financial institutions to huge risks, reportedly causing one NGO to be fined.²¹ Approximately 90 percent of humanitarian expenditures in the DPRK are undertaken outside the country, with the remainder used for in-country operational costs, including rent, utilities, and salaries.²² The collapse of the banking channel has thus forced humanitarian organizations to rely on staff to carry large amounts of cash on their person when traveling to the DPRK.²³ They have struggled to pay their national staff and maintain their structures on the ground and have had to put operations on hold and even close some projects permanently.²⁴ This has also eroded the trust and acceptance these organizations have built with communities over the years, thereby threatening their access.²⁵ Ultimately, this means that aid is not getting to people in severe need.

Humanitarian actors operating in the DPRK are also facing challenges importing goods. Suppliers of goods, shipping companies, and some authorities in transit countries—who must also ensure they are complying with sanctions—are taking a risk-averse approach, causing delays in the delivery of humanitarian assistance.²⁶ For the most part, humanitarian actors are buying goods in China and shipping them across the Chinese-DPRK border, which requires presenting not only a UN exemption but also a permit from a relevant Chinese authority.²⁷ The thorough inspection of

any goods entering the country because of sanctions also adds a logistical obstacle to humanitarian supply chains, which limits the flexibility of their response.²⁸ The process requires a generous lead-time when planning shipments of humanitarian goods. Some suppliers are reluctant to import items “due to the heavy procedures, delays in port clearance, higher expenses and/or reputational risks.”²⁹ The limited availability of suppliers has increased costs for humanitarian actors.³⁰

Another import-related challenge is restrictions on the import of dual-use items, in particular since the 2017 UN sanctions regime banned the import of certain types of metal. Prohibited items are categorized through harmonized system codes administered by the World Customs Organization, but verifying whether an item falls outside the code system is a challenge.³¹ One humanitarian organization had to remove nail clippers from hundreds of hygiene kits in order for them to be allowed inside the DPRK through Chinese customs.³² In another instance, a shipment of reproductive health kits by a UN agency was delayed because it contained aluminum steam sterilizers—the most important part of the kit.³³

Humanitarian operations in the DPRK are also facing delays related to exemption requests.³⁴ Since the adoption of the implementation assistance note on obtaining exemptions in August 2018, the process is clearer and more streamlined. In 2018, the approval of exemptions took an average of ninety-nine days. This dropped to fifteen days in

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

22 UN OCHA, “DPR Korea Needs and Priorities,” March 2019.

23 UN Security Council, *Letter Dated February 21, 2019 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council*, UN Doc. S/2019/171, March 5, 2019, Annex 85.

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

25 Interviews with humanitarian representatives, May–July 2019.

26 UN Security Council, *Letter Dated February 21, 2019 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council*, UN Doc. S/2019/171, March 5, 2019, Annex 85.

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

28 UN World Food Programme, “Nutrition Support for Children and Women and Strengthening Community Capacity to Reduce Disaster Risks: Standard Project Report 2016,” 2016, p. 8; “DPRK Transitional Interim Country Strategic Plan (Year 2018),” 2017, p. 2.

29 UN OCHA, “2019 DPR Korea Needs and Priorities,” March 2019.

30 UN Security Council, *Letter Dated February 21, 2019 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council*, UN Doc. S/2019/171, March 5, 2019, Annex 85.

31 In its March 2019 report, the DPRK panel of experts published a list of humanitarian-sensitive items that are prohibited under the UN sanctions regime because they are composed of one or several materials that fall in the system. UN Security Council, *Letter dated 21 February 2019 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council*, UN Doc. S/2019/171, March 5, 2019, Annex 87.

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

33 Daniel Jasper, “Engaging North Korea: A Toolkit for Protecting Humanitarian Channels amid ‘Maximum Pressure,’” American Friends Service Committee, June 2018, p. 39.

34 For a good overview, see: UN Security Council, *Letter Dated 21 February 2019 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council*, UN Doc. S/2019/171, March 5, 2019, Annex 85.

2019.³⁵

However, the process still requires humanitarian actors to provide a lot of detail and information in their requests, and the note recommends consolidating all planned shipments into one shipment every six months, a requirement that, even if somewhat flexible, is limiting.³⁶ Organizations must also notify the committee of any change to a planned shipment for which an exemption has been granted for their review. Sanctions committee members can put on hold or block exemption requests without any justification, an act that states often use as a political tool. In the fall of 2018, for example, many exemption requests were put on hold, creating huge delays in the operational response.³⁷ This makes planning operations challenging and has even led to time running out on grants, requiring organizations to give back some of their grant money if they were unable to implement programs. Delays also disrupt engagement with stakeholders on the ground, eroding their trust in humanitarian actors.

There has reportedly been an improvement in the timeliness of granting exemptions, but the process remains labor-intensive and subject to political dynamics between Security Council members.³⁸ Furthermore, despite this improvement at the UN, transit countries are still asking for additional import waivers,³⁹ and US-based organizations need to obtain OFAC licenses, which requires legal counsel and takes months. For one NGO, it reportedly took over a year and a half to get permission to ship sixteen boxes of beans to the DPRK.⁴⁰

This whole process not only makes it difficult for humanitarian actors to respond effectively to emergency needs, it also makes it extremely challenging to have a large-scale response and to time shipments according to seasons in the DPRK.

These challenges are particularly concerning from a food security perspective in a country in which the World Food Programme has warned that ten million people face imminent food shortages in 2019 after the worst harvest in ten years.⁴¹

SYRIA

Sanctions Landscape

Both counterterrorism sanctions regimes and sanctions regimes against the government apply in Syria, creating a complex web of restrictions.

The UN's ISIL (Da'esh) & Al-Qaida sanctions regime, created in 1999 by Security Council Resolution 1267, lists individuals, groups, undertakings, or entities associated with the Islamic State and al-Qaida, a number of which are operating in Syria. The sanctions regime's criteria for listing include "otherwise supporting acts or activities of... ISIL (Da'esh), Al-Qaida or any cell, affiliate, splinter group or derivative thereof." It imposes a travel ban, an arms embargo, and an asset freeze meant to ensure that no funds, financial assets, or economic resources of any kind are available to any listed entities or individuals.⁴² Listed entities and individuals can apply for an exemption from the asset freeze for basic and extraordinary expenses.⁴³ In the preamble of many of the sanctions regime's resolutions, the Security Council has reaffirmed that any measures taken to counter terrorism must comply with all states' obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law (IHL). It has also called upon states to take into account "relevant [Financial Action Task Force (FATF)] Recommendations and international standards designed to... protect non-profit organizations, from terrorist abuse, using a risk-based approach, while working to mitigate the impact on

35 Jessup Jong and Kee Park, "Humanitarian Exemptions for North Korean Aid Work: Crunching the Numbers," NK News, July 16, 2019.

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

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

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

39 UNICEF, "DPR Korea Mid-Year Humanitarian Situation Report, 1 January–30 June 2019," August 2019.

40 Phone interview with humanitarian representative, April 2019; American Friends Service Committee, "Engaging North Korea," p. 39.

41 Food and Agriculture Organization and World Food Programme, "Joint Food Security Assessment, Democratic Republic of North Korea," May 2019.

42 The ISIL (Da'esh) & Al-Qaeda sanctions committee has developed explanations of terms for the three sanctions measures, available at www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_assets_freeze_-_english.pdf; www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_travel_ban_english.pdf; and www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_arms_embargo_english.pdf.

43 UN Security Council Resolution 1452 (December 20, 2002), UN Doc. S/RES/1452.

legitimate activities.”⁴⁴ Beyond this broad language, however, there are no specific safeguards for humanitarian activities.

The EU’s counterterrorism sanctions are a combination of the UN sanctions under Security Council Resolution 1267, an autonomous sanctions regime put in place following Security Council Resolution 1373, and, since 2016, autonomous sanctions against persons or entities associated with IS and al-Qaida.⁴⁵ They do not contain safeguards for humanitarian activities.⁴⁶ The US ensures it is in compliance with UN sanctions and imposes autonomous sanctions under two counterterrorism designation regimes—the “foreign terrorist organization” designation and the “specially designated global terrorist” designation.⁴⁷ For the latter, there is an exception for donations of items “intended to be used to relieve human suffering, except to the extent that the President determines that such donations... would seriously impair his ability to deal with any national emergency.”⁴⁸ In 2001, President George W. Bush determined in Executive Order 13224 that such donations would seriously impair his ability to deal with the national emergency declared in that order.⁴⁹ While terrorism-related executive orders since then have routinely canceled this exception, organizations can apply for a specific OFAC license to engage in a transaction that otherwise would be prohibited.

The EU and the US also have autonomous sanctions regimes against individuals and entities

supporting the Syrian government. They have been described as some of the “most complicated and far-reaching sanctions regimes ever imposed,” and include trade restrictions, financial sanctions, an arms embargo, travel restrictions, and an asset freeze.⁵⁰ The US has also designated Syria as a state sponsor of terrorism, which allows it to impose strict sanctions, including controls over the export of dual-use items and the prohibition of US citizens from engaging in a financial transaction with the listed government without a US Treasury license.

Under the relevant EU regulation, the “competent authorities” of member states may grant exemptions from the prohibitions for humanitarian purposes.⁵¹ Organizations funded by the EU or a member state to provide humanitarian assistance in Syria may also purchase and pay for fuel without an authorization.⁵²

Under the US regime, OFAC can issue general licenses, which exempt certain operations from sanctions. For example, there is a general license for the “activities to support humanitarian projects to meet basic human needs in Syria, including... drought relief, assistance to refugees, internally displaced persons, and conflict victims, food and medicine distribution, and the provision of health services.”⁵³ Organizations can also apply for specific OFAC licenses to authorize prohibited transactions that may fall outside of the general license, which are reportedly regularly granted for items such as medicines and medical devices.⁵⁴ In terms of enforcement, the imposition of civil monetary

44 UN Security Council Resolution 2368 (July 20, 2017), UN Doc. S/RES/2368, para. 22.

45 European Council, Common Position 2001/931/CFSP, December 27, 2001; Regulation 2580/2001, December 27, 2001; and Decision 2016/1693/CFSP, September 20, 2016.

46 Technically, the EU could have created an exemption or exception for humanitarian action in its autonomous counterterrorism sanctions. However, it did not because their design is inspired by UN sanctions. Phone interview with EU sanctions expert, July 2019.

47 These fall, respectively, under the Immigration and Nationality Act of 1965 and the International Emergency Economic Powers Act of 1977 and Executive Order 13224 of 2001. Foreign terrorist organizations are foreign organizations deemed by the US Secretary of State to engage in, or retain the capacity and intent to engage in, terrorist activity that threatens US nationals or US national security. Specially designated global terrorists are entities and individuals whom OFAC finds have committed or pose a significant risk of committing acts of terrorism, or whom OFAC finds provide support, services, or assistance to, or otherwise associate with, terrorists and terrorist organizations designated under OFAC Counter Terrorism Sanctions programs, as well as such persons’ subsidiaries, front organizations, agents, or associates. These designations trigger an asset freeze. Designation as a foreign terrorist organization also triggers immigration restrictions and makes it a crime to knowingly provide “material support or resources” to the organization.

48 50 US Code, Sec. 1702(b)(2).

49 Executive Order 13224, September 23, 2001, Sec. 4.

50 Justine Walker, “Study on Humanitarian Impact of Syria-Related Unilateral Restrictive Measures,” UN Economic and Social Commission for Western Asia and Office of the UN Resident Coordinator in the Syrian Arab Republic, May, 2016, p. 6.

51 For example, see Articles a(2), 3(3), 6a(1) and 16a(1) in: European Commission Regulation 36/2012, January 18, 2012. See also: “Frequently Asked Questions on EU Restrictive Measures in Syria,” September 1, 2017, available at https://ec.europa.eu/fpi/sites/fpi/files/faqs_post_isc_clean_en.pdf.

52 EU Council Regulation 36/2012, January 18, 2012, Arts. 6a(1) and 16a(1).

53 US Department of the Treasury, OFAC, General License 11A, August 17, 2011, Art. b(1).

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

penalties for the violation of sanctions does not require any intent by individuals or organizations to have engaged in prohibited transactions or activities.⁵⁵

Australia, Canada, Japan, Norway, Switzerland, Turkey, and the League of Arab States have also applied financial sanctions, as well as asset freezes, travel restrictions, and arms embargoes on Syria.

Challenges for the Humanitarian Response

The way in which the various sanctions regimes impact humanitarian actors in Syria differs depending on the areas in which they operate. For those organizations working in government-controlled areas, the challenges are primarily related to EU and US sanctions against the Syrian government. Organizations operating in areas controlled by non-state armed groups face challenges related to UN counterterrorism sanctions and other types of counterterrorism measures.

One of the challenges facing humanitarian organizations operating across Syria is de-risking by financial institutions. Humanitarian organizations are experiencing problems transferring funds into Syria, mainly as a consequence of broad US and EU financial sanctions against Syrian individuals and entities supporting the regime, including banks.⁵⁶ UN and other counterterrorism sanctions against IS and al-Qaida add another layer of complexity, further increasing the risk for banks. According to some reports, humanitarian NGOs are increasingly devising their aid programs to prioritize financial access rather than need or to focus on the areas most likely to pass scrutiny from

both banks and donors.⁵⁷ Financial de-risking has also delayed programs to the point where they are no longer relevant, which affects organizations' abilities to respond to predictable events such as seasonal changes.⁵⁸

One interviewee explained that, as of April 2019, there was only one correspondent bank that humanitarian actors could use in Syria, and that it changed all the time, resulting in humanitarian organizations getting cut off from financial services from one day to the next.⁵⁹ Another interviewee described how financial de-risking resulted in the obstruction of their bank transfers, preventing them from paying bills and invoices for three months. This ultimately led to high debt, threatened their security, and prevented them from meeting the humanitarian needs agreed upon with authorities.⁶⁰ One medical NGO reported that it had to stop its activities because its local staff had not received their salary for four months due to the extensive checks the bank was conducting before allowing transfers.⁶¹ Banks are even reluctant to transfer funds to neighboring countries, such as Jordan, for humanitarian organizations to use in Syria for fear of violating US sanctions.⁶² Instead, humanitarian actors increasingly rely on informal banking systems such as *hawala* or use cash.⁶³ This makes it difficult to audit transactions, prompting concerns with donors and limiting the ability of organizations to raise funds.⁶⁴ De-risking by private sector entities, such as shipping or insurance companies, has also led to potential arrangements being overly expensive and economically unviable.⁶⁵

Humanitarian actors also face difficulties related

55 US Department of the Treasury, OFAC, "Syria Sanctions Program," August 2, 2013, Section V.

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

57 Keatinge and Keen, "Humanitarian Action and Non-state Armed Groups," p. 3; Stuart Gordon, Alice Robinson, Harry Goulding, and Rawaad Mahyub, "The Impact of Bank De-risking on the Humanitarian Response to the Syrian Crisis," Humanitarian Policy Group, August 2018.

58 Stuart Gordon and Sherine El Taraboulsi-McCarthy, "Counter-Terrorism, Bank De-risking and Humanitarian Response: A Path Forward: Key Findings from Four Case Studies," Humanitarian Policy Group, August 2018, p. 2; Gordon, Robinson, Goulding, and Mahyub, "The Impact of Bank De-risking on the Humanitarian Response to the Syrian Crisis," p. 19.

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

60 Phone interview with humanitarian representative, May 2019.

61 French Commission des Affaires Étrangères, "Rapport d'information en conclusion des travaux d'une mission d'information constituée le 24 octobre 2017 sur la lutte contre le financement du terrorisme international," April 3, 2019.

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

63 *Hawala* is a money-transfer system outside of the conventional banking system. Money is transferred via a network of *hawala* brokers and is difficult to detect.

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

65 Aron Lund, "Just How 'Smart' Are Sanctions on Syria?" *New Humanitarian*, April 25, 2019.

to clauses in donor agreements and donors' overall risk aversion in Syria. Some donors, for example, ask organizations to screen beneficiaries, which is a red line for those that operate according to the basic humanitarian principle of impartial, needs-based assistance. In northwestern Syria, some donors have asked organizations to make the case that they are not supporting Hay'at Tahrir al-Sham, a designated group, while also expecting them to report on the movement, activity, and command-and-control structure of the group in a context where humanitarian actors are already often suspected of being spies.⁶⁶ In April 2019, the UK Department for International Development told NGOs to stop UK-funded humanitarian cash handouts as a "precautionary measure due to the risks associated with the dispersal of [IS] members."⁶⁷

Another challenge relates to US and EU sanctions' restrictions on reconstruction work, which have led donors to engage in micro-scrutiny and micro-level approval for projects. One interviewee described how it was more difficult to get approval from donors even for early-recovery work, which is provided for in the humanitarian response plan for Syria.⁶⁸ For example, donors have not allowed humanitarian organizations to repair damaged sewer systems, and have even been reluctant to authorize the repair of critical health and education infrastructure. Anything that requires cement is not feasible because there are prohibitions on the import of cement, and Syria's cement companies are sanctioned. Various donors in the EU reportedly have different interpretations of the scope of the EU sanctions, which adds to the complexity.⁶⁹

US and EU sanctions, and in particular prohibi-

tions on the export of dual-use items to Syria, have made it challenging to import goods into Syria. US restrictions are applied to any item containing at least 10 percent US parts, which also subjects many European and other products to US sanctions.⁷⁰ In 2018, a large Syria-based humanitarian organization reported difficulties importing medical devices, and one Syrian doctor described challenges importing spare parts for CT-scan equipment.⁷¹ The parts needed had to come from specific European companies, but their import was prohibited by EU sanctions. They therefore had to hire experts to train staff in Syria to make the scans function with local products. Essential construction equipment and basic water supplies such as pipes and water pumps are also sanctioned under broad definitions of dual-use items.⁷² While humanitarian organizations can procure these items locally, the lower quality makes scaling up the response more difficult.⁷³

The number of government-related entities under US and EU sanctions, as well as the ongoing lack of understanding in the humanitarian sector of the applicable sanctions, makes it difficult for humanitarian actors to work in government-controlled areas. For example, many organizations incorrectly thought that registering with the Syrian Ministry of Finance would violate the sanctions by requiring them to pay taxes, but the sanctions only apply to the Ministries of Defense and Interior.⁷⁴ US sanctions against Iran have also had an impact on the humanitarian response in Syria. In particular, they have led to a fuel shortage in the country, leading the Syrian government to issue fuel-rationing cards. This has increased the price of fuel and public transportation, making it harder for humanitarian staff to travel.⁷⁵

66 Ibid.

67 "Syria Cash Aid Freeze, Somali Biometrics, and Poverty Porn: The Cheat Sheet," *New Humanitarian*, April 26, 2019.

68 Interview with humanitarian representative, New York, April 2019; UN OCHA, "2018 Syrian Arab Republic Humanitarian Response Plan, January–December 2018," August 2018.

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

70 This refers to OFAC's *de minimis* rule. While there is no official percentage that OFAC has defined as "*de minimis*," most often, OFAC has set the threshold for individual licenses as below 10 percent of US content or value. See Practical Law Finance, "LSTA Issues Guidance on OFAC Compliance in Lending Activities," August 25, 2016; and Lund, "Just How 'Smart' Are Sanctions on Syria?"

71 UN General Assembly, *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on His Mission to the Syrian Arab Republic*, UN Doc. A/HRC/39/54/Add.2, October 8, 2018; Skype interview with Syrian medical doctor, April 2019.

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

73 Phone interview with humanitarian representative, May 2019.

74 Written correspondence with humanitarian representative, November 2019.

75 Interviews with humanitarian representative, April–July 2019.

As described above, both the EU and the US sanctions regimes provide the opportunity to apply for exemptions under certain circumstances. These processes, however, create their own set of challenges. First, many organizations were initially not aware of the possibility of obtaining exemptions. Even though awareness has grown, there is still confusion around the process, particularly among smaller or local humanitarian organizations. For an EU license, for example, organizations need to apply to the authorities in the EU member state where they have their headquarters, but there is confusion around whether or not the European Commission can issue licenses for EU-funded projects (it cannot).⁷⁶ Second, there is a lack of clarity as to when and how regularly exemptions must be obtained, which causes difficulties because, according to some, they are required for every shipment, financial transfer, and project.⁷⁷ Third, legal and other costs to seek licenses are high, and some smaller organizations have noted that such costs were not provided for in their projects and were often disproportionate to the value of the goods being sought.⁷⁸ Fourth, obtaining exemptions takes time and restricts the flexibility and timeliness of a response. It is hard to predict how long it will take for an exemption to be approved, but it generally takes several months. For example, the US government reportedly takes between three and six months to process a request for the purchase of IT equipment.⁷⁹

Because of these challenges, there have been few exemption applications from humanitarian organizations.⁸⁰ Furthermore, at the EU level, even when organizations apply and receive exemptions from the country where they are headquartered, banks

sometimes want to see an exemption from the country where they are based, even though any member-state exemption is valid for the EU sanctions regime. Banks may also simply refuse to do business with organizations despite an exemption, as they may still perceive the risk as being too high.⁸¹

In rare cases, sanctions may be enforced against humanitarian organizations, which may involve significant fines.⁸² Individual staff members can also face the risk of civil or criminal liability for violating a sanctions regime, although there appears to be no precedent for this. Given the complexity of sanctions and counterterrorism measures, the level of fear of falling afoul of them is high, especially in areas where sanctioned groups have territorial control.⁸³ Moreover, the criteria for listing and asset freeze in UN Resolution 1267's sanctions regime are broadly defined. In theory, some types of humanitarian activities could serve as a justification for adding a humanitarian organization to a sanctions list (for providing "otherwise supporting acts or activities" to sanctioned individuals or entities) or understood as a violation of the assets freeze (for having made available "funds, financial assets or economic resources" to sanctioned individuals or entities).⁸⁴ These provisions have been incorporated into EU law. The basis for listing individuals and entities in both of the US designation regimes is similarly broad, as is their prohibition of material support to sanctioned entities.⁸⁵

The complex regulatory framework makes operating in Syria extremely difficult. There is a lot of uncertainty and doubt as to how to comply with all applicable measures and a lack of understanding

76 Phone interview with humanitarian representative, May 2019; UN General Assembly, *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on His Mission to the Syrian Arab Republic*, UN Doc. A/HRC/39/54/Add.2, October 8, 2018.

77 Interviews with humanitarian representatives, May–July 2019.

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

79 Lund, "Just How 'Smart' Are Sanctions on Syria?"

80 Phone interview with sanctions expert, April 2019.

81 Phone interview with humanitarian representative, July 2019.

82 Although not related to sanctions, cases brought under US law against Norwegian People's Aid and, more recently, Oxfam for noncompliance with a USAID certification on terrorist financing is a concerning development for the humanitarian sector. See, for example, Norwegian People's Aid, "Norwegian People's Aid Reaches a Settlement with the U.S. Government," April 3, 2018; Ben Parker, "Oxfam Faces \$160 Million Legal Threat over Palestine Aid Project," *New Humanitarian*, September 12, 2019.

83 Interview with humanitarian representative, New York, July 2019.

84 UN Security Council Resolutions 2368 (July 20, 2017), UN Doc. S/RES/2368; and 2161 (June 17, 2014), UN Doc. S/RES/2161.

85 See: 8 US Code, Sec. 1189; 18 US Code, Sec. 2339B (a)(1); Executive Order 13224, September 23, 2001; US Supreme Court, *Shelby County v. Holder*, 570 US 529, June 25, 2013.

of the consequences sanctions could have on the humanitarian response. The consequences of violating these measures are dire, which has led to over-compliance by the private sector, donors, and humanitarian actors at the expense of populations in need.

AFGHANISTAN

Sanctions Landscape

The Security Council first imposed sanctions on the Taliban in 1999 under Resolution 1267. In 2011, it decided to split the lists of individuals and entities associated with al-Qaida and those associated with the Taliban.⁸⁶ The sanctions imposed on those listed under the Taliban sanctions regime include an asset freeze, a travel ban, and an arms embargo. The Taliban, however, are not listed as an organization. An exemption from the travel ban can be requested for travel necessary to participate in meetings in support of peace and reconciliation, and listed individuals and entities can also obtain an exemption from the asset freeze for basic and extraordinary expenses. The Security Council has affirmed the need to combat the threat of the Taliban in accordance with international humanitarian law (IHL).⁸⁷

Under previous, broader UN sanctions when the Taliban had close to full control of Afghanistan, including its airfields, the Security Council had established exemptions to the flight ban and the asset freeze on the grounds of humanitarian need, if approved by the sanctions committee.⁸⁸ A year later, the Security Council decided that the committee would maintain a so-called “white list” of pre-approved organizations to which the prohibition on flights to and from areas controlled by the Taliban would not apply.⁸⁹ There was also an exemption to the asset freeze authorized “on a case-

by-case basis on the grounds of humanitarian need.”⁹⁰

While it implements the UN sanctions regime, the EU also imposes restrictive measures against individuals associated with the Taliban.⁹¹ These measures prohibit providing listed individuals with arms and related material, technical advice, training, and assistance. It also froze all assets of listed persons and entities, imposed travel restrictions, and prohibited making any funds or assets directly or indirectly available to them. The exemptions available for these measures are those provided for in the UN sanctions regime. The US also imposes sanctions on the Taliban, in partnership with the Terrorist Financing Targeting Center, an initiative conducted by the US in collaboration with the Gulf States.⁹² As with individuals associated with IS or al-Qaida, OFAC has designated a number of individuals associated with the Taliban as specially designated global terrorists.⁹³

To the extent that IS and al-Qaida are present in Afghanistan, the counterterrorism sanctions described above are also relevant in the Afghan context.

Challenges for the Humanitarian Response

The sanctions against the Taliban impact the humanitarian response in Afghanistan in a number of ways. As in many contexts in which sanctioned individuals and entities operate, some donors impose restrictive compliance-related requirements in their funding agreements. One interviewee explained that they conduct counterterrorism checks on every person they contract, which is resource-intensive.⁹⁴ Donor requirements also make it hard to operate in Taliban-controlled areas. For example, some donors restrict engaging

⁸⁶ UN Security Council Resolutions 1988, UN Doc. S/RES/1988 (2011); and 1989, UN Doc. S/RES/1989 (2011).

⁸⁷ UN Security Council Resolution 2255, UN Doc. S/RES/2255 (2015), paras. 18–19.

⁸⁸ According to a former UN sanctions expert, although the formulation differs from the one in Resolution 2255, the exemptions in Resolution 1267 were very similar in scope to the ones currently applicable. UN Security Council Resolution 1267 (October 15, 1999), UN Doc. S/RES/1267, para 4(a) and (b).

⁸⁹ UN Security Council Resolution 1333 (December 19, 2000), UN Doc. S/RES/1333, para. 12. See also: United Nations, “Approved List of Humanitarian Relief Providers for Afghanistan,” January 19, 2001, available at www.un.org/press/en/2001/afg123.doc.htm. This system no longer exists under the current UN Taliban sanctions regime.

⁹⁰ UN Security Council Resolution 1267 (October 15, 1999), UN Doc. S/RES/1267, para. 4(b).

⁹¹ EU Council Decision 2011/486/CFSP, August 1, 2011; EU Council Regulation 753/2011, August 1, 2011.

⁹² US Department of the Treasury, “Treasury and the Terrorist Financing Targeting Center Partners Sanction Taliban Facilitators and Their Iranian Supporters,” October 23, 2018.

⁹³ Under Executive Order 13224 (2001). See, for example, US Department of the Treasury, “Treasury Sanctions Taliban and Haqqani Network Financiers and Facilitators,” January 25, 2018.

⁹⁴ Skype interview with humanitarian representative, July 2019.

in dialogue with the Taliban, which is not prohibited by the sanctions but is perceived by donors as legitimating the group.⁹⁵

Another challenge is that the Taliban reportedly ask humanitarian organizations to pay a 10 percent tax to operate in areas they control. This puts these organizations in a difficult position because some donors prohibit giving money to sanctioned individuals or entities. Although this may seem like a straightforward requirement, it is unclear to organizations how far it goes. What would the consequences be of paying the salary of a teacher, or paying a driver to deliver goods, if they then paid the Taliban tax? Similarly, what if the security fee that organizations doing cash programming in some areas pay hawala brokers is actually used to pay the Taliban tax? Looking too closely at these questions would freeze humanitarian operations. As donors are extremely risk-averse, these concerns have also reduced funding. One donor government reportedly told an NGO that it would not receive funding because they had heard that all the money was going to the Taliban.⁹⁶

While there is no precedent for this in Afghanistan, this lack of clarity and the risk of fines, and even criminal prosecution, for violating sanctions have a chilling effect on the humanitarian response in Taliban-controlled areas.⁹⁷ Humanitarian actors are unclear on what is allowed in terms of engaging with the Taliban, and it is reportedly difficult to get answers from their donors or their own organizations.⁹⁸ With respect to donors, engagement with the Taliban is done on a “don’t ask, don’t tell” basis, putting the risk on humanitarian actors, some of which then place that risk on the local actors they work with.⁹⁹ Furthermore,

there has been no clear messaging on this from the UN humanitarian leadership.¹⁰⁰ As is the case for the IS and al-Qaida sanctions regime, the UN’s 1988 sanctions regime’s criteria for listing and asset freezes are broadly defined, creating the risk of potential civil or criminal liability for humanitarians. The standards for labeling someone a specially designated global terrorist or for considering activities to be material support to sanctioned entities under US sanctions are also broad, causing similar problems.

In part because of humanitarian organizations’ fear and misunderstanding of sanctions, the current humanitarian response in Afghanistan is heavily skewed toward government-controlled areas, rather than areas controlled by the Taliban.¹⁰¹ This is problematic in a context where Taliban control and influence remain extensive.¹⁰² In 2001, the secretary-general reported that sanctions had affected the relationship between the international humanitarian community and the Taliban and had a negative effect on the operating environment for humanitarian agencies; this reportedly remains a problem.¹⁰³ Of course, there are challenges to operating in these areas other than sanctions, such as logistical and security concerns.¹⁰⁴ However, the Taliban have attempted to establish themselves as authorities in the areas they control and have shown openness to NGOs coming to and operating there.¹⁰⁵ As such, there may be more sanctions-related challenges as organizations strengthen their efforts to move toward a more development-oriented response, requiring deeper involvement with authorities.

In the years following 9/11, many banks reportedly pulled out of Afghanistan altogether due to

95 Skype interview with humanitarian representative, August 2019.

96 Skype interview with humanitarian representative, July 2019.

97 WhatsApp interview with humanitarian representative, August 2019.

98 Interview with humanitarian representative, Geneva, June 2019. Humanitarian actors are not the only ones facing such challenges. See “Pentagon ‘Wanted to Pay for Taliban Travel Expenses,’” BBC, May 16, 2019.

99 WhatsApp interview with humanitarian representative, August 2019.

100 Interview with humanitarian representative, Geneva, June 2019.

101 Interview with humanitarian representative, New York, March 2019; OCHA Afghanistan, “Afghanistan Operational Presence (3W), July–September 2019.”

102 From November 2016 to October 2018, Afghan government control and influence over its districts ranged between 54 and 60 percent. Special Inspector General for Afghanistan Reconstruction, “Quarterly Report to the United States Congress,” April 30, 2019; Alia Chughtai, “Afghanistan: Who Controls What,” *Al Jazeera*, June 24, 2019.

103 UN Security Council, *Report of the Secretary-General on the Humanitarian Implications of the Measures Imposed by Security Council Resolutions 1267 (1999) and 1333 (2000) on the Territory of Afghanistan under Taliban Control*, UN Doc. S/2001/1215, December 18, 2001; Email exchange with humanitarian representative, August 2019.

104 See, for example, Rod Nordland, “Taliban Target Aid Groups, in an Ominous Turn in Afghanistan,” *New York Times*, May 13, 2019.

105 Interview with humanitarian representative, Geneva, June 2019. See also: Ashley Jackson, “Life under the Taliban Shadow Government,” Overseas Development Institute, June 2018.

concerns with the Taliban and al-Qaida.¹⁰⁶ However, interviewees did not point to financial de-risking as one of the challenges they face today.

SOMALIA

Sanctions Landscape

In 1992, the Security Council imposed “a general and complete embargo on all deliveries of weapons and military equipment to Somalia.”¹⁰⁷ The UN Somalia sanctions regime today includes a general arms embargo and a charcoal ban on Somalia, as well as an arms embargo, travel ban, and asset freeze on individuals or entities designated by the sanctions committee.¹⁰⁸ It also provides for the inspection of all cargo to and from Somalia.¹⁰⁹ In 2010, when famine was looming over Somalia and humanitarian activities were impeded by the sanctions regime, the Security Council introduced the first, and to date only, exception for humanitarian action in a UN sanctions regime—an exception to the regime’s asset freeze.¹¹⁰ It has also regularly reaffirmed “the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable... international humanitarian law, threats to international peace and security caused by terrorist acts.”¹¹¹

In implementing the UN Somalia sanctions regime, the EU has passed laws that replicate the exception provided for by the Security Council.¹¹² In 2008, the US listed al-Shabab as a terrorist organization, and since 2012 it has implemented a sanctions regime in Somalia.¹¹³ For the most part, the US sanctions only target individuals and entities, with the exception of a ban on the import

of Somali charcoal. They do not include the UN exception.¹¹⁴ With respect to the provision of humanitarian assistance, the Office of Foreign Assets Control (OFAC) has provided specific licenses to the Department of State and USAID, as well as their contractors and grantees, to engage in certain transactions while conducting official assistance activities in Somalia.¹¹⁵ OFAC’s FAQ on Somalia sanctions makes it clear that international NGOs can provide humanitarian assistance in Somalia without an OFAC license but that US persons should exercise caution not to provide funds or material support to al-Shabab or other designated groups. It also indicates that incidental benefits provided to al-Shabab members, including payments made in the conduct of assistance activities where the organization did not have reason to know it was dealing with al-Shabab, are not a focus for OFAC sanctions enforcement.¹¹⁶

Challenges for the Humanitarian Response

Following the US listing of al-Shabab as a terrorist organization in 2008 and the UN listing of al-Shabab as an entity subject to UN sanctions in 2010, most humanitarian organizations suspended programs in areas controlled by the group due to concerns about potentially violating sanctions. Al-Shabab also later expelled some humanitarian organizations from the areas under its control, citing concerns about their neutrality.¹¹⁷ Although it is difficult to claim direct causality, according to one interviewee that period of time also coincided with a significant decrease in funding levels, especially among traditional donors like the US, the UK, and the EU.¹¹⁸

106 Phone interview with private sector representative, April 2019.

107 UN Security Council Resolution 733 (January 23, 1992), UN Doc. S/RES/733, para. 5.

108 UN Security Council, “Security Council Committee Pursuant to Resolution 751 (1992) Concerning Somalia,” available at www.un.org/securitycouncil/sanctions/751#Somalia.

109 UN Security Council Resolution 1907 (December 23, 2009), UN Doc. S/RES/1907.

110 UN Security Council Resolution 1916 (March 19, 2010). This exception has been renewed every year, most recently in Resolution 2444 (2018).

111 See, for example, UN Security Council Resolution 2385 (November 14, 2017), UN Doc. S/RES/2385.

112 EU Council Regulation 356/2010, April 26, 2010; EU Council Decision 2010/231/CFSP, April 26, 2010.

113 Executive Order 13536, January 1, 2001, amended by Executive Order 13620, July 20, 2012.

114 These are listed in OFAC’s “specially designated nationals” list, a compilation of entities and individuals that have been targeted under one or more of the US Treasury’s sanctions programs.

115 US Department of the Treasury, OFAC, “Somalia Sanctions Program,” October 3, 2014.

116 However, OFAC advises implementers to consult with OFAC before proceeding with the operation if faced with demands for large-scale or repeated payments in al-Shabab-controlled areas. US Department of the Treasury, “OFAC FAQs: Somalia Sanctions,” Questions 130–132, available at www.treasury.gov/resource-center/faqs/sanctions/pages/faq_other.aspx#somalia.

117 For a more detailed discussion, see: Kate Mackintosh and Patrick Duplat, “Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action,” pp. 73–87.

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

According to a number of interviewees, the adoption of this exception for humanitarian assistance had a positive effect on the response in Somalia, as did the issuance of guidance by the US. In 2016, the UN panel of experts on Somalia reported that “the maintenance of the ‘carve out’ contributes to enabling the delivery of assistance to people in need.” It emphasized that the existence of the exception reassures both humanitarian actors and donors and encourages the UN country team “to develop and implement more rigorous due diligence mechanisms in order to protect its renewal.”¹¹⁹ A couple of interviewees agreed on the importance of the exception for donor comfort in Somalia.¹²⁰ Indeed, al-Shabab collects taxes for all activities in areas under its control. Most recently in 2018, the emergency relief coordinator stated that the nonrenewal of the humanitarian exception “would result in delays in the delivery of humanitarian assistance in areas controlled by non-State armed groups, which would put affected communities at risk of loss of lives and livelihoods and of exposure to suffering.”¹²¹

Although a critically important step, the UN exception only applies to UN agencies, their partners, and organizations with UN-observer status, not to all humanitarian actors. Some NGOs reportedly tried to push for expanding the exception to be based on activities rather than organizations but were told by some donors not to push their luck.¹²² Crucially, it is also not mandatory for states to include the exception in domestic law. Not all member states have implemented the exception in the UN’s Somalia sanctions regime, creating a legal gray area that contributes to the continued chilling effect of sanctions on the humanitarian response in

Somalia.¹²³ Humanitarian actors are concerned about legal exposure and, beyond that, about funding and reputational risks of even an isolated incident of aid being diverted to al-Shabab. As highlighted in the 2018 humanitarian response plan for Somalia, “Counterterrorism measures... continue to impact some organizations’ perception of risks in areas under the control/influence of listed entities and has continued to deprive some people in need of assistance.”¹²⁴

Few humanitarian actors are working in al-Shabab-controlled areas, leaving an estimated two million people out of reach.¹²⁵ According to one interviewee, “No one will fund you to go work there,” although another posited that the UN’s Somalia Humanitarian Fund could potentially be used. Only a few local organizations working with funding from the Somali diaspora have sporadic access, and they reportedly take instructions from al-Shabab on whom to assist.¹²⁶ It is difficult to get an accurate sense of the humanitarian response in these areas, however, partly because it is mostly kept under the radar, but also due to the shifting frontlines and rapidly evolving dynamics. Although sanctions are a concern in al-Shabab-controlled areas, interviewees also stressed a number of other impediments. For one, al-Shabab does not welcome international NGOs, particularly Western organizations, in the areas under its control. Furthermore, one interviewee stressed that even if organizations had access, they have not worked in those areas in years and do not have the logistics or relationships necessary to ensure the security of their operations.¹²⁷ Arguably, however, these challenges can be traced back to the period when al-Shabab was listed by the US and the UN without exceptions, resulting in NGOs getting out

119 UN Security Council, *Letter Dated 7 October 2016 from the Chair of the Security Council Committee Pursuant to Resolutions 751 (1992) and 1907 (2009) Concerning Somalia and Eritrea Addressed to the President of the Security Council*, UN Doc. S/2016/919, October 31, 2016.

120 Interviews with humanitarian representatives, June–October 2019. See also: UN Security Council, *Letter Dated 13 September 2019 from the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Addressed to the Chair of the Security Council Committee Pursuant to Resolution 751 (1992) Concerning Somalia*, UN Doc. S/2019/799, p. 14.

121 UN Security Council, *Letter Dated 8 October 2018 from the Chair of the Security Council Committee Pursuant to Resolutions 751 (1992) and 1907 (2009) Concerning Somalia and Eritrea Addressed to the President of the Security Council*, UN Doc. S/2018/896, October 8, 2018.

122 Skype interview with humanitarian representative, May 2019.

123 Norwegian Refugee Council, “Principles under Pressure,” June 2018, p. 15.

124 UN OCHA, “2019 Somalia Humanitarian Response Plan, January–December 2018,” January 2019, p. 20.

125 Interviews with humanitarian representatives, April–July 2019; UN OCHA, “Somalia Operational Presence (3W), August 2019”; UN Security Council, *Letter Dated 13 September 2019 from the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Addressed to the Chair of the Security Council Committee Pursuant to Resolution 751 (1992) Concerning Somalia*, UN Doc. S/2019/799, October 7, 2019, p. 6.

126 Interviews with humanitarian representatives, June–July 2019.

127 Skype interview with humanitarian representative, July 2019.

of al-Shabab areas for fear of sanctions.

A proposal by Kenya to list al-Shabab under the UN's counterterrorism sanctions regime created further concern within the humanitarian sector in 2019.¹²⁸ The sanctions measures imposed by that regime are the same as those in the Somalia regime, but, as described above, the UN counterterrorism sanctions regime does not contain an exception for humanitarian assistance. The fear, therefore, was that listing al-Shabab under this regime would nullify the humanitarian exception. It is hard to predict the impact such a change would have on the humanitarian response in Somalia. One interviewee explained that it would likely lead to a freezing of operations in the north and south of the country for several weeks as organizations attempt to determine what areas they could work in. Additionally, it would be "the nail in the coffin of an independent, impartial, and neutral humanitarian response" in Somalia.¹²⁹ Six Security Council members ultimately objected to the Kenyan request. In a subsequent report, the emergency relief coordinator noted that the humanitarian exception "provides the basis for donors, contractors and finance and banking systems to enable the financing of humanitarian assistance in areas in which Al-Shabaab operates."¹³⁰ However, Kenya is running for a seat on the Security Council and will reportedly be asking for individual al-Shabab members to be listed under the UN counterterrorism sanctions regime in the future.¹³¹

Safeguarding the Space for Humanitarian Action under Sanctions Regimes

The issue of sanctions regimes' adverse impact on humanitarian activities is not new. In 1998, the UN Office for the Coordination of Humanitarian Affairs (OCHA) reported how UN sanctions regimes hampered the capacity of humanitarian actors to operate in countries such as the former

Yugoslavia, Haiti, Iraq, Burundi, and Sierra Leone.¹³² In the two decades since, the number of sanctions has multiplied, particularly in relation to counterterrorism, further constricting the space for humanitarian action. Efforts to find consistent and effective ways to lessen the adverse impact of sanctions regimes on humanitarian aid have made little progress and continue to face considerable obstacles. While there are no straightforward solutions, there are a number of ways forward for stakeholders to consider that could help safeguard humanitarian action in contexts in which sanctions regimes apply:

1. Including language that safeguards humanitarian activities in sanctions regimes
2. Raising awareness and promoting multi-stakeholder dialogue
3. Conducting better, more systematic monitoring of and reporting on the impact of sanctions on humanitarian activities
4. Developing more and improved guidance on the scope of sanctions regimes
5. Improving risk management and risk sharing

INCLUDING LANGUAGE THAT SAFEGUARDS HUMANITARIAN ACTIVITIES IN SANCTIONS REGIMES

One way forward is to include language that safeguards humanitarian activities in sanctions regimes. This will help ensure that the implementation of sanctions is targeted toward its intended purpose, is in line with IHL where it applies, and avoids hindering humanitarian activities. The rules of IHL foresee the possibility of the provision of impartial humanitarian aid and protect all humanitarian and medical personnel. They apply to state and non-state armed groups alike, regardless of whether they are labeled "terrorist" by states or the Security Council. The Security Council has made clear in its counterterrorism resolutions that efforts to combat threats to international peace and security must comply with IHL.¹⁴² It has also made

128 Sara Jerving, "Humanitarians Warn against Adding al-Shabab to UN Sanctions List," Devex, August 16, 2019.

129 Skype interview with humanitarian representative, July 2019.

130 UN Security Council, UN Security Council, *Letter Dated 13 September 2019 from the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Addressed to the Chair of the Security Council Committee Pursuant to Resolution 751 (1992) Concerning Somalia*, UN Doc. S/2019/799, October 7, 2019, p. 14.

131 Interview with sanctions expert, New York, September 2019.

132 Claude Bruderlein, "Coping with the Humanitarian Impact of Sanctions: An OCHA Perspective," OCHA, 1998.

Box 1. Other UN sanctions regimes

The UN has a total of fourteen sanctions regimes, which differ in scope, context, and purpose. As such, the extent and manner in which they impact humanitarian activities also differ. For example, in 2017, the Security Council created a sanctions regime for Mali, which imposes a travel ban and asset freeze and principally aims to help Mali's recovery and to support the 2015 peace agreement. Currently, a travel ban is imposed on eight individuals for their engagement in actions or policies that threaten the peace, security, or stability of Mali.¹³³ According to interviewees, this sanctions regime has not created challenges for the humanitarian response in Mali so far.

Similarly, the Central African Republic sanctions regime, which was created to support peace, security, and stability in the country and principally lists individuals, does not appear to affect humanitarian actors there.¹³⁴ That being said, one interviewee noted some challenges related to the implementation of the Democratic Republic of the Congo (DRC) sanctions regime and its restrictions on the import of dual-use items.¹³⁵

The UN Yemen sanctions regime was first created in 2014 to support the country's political transition. Only five individuals were listed, one of whom is the late president Ali Abdullah Saleh, and another is his son, who is currently under house arrest in the UAE.¹³⁶ In 2015, Security Council Resolution 2216 imposed a targeted arms embargo. According to one interviewee, Saudi Arabia temporarily blocked imports, allegedly as a way to implement the sanctions.¹³⁷ The Saudi-led coalition prohibited imports that it assessed had dual civil-military use, resulting in difficulties shipping items into Hodeidah, one of Yemen's principal ports.¹³⁸

At the request of the Yemeni government, and to ensure compliance with the sanctions regime, the UN set up the UN Verification and Inspection Mechanism for Yemen (UNVIM), which inspects commercial imports into ports outside of government control. Although humanitarian vessels are exempt from this process, UN humanitarian assistance is often shipped in mixed commercial cargo vessels and is therefore subject to inspection.¹³⁹ Despite concerns raised by humanitarian actors that the resulting interaction with UNVIM could compromise their perceived independence, the system reportedly works well and is not creating any particular delays.

There have also been reports of significant de-risking challenges for humanitarian actors in Yemen, although this is mainly due to the global counterterrorism finance regime rather than the UN Yemen sanctions regime.¹⁴⁰ Two interviewees also expressed concern at reports that the US is considering designating the Houthis as terrorists, which they fear could cripple the humanitarian response in Yemen.¹⁴¹

133 UN Security Council, Mali Sanctions Committee, "Narrative Summaries," available at www.un.org/securitycouncil/sanctions/2374/materials/summaries.

134 Interviews with humanitarian and sanctions representatives, February–June 2019.

135 Phone interview with humanitarian representative, February 2019.

136 Gregory D. Johnsen, "The UN and Yemen: The Need for Precisely Guided Diplomacy," Sana'a Center for Strategic Studies, May 2019.

137 Interview with sanctions expert, New York, March 2019.

138 Security Council Report, "Monthly Forecast, May 2019," April 29, 2019.

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

140 Sherine El Taraboulsi-McCarthy with Camilla Cimatti, "Counter-terrorism, De-risking and the Humanitarian Response in Yemen: A Call for Action," Humanitarian Policy Group, February 2018.

141 Interviews with humanitarian representatives, New York, April 2019; Missy Ryan, "Trump Administration Considers Naming Yemen's Houthi Rebels a Terrorist Group," Washington Post, November 8, 2018.

this clear in a number of its sanctions regimes.¹⁴³

Existing Efforts

There is precedent for sanctions regimes including either exemptions or exceptions for humanitarian action at the UN, regional, and national levels (see Annex). Even if a resolution requires a sanctions regime to be implemented in accordance with IHL, if there are no exceptions or exemptions at the UN level, it is unlikely such provisions will be implemented at the regional or national levels.¹⁴⁴ The UN sets the scope of sanctions, and vague references to IHL and humanitarian activities in resolutions have not been sufficient to act as safeguards. At the EU level, guidance states that “in the case of EU implementation of restrictive measures decided by the Security Council through a resolution, it will... only be possible to include exemptions if they are in line with the Resolution.”¹⁴⁵ This will be up to the interpretation of the member states of the Council of the EU. If the resolution requires measures to be implemented in line with IHL, however, this arguably requires states to create exceptions or exemptions for humanitarian activities.

Where there are exemptions and exceptions included in UN and EU sanctions, their effectiveness depends on their proper implementation by member states. At the EU level, for example, the implementation of exemptions has created some challenges, as the process is not necessarily clear. In fact, a number of interviewees noted that even

where exemptions are available, they are not really used by humanitarian actors because the process is too complex and slow.¹⁴⁶ For a number of EU experts interviewed, there is a clear need to clarify, streamline, and accelerate these procedures.

What Could Be Done

There is a need to find the right balance between the goals set out in sanctions regimes and effective humanitarian action. One way to achieve this is to include provisions in sanctions regimes that explicitly remind states of their obligations under IHL to safeguard humanitarian activities (see Box 2).¹⁴⁷ This is particularly pertinent at the UN and regional levels, as they set the scope for the implementation of sanctions by member states. The Security Council, the EU, and member states should also make it clear in legally binding documents that humanitarian activities carried out by impartial humanitarian actors in a manner consistent with IHL should not be criminalized.

Given the challenges described in the first section of this paper, humanitarian actors have indicated the need for exceptions, rather than case-by-case exemptions, for humanitarian activities. These exceptions can come in different forms. Ideally, an exception would be broad, applying across all sanctions regimes to all humanitarian actors for all humanitarian activities. At the UN, this could take the form of a stand-alone resolution that would apply to all UN sanctions regimes. Such a cross-cutting resolution would provide much-needed

Box 2. Elements to be included in sanctions regimes to safeguard humanitarian activities

- Demand that member states ensure that all measures taken to implement the sanctions comply with their obligations under international law, including international humanitarian law, international human rights law, and international refugee law.
- Decide that the sanctions measures imposed do not apply to humanitarian activities, including medical activities undertaken by impartial humanitarian organizations.
- Include a mandate to monitor, assess, and report on the impact of sanctions on humanitarian activities.

¹⁴² See, for example, UN Security Council Resolution 2462 (March 28, 2019), UN Doc. S/RES/2462.

¹⁴³ It has done so in the ISIL (Da'esh) and Al-Qaida, Somalia, and Taliban sanctions regimes.

¹⁴⁴ See, for example, Council of the European Union, “Sanctions Guidelines—Update,” General Secretariat of the Council, May 4, 2018, available at <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>.

¹⁴⁵ Council of the European Union, “Sanctions Guidelines—Update,” May 4, 2018, p. 18.

¹⁴⁶ Interviews with humanitarian and sanctions experts, March–September 2019.

¹⁴⁷ Regardless of whether or not it is explicitly referenced in a sanctions regime, IHL always provides for the possibility of impartial humanitarian activities where there is an armed conflict.

clarity and certainty for the humanitarian sector. Politically, however, it appears unrealistic at this stage, as some member states want to maintain control over the sanctions measures they impose. There is also no precedent for the Security Council regulating one issue for all sanctions regimes. An alternative to a cross-cutting resolution could be for the president of the Security Council to issue a letter addressing these issues. While non-legally-binding, this could send a strong signal and would likely be easier for Security Council members to negotiate.

A regime-by-regime approach would give the Security Council more control and the ability to tailor exceptions and could help build confidence in exceptions.¹⁴⁸ On the other hand, it would open up each exception to contentious and regime-specific political negotiations. Regardless, the Security Council should preserve the existing exception in the Somalia sanctions regime, especially given some states' continued interest in listing al-Shabab or its members under the UN counterterrorism sanctions regime.

Although not ideal, given current political dynamics, the Security Council could also consider area-specific, organization-specific, item-specific, or activity-specific exceptions, or a combination of these. One option would be a "white list" of organizations to which sanctions would not apply. There could be a standing list of large, well-established organizations and a procedure for other organizations to apply, perhaps with a fast-track process for the implementing partners of those on the list and a system to review the list. This would give the Security Council a measure of control that it fears losing with more general safeguards for humanitarian activities. A "white list" was reportedly discussed for one of the EU sanctions regimes but ultimately dropped as the humanitarian community feared that being accepted on such a list would endanger their neutrality.¹⁴⁹ One of the concerns about a "white list" is what it would mean

for organizations not on the list. Furthermore, this idea raises questions about what organizations would need to prove to get on the list, which could be a constraint for smaller organizations, in particular local or national ones. The process of establishing such a list—who makes the decision based on what criteria—is unclear. One interviewee expressed concern that this could become yet another tool that member states could use to restrict the humanitarian space.¹⁵⁰

Similarly, item-specific exceptions would necessarily exclude certain aspects of a humanitarian response. For example, if a "white list" of items is adopted, the risk is that items not on the list will be questioned. As one interviewee asked, what happens if there is a sudden-onset disaster like cholera and chlorine is not on the list?¹⁵¹

If and when the inclusion of exceptions is not possible, exemptions should be considered. At the EU, member states currently favor exemptions (referred to as derogations) rather than exceptions because they allow states more oversight over where funding goes, according to a number of interviewees.¹⁵² However, most EU sanctions regimes do not contain exemptions for humanitarian activities. According to one EU expert, this is partly because the unintended consequences of sanctions are still being denied and partly because some sanctions regimes are limited in scope or are deemed not to impact humanitarian activities.¹⁵³ According to another EU expert, there is a legal argument for including exemptions, and even exceptions, in all regimes, as EU law requires all sanctions to be in compliance with IHL where it applies and not to impede humanitarian aid operations.¹⁵⁴

The process for requesting exemptions should also be clearer and more streamlined at both the UN and the EU. Relevant government entities should be sufficiently staffed to ensure processes are efficient. Governments could also explore mutually recognizing exemptions granted by other

148 Emanuela-Chiara Gillard, "Recommendations for Reducing Tensions in the Interplay between Sanctions, Counterterrorism Measures and Humanitarian Action," Chatham House, August 2017.

149 Written correspondence with EU expert, October 2019.

150 Interview with humanitarian representative, New York, September 2019.

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

152 Interview with sanctions experts and humanitarian representatives, Brussels, September 2019.

153 Written correspondence with EU expert, October 2019.

154 Interview with EU expert, Brussels, September 2019. See: Articles 21 and 214 of the Treaty on the European Union.

countries.¹⁵⁵ At the UN level, the DPRK sanctions committee should ensure that the exemption process does not delay the humanitarian response and that requests for exemptions are not held up for political purposes. At the EU level, member states should ensure that the process to obtain exemptions is clear, fast, and effective. The process is currently controlled by member states, rather than by the EU, and they can, in practice, make the process so restrictive that no exemption is ever granted.¹⁵⁶ Governments can also lack any process at all, with the result that requests are passed around internally with no one able to give a clear answer.¹⁵⁷ More detailed rules from the EU on implementation would provide much-needed clarity.

The Security Council should endeavor to include already agreed upon language on IHL and humanitarian activities in a consistent manner across sanctions regimes and in the operative paragraphs of the respective resolutions. Having consistent and more standardized language in sanctions regimes generally makes them more predictable and easier to apply. It would also help prevent differing interpretations by member states.

Progress on safeguards for humanitarian activities has been slow and mostly reactive. However, there is a strong case to be made for a more preventive approach. When it is imposing sanctions, the Security Council needs to give the same weight to protecting civilians, including by not impeding principled humanitarian action, as it does to attaining political objectives. Otherwise, the legitimacy and efficacy of sanctions will be cast into doubt.¹⁵⁸ Safeguards need to be included from the get-go, not when a problem arises, as it takes time to pass an exception or exemption, and humanitarian organizations need to be able to act fast. The case of Somalia is telling. When the UN and US listed al-Shabab before the UN exception was passed, humanitarian actors left the areas under al-Shabab's control. This created the perception that

they are not neutral actors, leading to mistrust and related security challenges, and has left people in al-Shabab-controlled areas mostly without assistance.

RAISING AWARENESS AND PROMOTING MULTI-STAKEHOLDER DIALOGUE

There is a continued need for more awareness of this issue, as well as for more structured dialogue between and among government actors, sanctions experts, humanitarian actors, and the private sector. Raising awareness and building expertise are necessary to improve understanding of what sanctions regimes are and how they affect the humanitarian sector and to build a foundation for balanced solutions. Dialogue, especially between sectors, will help create channels of communication that can build trust, an essential first step to the safeguarding of principled humanitarian activities.

Existing Efforts

Within the humanitarian sector, there is a recognition that efforts to raise awareness and engage in dialogue on this issue, both within and among organizations, have been insufficient. Even big and established organizations have only recently begun to do this internally in a coordinated and structured manner, and there is no sector-wide approach.¹⁵⁹ The Norwegian Refugee Council has started to organize workshops at the country level to raise awareness on how counterterrorism and sanctions measures can impact humanitarian work. In Washington, DC, InterAction has been coordinating these efforts, and in New York, Brussels, and Geneva, organizations are increasingly engaging in collective advocacy on issues related to counterterrorism and sanctions.¹⁶⁰ Overall, however, the humanitarian sector does not have a unified and consistent approach. In particular, OCHA has insufficiently prioritized this area of work. There is also a lack of communication and coordination within governments, especially

155 Sue Eckert, "Statement before the Subcommittee on Financial Institutions and Consumer Credit," US House of Representatives, June 26, 2018.

156 Interviews with EU experts, Brussels, September 2019.

157 Written correspondence with humanitarian representative, October 2019.

158 David Cortright and George Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder, CO: Lynne Rienner, 2000), International Peace Academy, p. ix.

159 For example, one organization has created an internal task force to pool expertise and thinking around this issue.

160 See, for example, CARE International, "Counter-Terrorism Frameworks and Safeguarding Humanitarian Space: Humanitarian Recommendations ahead of the UNGA High Level Side Event," September 23, 2019.

between the departments that fund humanitarian operations and the treasury departments whose regulations and policies often impede humanitarian action.

Engagement between the humanitarian and sanctions sectors has also been limited and unsystematic. At the UN level, the 2015 High Level Review of United Nations Sanctions provided an unprecedented platform for engagement among UN departments and agencies. Although many interviewees perceived this platform as being helpful, it only existed while the review was ongoing. OCHA and the former UN Department of Political Affairs developed a memorandum of understanding (MoU) outlining ways in which they could better share information and work together. However, this MoU is not in use.¹⁶¹ In addition, humanitarian actors have occasionally briefed the DPRK and Somalia sanctions committees and there is some ad hoc engagement between humanitarian organizations and the panels of experts. At the EU level, humanitarian actors briefed sanctions experts in the RELEX working group, the Council of the EU's working group on sanctions, for the first time in 2019 despite it having been a standing agenda item for three years. Additionally, member states organized joint meetings between the EU sanctions and humanitarian working groups.¹⁶² These joint initiatives show that the level of trust between the two communities has improved. Humanitarian actors have also shared their concerns with donors through the Good Humanitarian Donorship initiative, a group co-organized by Switzerland and the EU.¹⁶³

Nonetheless, sanctions policymakers are not natural interlocutors for humanitarian actors, and the humanitarian sector has not been sufficiently proactive in engaging them. As a result, humanitarian organizations traditionally have discussed issues with the donor departments of governments rather than those implementing sanctions policies. That being said, humanitarian organizations have

valid concerns about the risks of being perceived as interacting with these political entities. However, their need to push back against an increasingly tightening humanitarian space appears to be slowly overtaking these concerns.

There have also been attempts to convene broader multi-stakeholder dialogues with government entities, humanitarian actors, and the private sector. The World Bank and the Association of Certified Anti-Money Laundering Specialists (ACAMS) are sponsoring a Stakeholder Dialogue on de-risking, with a focus on the US.¹⁶⁴ This dialogue identified four work streams to support financial access for humanitarian organizations.¹⁶⁵ However, progress has been slow, in part due to a lack of robust participation by key government stakeholders.¹⁶⁶ The World Bank and ACAMS therefore settled on developing a paper on best practices for banks and charities—a valuable but limited result.

Switzerland and the European Commission's Directorate General for Civil Protection and Humanitarian Aid Operations are also leading a dialogue on compliance with sanctions in Syria, bringing together NGOs, the financial sector, donors, and regulatory government agencies. This dialogue aims to produce risk-management principles for financial transactions in Syria and has helped stakeholders share their concerns and create more comfort around these issues.¹⁶⁷ In 2018, Germany, Mexico, and Switzerland organized a series of high-level discussions in New York on safeguarding the space for principled humanitarian activities in counterterrorism and sanctions regimes. The EU and Belgium also co-hosted a high-level side event on these issues during the high-level week of the General Assembly in September 2019.

The UN Security Council Affairs Division has also convened ad hoc and context-specific multi-stakeholder dialogues on bank de-risking, and some states have convened multi-stakeholder

¹⁶¹ Interview with UN humanitarian and sanctions representatives, New York, February 2019.

¹⁶² The Norwegian Refugee Council briefed the RELEX working group in January 2019, and the International Committee of the Red Cross briefed a joint meeting of RELEX and the Working Party on Humanitarian Aid and Food Aid in May 2019.

¹⁶³ See, for example, Good Humanitarian Donorship, "High Level meeting, Co-chairs' Summary," October 24, 2018.

¹⁶⁴ World Bank, "Stakeholder Dialogue on De-risking: What Will It Take to Safeguard Financial Inclusion?" Washington, DC, May 31–June 1, 2016.

¹⁶⁵ World Bank, "Stakeholder Dialogue on De-risking: Supporting Financial Access for Humanitarian Organizations and Charities," 2017.

¹⁶⁶ Charity & Security Network, "Comments and Suggestions for Update of the U.S. National Terrorist Financing Risk Assessment," June 11, 2018.

¹⁶⁷ Graduate Institute Geneva, "Compliance Dialogue on Syria-Related Humanitarian Payments"; Phone interview with humanitarian representative, March 2019.

dialogues at the national level.¹⁶⁸ In the UK, the government created a Tripartite Working Group gathering government representatives, private sector actors, and NGOs to discuss banking restrictions. Although this has reportedly helped bridge internal government silos, raise awareness around the issue, and bring attention to the need for solutions, not much has been concretely achieved.¹⁶⁹ According to one interviewee, the challenge comes from the difficulty of solving this problem at the national level.¹⁷⁰ Indeed, most banks have global operations and will run their risk-management systems to accommodate the most severe enforcement apparatus—the apparatus in the US.

What Could Be Done

The humanitarian sector needs to better coordinate and build a more unified voice on this issue. A lack of consistency in its approach risks creating—and in some cases has already created—bad precedent. This not only decreases humanitarian organizations' leverage in negotiating and advocating to protect the humanitarian space but can also make it harder for humanitarian organizations to remain neutral, independent, and impartial.

There are a number of avenues the humanitarian sector could pursue to be more coherent and credible in negotiations and advocacy. At UN headquarters in New York, humanitarian actors could establish a working group to agree on language to submit to member states, identify opportunities to influence resolutions and policies, and develop advocacy strategies. The working group would need a permanent collective presence in New York to regularly engage with Security Council members, which OCHA could have a role in coordinating. More generally, the humanitarian sector should consider creating a global platform, network, or task force to discuss the challenges caused by counterterrorism measures and sanctions regimes¹⁷¹ For example, an online collab-

orative tool could be developed to pool evidence of impact, or a new task force could be created within the Inter-Agency Standing Committee (IASC).¹⁷² By adopting a more coordinated and unified approach, the humanitarian sector might also be more proactive, forthcoming, and systematically engaged on this issue.

In addition to dialogue within the humanitarian sector, there is a need to increase dialogue between humanitarian actors and sanctions experts at the UN, regional organizations like the EU, and member states. At the UN level, there should be more regular dialogue between humanitarian actors and the groups of experts that support the UN sanctions committees, including for pre-assessments of the impact of new sanctions before they are applied.¹⁷³ Humanitarian actors should ensure they are proactively and strategically engaging with member states in order to influence the negotiation of resolutions and other relevant decisions.¹⁷⁴ Counterterrorism, sanctions, and humanitarian experts should be attuned to these issues within member-state missions. These experts should communicate, or even collaborate, on the negotiation of sanctions resolutions that could have an impact on humanitarian action.

In the training SCAD provides to incoming Security Council members, it should also bring in humanitarian stakeholders to share their perspectives. It is important to have pragmatic discussions across sectors and for humanitarian actors to explain the concrete implications of some language and what it means to operate in areas where sanctions apply. It is important for humanitarian organizations to use these spaces not only to expose their concerns and challenges but also to be clear about the due-diligence and risk-management efforts they have put in place. It might also be worthwhile to have a more structured forum for such exchanges at the UN. The Inter-Agency Working Group on Sanctions, created during the

168 This is the case in France, the Netherlands, and the UK.

169 Interviews with humanitarian and sanctions experts, March–April 2019.

170 Phone interview with sanctions expert, April 2019.

171 The Global NPO Coalition on FATF is an interesting model to look at.

172 There used to be an IASC task force on the humanitarian consequences of sanctions.

173 Compliance & Capacity Skills International, “Best Practices Guide for Chairs and Members of UN Sanctions Committees,” December 2018.

174 In 2019, engagement by humanitarian actors on both the negotiation of UN Security Council Resolution 2462 (2019) and on the Kenyan request to list al-Shabab on the UN ISIL (Da’esh) and Al-Qaeda sanctions regime are good examples of the ability to influence decision making to take into account humanitarian concerns.

2015 High Level Review of UN Sanctions, provided such a platform but is reportedly dormant. This working group could be revived by the UN secretary-general, or this platform could take another form. SCAD could also convene regular interagency meetings, or the Group of Like-Minded States on Targeted Sanctions could take up this issue, to ensure that it is taken seriously.¹⁷⁵

On bank de-risking specifically, the private sector needs to be involved in multi-stakeholder discussions at the national, regional, and global levels. This will help build trust and address mutual concerns. At the UN, SCAD and various expert groups could more systematically convene such dialogues on specific country contexts. The European Commission should also consider engaging with the private sector on these issues in a more structured and systematic way. The member states that have organized multi-stakeholder dialogues at the national level should pool their findings and lessons learned and support other countries in organizing similar exercises. Member states could consider institutionalizing such multi-stakeholder dialogues at the national level so that there is a forum to engage on these issues, but also to solve concrete problems when they arise.

Engaging more systematically on these issues in a way that is both effective and impactful will require leadership in each stakeholder group, as well as political will and buy-in from governments. Governments must therefore work toward getting their own houses in order within and across relevant ministries.

CONDUCTING BETTER, MORE SYSTEMATIC MONITORING AND REPORTING

There is a need for more systematic monitoring of and reporting on the impact of sanctions regimes

on humanitarian action. This is important in order to understand, track, and appropriately respond to these challenges. More generally, it would help make sanctions more effective, as their purpose is not to hinder humanitarian activities.¹⁷⁶ However, increased reporting should not be a precondition for taking action, since there is already sufficient documentation to start making improvements and member states have not made clear how much additional documentation they would want to see. Ultimately, the responsibility rests on member states to ensure that their sanctions safeguard humanitarian activities, not on humanitarian actors to prove that they are hindered by sanctions. Although this section focuses on UN processes, there is also a need for better monitoring and reporting at the regional and national levels when autonomous sanctions are imposed.

Existing Efforts

Within the UN, monitoring and reporting have been reactive and ad hoc despite long-standing recommendations to assess the humanitarian impact of sanctions.¹⁷⁷ The most thorough UN reporting has been conducted by UN special rapporteurs.¹⁷⁸ The panels or groups of experts appointed to support UN sanctions committees have also, on relatively rare occasions, reported on the impact of a sanctions regime on humanitarian activities. The monitoring team for the ISIL (Da'esh) and Al-Qaida sanctions regime is the only one specifically mandated to report on the unintended consequences of the sanctions, and, in 2016 and 2017, it explicitly reported on challenges related to financial de-risking.¹⁷⁹ However, according to one expert, the only reason the Security Council requested this review was because without it, the EU would not have been able to implement the UN sanctions because of due-process concerns.¹⁸⁰

175 The group includes Austria, Belgium, Chile, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Switzerland, and Sweden.

176 Cortight and Lopez, *The Sanctions Decade*, p. 215.

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

178 See, for example, UN General Assembly, *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on His Mission to the Syrian Arab Republic*, UN Doc. A/HRC/39/54/Add.2, October 8, 2018; UN General Assembly, *Impact of Measures to Address Terrorism and Violent Extremism on Closing Civic Space and Violating the Rights of Civil Society Actors and Human Rights Defenders—Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/HRC/40/52, March 1, 2019.

179 UN Security Council Resolution 2199 (February 12, 2015), UN Doc. S/RES/2199. See: UN Security Council, *Letter Dated 19 July 2016 from the Chair of the Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities Addressed to the President of the Security Council*, UN Doc. S/2016/629, July 19, 2016; and *Letter Dated 11 January 2017 from the Chair of the Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities Addressed to the President of the Security Council*, UN Doc. S/2017/35, January 13, 2017.

180 Interview with sanctions expert, New York, April 2019.

Other groups are mandated to give recommendations on how to improve the effectiveness of sanctions regimes or the implementation of sanctions measures.¹⁸¹ On some occasions, groups of experts have interpreted this to mean that they could look at the impact of sanctions on humanitarian activities. In particular, the 2019 report of the DPRK panel of experts directly and thoroughly addresses the ways in which the exemption procedure creates difficulties for humanitarian actors.¹⁸² Given most groups' lack of an explicit mandate, whether or not they tackle this issue depends on how "activist" they are.¹⁸³ Indeed, the DPRK panel of experts' decision to look at the impact on humanitarian activities in its last report was highly criticized, in particular by the US.¹⁸⁴ This might be because the Security Council is reportedly sensitive about the mandates of some of the groups of experts and can interpret them strictly.¹⁸⁵

In 1997, the UN General Assembly passed a resolution requesting that the Secretariat coordinate assessments of sanctions when they are imposed and implemented, and immediately bring information on their potential or actual humanitarian impact to the attention of the Security Council.¹⁸⁶ However, this was not systematically put into practice. The Security Council has on a few occasions requested humanitarian impact assessments from OCHA before deciding on the modalities of some sanctions regimes.¹⁸⁷ Similarly, it has requested a review or assessment of a sanctions regimes' humanitarian impact.¹⁸⁸ The DPRK panel of experts' 2019 report recommends such an assessment, but according to an interviewee, the Security Council "will not agree to anything even

close to that."¹⁸⁹ The review of sanctions regimes is an extremely sensitive and contentious question for the Security Council, as indicated by the fact that it has only requested a regular review of the sanctions on IS and al-Qaida.

Various UN humanitarian actors have briefed the DPRK and Somalia sanctions committees on humanitarian concerns. The Security Council requests the emergency relief coordinator to report to the Security Council on "the delivery of humanitarian assistance in Somalia and on any impediments to the delivery of humanitarian assistance in Somalia."¹⁹⁰ However, these reports tend not to be very substantial with regard to the question of how the sanctions regime impacts or may impact the humanitarian response in Somalia.¹⁹¹ The emergency relief coordinator also briefs the Somalia sanctions committee every year on humanitarian concerns. OCHA, however, does not have the capacity or the expertise to adequately monitor and report on this issue.¹⁹² OCHA and the UN resident coordinator in the DPRK have also briefed the DPRK sanctions committee on the impact of the sanctions on humanitarian activities.

What Could Be Done

There is a clear need for better and more systematic monitoring and reporting on this issue at the UN. Prior to establishing sanctions, the Security Council could request an assessment of the impact sanctions might have on humanitarian activities and regular updates during implementation of the sanctions. In the past, the council has requested such assessments from OCHA, but it could also appoint a special representative or expert group.

181 See the panel of experts mandates for Somalia, the Democratic Republic of the Congo, the DPRK, and Libya.

182 UN Security Council, *Letter Dated 21 February 2019 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council*, UN Doc. S/2019/171, March 5, 2019, Annex 85. This was not the first time this was reported on in the DPRK, but it was the first time it was looked at so extensively.

183 Interview with sanctions expert, New York, April 2019.

184 Interviews with sanctions experts, February–May 2019.

185 Interview with sanctions expert, New York, April 2019.

186 UN General Assembly Resolution 51/242 (September 26, 1997), UN Doc. A/RES/51/242.

187 For example, in 1996 and 1997, the UN Security Council requested an assessment before imposing a flight ban on Sudan and sanctions on Sierra Leone (Resolutions 1070 and 1132, respectively).

188 OCHA and UNICEF led an interagency study on the impact of sanctions imposed on Yugoslavia, and the Security Council requested reports from OCHA on the humanitarian implications of the sanctions imposed on the Taliban and on Liberia in the early 2000s. The IASC Task Force on the Humanitarian Consequences of Sanctions, now defunct, provided support in the drafting of these reports.

189 Interview with sanctions expert, New York, March 2019.

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

191 See, for example: UN Security Council, *Letter Dated 13 September 2019 from the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Addressed to the Chair of the Security Council Committee Pursuant to Resolution 751 (1992) Concerning Somalia*, UN Doc. S/2019/799, October 7, 2019.

192 Interview with humanitarian representative, New York, June 2019.

This could be done sanctions-regime-by-sanctions-regime or could cut across all sanctions regimes, an option which would have the added benefit of standardizing these assessments.

The Security Council could also consider including regular, standardized, and data-based assessments of the impact of sanctions on humanitarian activities in groups of experts' mandates.¹⁹³ This would ensure that the Security Council systematically looks at this issue. However, for some sanctions regimes, this would open up the possibility of contentious negotiations. There is also a concern about the expertise on humanitarian issues within these groups and the limited resources and time the experts would have to implement their already loaded mandates. Another challenge is that humanitarian actors may be reluctant to engage with these political entities in certain contexts, as it could create the perception that they are providing them with information.

Beyond Security Council action, groups of experts could interpret their mandates to allow for monitoring and reporting on the adverse impact of sanctions on humanitarian activities. This idea faces a number of obstacles, however, particularly the potential that the Security Council will push back against broad interpretations of these mandates. Furthermore, the appointment of these experts is political, which can, in some cases, make it hard for them to report what might be unpopular information. Nonetheless, this would be an important way to shed light on this issue.

Sanctions committees also have a role to play. They can make detailed inquiries to groups of experts or other UN or non-UN entities on the impact of sanctions on humanitarian action. They can also organize briefings with humanitarian actors, as the Netherlands did as the chair of the DPRK sanctions committee.¹⁹⁴ Chairs of sanctions committees could look at this issue during country visits—although this might create doubt about the neutrality of humanitarian actors.

Other parts of the UN that could conduct monitoring and reporting are SCAD, OCHA, and the UN Human Rights Council's special rapporteurs. Although it would be a relevant place for such monitoring and reporting to be undertaken, SCAD does not have the right expertise on this issue, nor does it have access to specific countries. OCHA could encourage humanitarian coordinators and humanitarian country teams to document the impact of sanctions on humanitarian operations. However, it arguably lacks the resources and capacity to conduct systematic monitoring and reporting on this issue without the close collaboration of operational humanitarian organizations on the ground, which typically presents many challenges. Furthermore, for some interviewees, taking on such a role risks politicizing OCHA's primary humanitarian mission;¹⁹⁵ this has been a challenge, for example, in the DPRK sanctions regime.¹⁹⁶ On the other hand, OCHA is mandated to facilitate humanitarian access, and many believe this issue falls squarely within its mandate. The UN special rapporteurs play an important role in reporting and can, notably, expand the scope of what humanitarian actors may be able to say, but do not have a budget or resources. Ensuring that this reporting and monitoring are systematic may even require a specific mechanism akin to the former IASC Task Force on the Humanitarian Consequences of Sanctions.

Regardless of where it sits and what form it takes, any serious monitoring and reporting on the impact of sanctions on humanitarian activities requires investment in expertise, capacity, and resources. It also needs to go hand in hand with dialogue and consultation with the humanitarian sector, which requires addressing concerns over the confidentiality of shared information. Therefore, while recognizing the challenges associated with this, humanitarian actors need to actively try to get a sense of how sanctions are impacting their work and to collect information on this internally.

193 Compliance & Capacity Skills International, "Best Practices Guide for Chairs and Members of UN Sanctions Committees"; UN High-Level Review on Sanctions, "UN Sanctions: Humanitarian Aspects and Emerging Challenges," January 19, 2015.

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

195 Interview with humanitarian representative, New York, June 2019.

196 Interview with humanitarian representatives, New York, October 2019.

DEVELOPING MORE AND IMPROVED GUIDANCE

Many of the adverse impacts of sanctions regimes on humanitarian activities described in the first section stem from the way in which these regimes are interpreted. Because the functioning and scope of sanctions regimes are unclear, humanitarian actors, donors, and the private sector may interpret sanctions regimes to be broader or more restrictive than they actually are. In the case of UN or regional sanctions, member states may implement them to be more restrictive than legally required and have different understandings of how they should be implemented, which creates its own set of challenges. As such, progress can be made by developing more and improved guidance on the functioning and scope of sanctions.

Existing Efforts

There is no uniform guidance for UN sanctions regimes. Although a number of UN sanctions committees have produced guidance, the DPRK sanctions committee is the first to produce guidance specifically related to humanitarian activities, which was generally positively received.¹⁹⁷

The ISIL (Da'esh) and Al-Qaida sanctions committee has approved “explanations of terms,” but these are not official UN documents. Instead, they are solely a compilation of relevant passages from Security Council resolutions. According to one interviewee, these documents have not been sufficiently or regularly updated.¹⁹⁸ In 2006, the UN Juridical Yearbook contained guidance on Security Council sanctions in Afghanistan, at the request of the under-secretary-general for peacekeeping operations.¹⁹⁹ It notes that the provision of financial assistance to a provincial government under the control of a listed person would violate the sanctions. However, it goes on to explain that if funds are not channeled through the government

but are provided through protected channels for specific humanitarian projects, such assistance would not violate the sanctions.

At the EU level, the European Commission has created the “EU sanctions map,” a useful interactive tool that compiles all of the sanctions imposed by the EU.²⁰⁰ The Council of the European Union has also produced guidelines and best practices on the implementation of EU sanctions. These guidelines contain sections on exemptions for humanitarian purposes and suggest possible wording for such an exemption.²⁰¹

These types of guidelines are useful to help member states implement the sanctions and bring attention to the need to minimize their humanitarian impact. However, as one interviewee pointed out, this general guidance is not enough to make the system work.²⁰² This was evident in Syria, where uncertainty in the humanitarian sector led the European Commission to produce a list of FAQs on sanctions in Syria.²⁰³ NGOs reportedly found the document helpful, because it clarified the scope of sanctions, some of the ways they intersected with their work, and when an exemption should be obtained.²⁰⁴ However, although better guidance is a positive step, navigating the sanctions in Syria remains operationally challenging for humanitarian organizations. Furthermore, as the implementation and enforcement of EU (and UN) sanctions is the responsibility of member states, the European Commission cannot include enforcement standards in the guidance it produces, so these standards can vary among individual member states.

Guidance at the national level is therefore also key to help humanitarian actors navigate UN, regional, and national sanctions regimes. A number of countries have produced such guidance. For example, the UK Office for Sanctions

197 All UN sanctions regimes have committee guidelines explaining how the sanctions committee functions and detailing how to apply for exemptions. Some sanctions regimes have additional guidance in the form of implementation assistance notices (Somalia, Sudan, Libya, and the DPRK), and one has due diligence guidelines (DRC). The guidance for the DPRK regime followed requests for guidance by a number of NGOs.

198 Interview with sanctions expert, New York, July 2019.

199 United Nations, “Juridical Yearbook,” 2006, pp. 471–473.

200 See : www.sanctionsmap.eu/#/main .

201 Council of the European Union, “Update of the EU Best Practices for the Effective Implementation of Restrictive Measures,” May 4, 2018; “Sanctions Guidelines—Update,” May 4, 2018, p. 40.

202 Interview with sanctions expert, Brussels, September 2019.

203 European Commission, “Frequently Asked Questions on EU Restrictive Measures in Syria.”

204 Interviews with humanitarian and sanctions experts, February–September 2019.

Implementation created a list of FAQs for nonprofit organizations in 2017 that goes over questions related to exemptions and licenses for humanitarian activities and provides some advice on operating in high-risk locations.²⁰⁵ The UK Charity Commission, the department responsible for registering and regulating charities, also produces guidance for charities, including on how the UK's counterterrorism legislation may affect charities and their work.²⁰⁶

OFAC published guidance related to the provision of humanitarian assistance by NGOs in 2014, including on the unwitting provision of humanitarian assistance to designated entities.²⁰⁷ OFAC also has an FAQ page that answers questions related to humanitarian assistance in specific countries.²⁰⁸ The Somalia FAQs, for example, note that unintentional payments to al-Shabab would not be a focus for OFAC enforcement if an organization did not have reason to know it was dealing with al-Shabab.²⁰⁹ In August of 2019, OFAC also published guidance and a statement that it "is committed to ensuring the unfettered flow of humanitarian aid to the people of Venezuela," which was welcomed by some in the humanitarian community.²¹⁰ Beyond this published guidance, however, NGOs reportedly have a hard time obtaining clarity from the US Treasury on specific questions.²¹¹ More generally, when humanitarian actors or financial institutions request specific guidance or assurances from government representatives, governments often do not (or cannot) provide it.²¹²

In 2018, Canada created the Sanctions Policy and Operations Coordination Division in its Ministry of Global Affairs with a helpline and augmented capacity to conduct outreach as a single focal point for issues related to sanctions. Although this is an interesting model, this division does not appear to have tackled issues related to the impact of sanctions on humanitarian activities so far.²¹³ Furthermore, the division's website explicitly states that "Global Affairs Canada does not provide legal advice to the public and is unable to confirm whether or not your particular activity or transaction is permitted under Canadian sanctions."²¹⁴

What Could Be Done

Government policymakers and regulators need to display greater leadership on, and take greater ownership of, their sanctions policies. They can do this by providing better guidance on the scope of sanctions and their enforcement standards, with a particular focus on how they may affect humanitarian activities.

A number of humanitarian representatives interviewed raised concerns about additional guidance, noting that clarification could narrow the space for humanitarian activities. According to one, "We might regret getting clarification on some things."²¹⁵ For example, specific guidance on dual-use items and what can or cannot be imported could create a system that undermines humanitarian activities and could ultimately result in political actors deciding what a humanitarian good is.²¹⁶ Under the DPRK sanctions regime, the development of guidance on dual-use items was

205 UK Treasury Office of Financial Sanctions Implementation, "Frequently Asked Questions: Factsheet for Charities and Other Non-Governmental Organisations (NGOs)." https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/625442/FAQs_Factsheet_for_Charities_and_Other_NGOs.pdf.

206 UK Charity Commission, "Guidance, Charities and Terrorism." Note that the Charity Commission is itself at times in a "tricky" situation given its role both policing the charity sector and providing it with guidance. See Victoria Metcalfe-Hough, Tom Keatinge, and Sara Pantuliano, "UK Humanitarian Aid in the Age of Counterterrorism: Perceptions and Reality," Humanitarian Policy Group, March 2015, p. 19.

207 Keatinge, "Uncharitable Behavior," p. 69. The guidance did not deal with designated entities demanding payment for the delivery of humanitarian assistance, prompting InterAction to publish a letter saying that this "would not prevent a repeat of the Somalia catastrophe." InterAction, "Letter in Response to OFAC Guidance," October 20, 2014.

208 US Department of the Treasury, "OFAC FAQs: Syria Sanctions," available at www.treasury.gov/resource-center/faqs/sanctions/pages/faq_other.aspx#syria_whole.

209 Note that the writing on the FAQs is not direct and contains many caveats.

210 US Department of the Treasury, OFAC, "Guidance Related to the Provision of Humanitarian Assistance and Support to the Venezuelan People," August 6, 2019; InterAction, "InterAction Applauds the U.S. Department of the Treasury for Its Commitment to the Unfettered Flow of Humanitarian Aid to the Venezuelan People," August 7, 2019.

211 Interviews with humanitarian representatives and former US official, February–April 2019.

212 Interviews with humanitarian representatives, February–May 2019.

213 Expert Roundtable on Canadian Economic Sanctions, Ottawa, Canada, October 9–10, 2019.

214 Government of Canada, "Disclosure of Sanctions Violations," available at: www.international.gc.ca/world-monde/international_relations-reactions_internationales/sanctions/contact_us-communiquez_avec_nous.aspx?lang=eng.

215 Interview with humanitarian representative, New York, September 2019.

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

discussed, but concerns were raised that it would lead to the creation of a “white list” of items and end up sidelining the existing system of case-by-case exemption for goods that may not be on the list.²¹⁷

Even if guidance does not specifically address humanitarian concerns, general guidance at the UN and regional levels can support member states as they implement sanctions regimes. General guidance can also ensure that other stakeholders, such as the private sector and humanitarian actors, do not have to deal with different interpretations of the scope of sanctions regimes or implementation measures in each member state.

At the UN level, there is a lot of space for additional guidance on sanctions. In terms of more general guidance, the UN could consider developing a tool similar to the EU’s sanctions map, which could specifically indicate humanitarian language in relevant Security Council resolutions and existing guidance documents. Member states should also be pushing for guidelines on how they should implement the sanctions regimes. For example, the explanation of terms for the ISIL (Da’esh) and Al-Qaida sanctions regime and the Taliban sanctions regime could be given official UN document status, which would demonstrate that the sanctions committees support them and push member states to take them more seriously.²¹⁸ These documents should also be more regularly updated, which could fall under the chair of the sanctions committees’ program of work. Similar documents could also be produced for the other UN sanctions regimes.

In terms of humanitarian activities more specifically, the sanctions committees might consider introducing non-binding documents that specify the targeted nature of UN sanctions. These could contain language that identifies how member states should ensure that humanitarian activities are safeguarded in the implementation of the sanctions. For example, such a document could explicitly state that no UN sanctions regime

prohibits engaging with designated entities or individuals for the purposes of conducting humanitarian activities. At the country level, the UN country team could set up parameters for how humanitarian actors should operate in a country in the context of sanctions. Despite providing no guarantees, this type of effort can help create a shared understanding of the operational context and bring some clarity to humanitarian actors navigating complex regulatory frameworks.

More guidance could also be developed on EU sanctions. The EU sanctions map could more clearly indicate where and what forms of humanitarian exceptions and exemptions exist. The FAQ on the Syria sanctions is a model that other EU sanctions regimes could reproduce. More cross-cutting guidance across EU sanctions regimes is reportedly also being considered.²¹⁹ The EU, however, can only provide interpretations of EU law. National-level guidance, which follows EU guidance, is crucial. Governments should ensure that they are providing clear guidance on the scope of sanctions, the availability and use of exemptions where they exist, and enforcement standards. Member states could also consider providing clear points of contact for questions related to sanctions.

Although better guidance may be difficult to obtain at the UN level, like-minded member states could work together to produce streamlined national guidance for humanitarian actors and the financial sector. This would ensure that at least in those member states, stakeholders are not dealing with different standards and requirements.

Finally, financial institutions require more clarity on standards and thresholds for sanctions compliance, due diligence, and “know-your-customer” or “know-your-customer’s-customer” procedures to ensure they are not over-complying at the expense of humanitarian actors. However, guidance, where it exists, is generally informational rather than legal. For financial institutions, it will therefore often be insufficient to justify taking on what they perceive as high levels of risk.

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

218 Interview with sanctions expert, New York, July 2019.

219 Interview with EU sanctions experts, Brussels, September 2019.

IMPROVING RISK MANAGEMENT AND RISK SHARING

Humanitarian actors are currently shouldering much—if not all—of the risk that stems from operating in contexts in which sanctions regimes apply. Most large international NGOs undertake considerable due-diligence measures for their programs, international and local partners, and staff and heavily invest in complying with sanctions obligations. Yet the humanitarian sector as a whole continues to be perceived as vulnerable and high-risk. On the other hand, even for bigger organizations, the complex regulatory environment makes risk management challenging. As such, humanitarian actors could benefit from risk-management support. That said, risk management does not address some of the challenges humanitarian actors face, particularly related to their ability to provide principled humanitarian services. There is also a need to consider what risk-sharing measures could be taken.

Existing Efforts

Risk management: Many humanitarian organizations have undertaken massive efforts to comply with sanctions and other regulatory measures.²²⁰ In 2015, the Norwegian Refugee Council published its Risk Management Toolkit highlighting steps that humanitarian organizations can and have taken to address some of the main challenges and risks associated with counterterrorism measures.²²¹ Organizations have set up programmatic and informational controls that give confidence to their donors in contexts where the level of scrutiny on operations is extremely high. According to one interviewee, “If you are giving money to a serious organization, their system and controls will ensure the money is being used for its intended purpose—the systems pick up the worst diversion.”²²² For smaller or local NGOs, however, meeting the high

standards required is challenging. In general, having zero tolerance for diversion of aid in the complex contexts in which humanitarian organizations operate is unrealistic.

Despite considerable investment in compliance, as well as rigorous systems and controls, many in the sanctions, counterterrorism, and banking spheres continue to consider the humanitarian sector as vulnerable and high-risk. This stems in large part from a lack of understanding of the humanitarian sector and the environment in which it operates. For example, the Financial Action Task Force (FATF) developed recommendations that serve as internationally endorsed global standards against money laundering and terrorist financing. In the first iteration of these recommendations, FATF warned that terrorists hide behind nonprofit organizations, using them to funnel money, and advised states to enact a range of measures to prevent these interactions.²²³

In June of 2016, FATF revised its Recommendation 8 on combating the abuse of nonprofit organizations to promote a risk-based approach that does not disrupt or discourage legitimate nonprofit activities. The revisions clarified that not all nonprofit organizations represent the same level of risk and that some represent little or no risk at all.²²⁴ Concerns remain, however, about how states will apply the new risk-based approach in practice.²²⁵ Most governments have reportedly not issued new regulatory guidance following this revision.²²⁶ For example, the US has not revised its banking regulations, so US enforcement agencies are still treating NGOs as high-risk.²²⁷ In some countries, however, the revision has reportedly led governments to assess the risk of the sector. The Global NPO Coalition on FATF, a network of nonprofit organizations that advocate for changes in FATF’s Recommendations, is currently working

220 See, for example, Joel Charny, “Counter-terrorism and Humanitarian Action: The Perils of Zero Tolerance,” *War on the Rocks*, March 20, 2019.

221 Norwegian Refugee Council, “Risk Management Toolkit,” December 15, 2015.

222 Phone interview with humanitarian representative, April 2019.

223 FATF is an independent intergovernmental organization founded in 1989 at a summit of the G7 to develop and promote policies to protect the global financial system against money laundering, terrorist financing, and the financing of proliferation of weapons of mass destruction. Its counterterrorism mandate was introduced after 9/11. In 2012, it published the “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations.”

224 Financial Action Task Force, “Terrorist Financing Risk Assessment Guidance,” July 2019, p. 43.

225 Ben Hayes, “The Impact of International Counter-terrorism on Civil Society Organisations,” *Bread for the World*, p. 26.

226 Norwegian Refugee Council, “Principles under Pressure,” p. 25.

227 Phone interview with US sanctions expert, April 2019.

on developing a risk-assessment approach on which it will constructively engage with the FATF.²²⁸

Banks also have limited expertise on the humanitarian sector and how it works in complex contexts, although some have been doing interesting work. One representative from the banking sector did note that his bank had produced an internal guidance document on charity customers, which pointed out red flags and risk-management procedures to look out for.²²⁹ Furthermore, Barclays, one of the leading banks in the charity sector, has done a lot of work engaging and training the humanitarian sector and has produced guidance for charities on financial crime risk management.²³⁰

In terms of support to risk management efforts, a number of interviewees noted that donors often do not provide funds for compliance efforts. Furthermore, international organizations do not always provide these types of funds to their implementing partners. In a study conducted in 2018, less than 30 percent of international NGOs or UN agencies and under 20 percent of local or national NGOs reported receiving funding or other resources for risk management.²³¹ Some big donors provide “unearmarked funding,” or funding without restrictions on its use, which organizations can then allocate for risk management.

The UN has also set up risk management units (RMUs) in Somalia and Afghanistan and is currently setting them up in South Sudan and Yemen. The RMUs aim to ensure that the UN, its partners, and its donors better understand and mitigate the risks associated with operating in certain contexts. For example, the RMU in Somalia was established in 2011 in the wake of a massive diversion of aid during the famine to provide a

knowledge base on risks associated with local contractors, vendors, and implementers.²³² When it was established, it helped bring together the risk-management efforts of various UN agencies within the country.²³³ Today, it runs a system with information on past and potential contractors where it uploads sanctions lists that UN agencies can check when entering into partnerships. With respect to UN agencies, it also responds to requests for risk assessments and can make recommendations on working with certain partners on risk-mitigating measures.²³⁴

One of its functions is also to provide support to NGOs which it has done by producing a risk management guide specifically for NGOs, for example.²³⁵ According to a 2018 UN report, the RMU supports humanitarian actors with risk management advice and training, among other things.²³⁶ One interviewee noted that the only direct engagement that the RMU has with NGOs is for capacity building, mostly in the form of training sessions. Overall, the RMU appears to play only a limited role in supporting humanitarian actors with respect to sanctions regimes as a number of humanitarian actors interviewed were not even aware of its existence or the nature of its work. One interviewee noted that it has been problematic because it is influenced by the political mandate of UN leadership in the country and has ultimately been a way for the UN to de-risk.²³⁷

Some governments have also undertaken efforts to support humanitarian actors with compliance and risk-management efforts. For example, the Charity Commission for England and Wales, an independent government department in the UK, provides a compliance toolkit to help charities manage risk.²³⁸ Additionally, in May, 2019, OFAC published guidance on the five essential

228 Phone interview with civil society representative, May 2019. See: <http://fatfplatform.org/about/>.

229 Phone interview with private sector representative, April 2019.

230 Barclays, “Avoiding the Risks of Financial Crime in the Charity Sector: 2019 Update.”

231 Abby Stoddard, Monica Czwarno, Lindsay Hamsik, “NGOs & Risk: Managing Uncertainty in Local-International Partnerships,” March 7, 2019, p. 25.

232 Interview with sanctions expert, New York, September 2019.

233 Phone interview with UN representative, July 2019.

234 Skype interview with UN representative, September 2019.

235 UN Somalia, “Risk Management for NGOs,” available at www.undp.org/content/dam/unct/somalia/docs/rmu/Risk%20Management%20For%20NGOs_English.pdf.

236 UN Security Council, *Letter Dated 8 October 2018 from the Chair of the Security Council Committee Pursuant to Resolutions 751 (1992) and 1907 (2009) Concerning Somalia and Eritrea Addressed to the President of the Security Council*, UN Doc. S/2018/896, October 8, 2018.

237 Skype interview with UN representative, September 2019.

238 UK Charity Commission, “Protecting Charities from Harm: Compliance Toolkit,” September 3, 2013.

components of an effective sanctions-compliance program.²³⁹ OFAC has also developed a risk matrix for the charitable sector aimed at assisting organizations in understanding and complying with their legal obligations under US sanctions programs while delivering aid in high-risk areas.²⁴⁰ Beyond governments, organizations like the Charity Finance Group provide training and guidance on risk management, banking, and reporting.

If support for risk management helps ensure compliance with existing sanctions regimes, it does not address the challenges that humanitarian actors face operating in a neutral, independent, and impartial manner. It also does not address the fact that in certain cases, traditional humanitarian activities that are provided for under IHL are considered to be in direct contradiction with sanctions regimes. One humanitarian representative explained that their organization is considering planning the types of activities it engages in based on the potential that beneficiaries are part of or associated with sanctioned armed groups.²⁴¹ The implementation of a zero-tolerance approach not only considerably slows down humanitarian activities, it also makes it harder for humanitarian organizations to remain principled.

Risk sharing: Risk-sharing measures help ensure that humanitarian actors are not bearing the full risk of operating in contexts in which sanctions regimes apply. Governments occasionally give guarantees to humanitarian organizations or financial institutions that certain activities or transfers fall outside the scope of sanctions regimes. However, they are reportedly reluctant or unable to give these guarantees most of the time, particularly in written form. A former US government official noted that the US Treasury does not like to provide clarity on the scope of sanctions

regimes. Although it will occasionally provide letters stating that a particular activity is not illegal and prosecution will not be pursued, this is the exception rather than the norm.²⁴² A representative from the Canadian government explained that the sanctions team could not issue guarantees of non-prosecution, as prosecution was the responsibility of another government department.²⁴³ The German government's *Nullbescheid*, or "negative certificate," can be issued upon request if an intended export is not within the scope of a sanctions regime and thus does not require an export authorization.²⁴⁴

The EU and the UN renegotiated the Financial and Administrative Framework Agreement in 2018, which governs contribution agreements between the two parties. During this renegotiation, there were discussions on responsibility sharing and, as a result, the agreement now provides for the UN to cooperate with the European Commission in assessing if recipients of EU funds fall under the scope of EU sanctions.²⁴⁵ According to one EU expert, UN entities must still check against sanctions lists, but the EU will double check and ultimately bear the final responsibility.²⁴⁶ The EU has also provided the UN with a document explaining that, in line with IHL and the principle of impartiality, compliance with sanctions measures applies only with respect to implementing partners and contractors, never final beneficiaries.²⁴⁷

Ensuring sanctions violations are enforced in a proportionate manner is another way that governments can share risk. In the US, OFAC can impose civil penalties on a strict liability basis. Nonetheless, the OFAC risk matrix indicates that "OFAC addresses every violation in context, taking into account the nature of a charity's business, the

239 US Department of the Treasury, "A Framework for OFAC Compliance Commitments," May 2019.

240 US Department of the Treasury, "Risk Matrix for the Charitable Sector."

241 Skype interview with humanitarian representative, April 2019.

242 Phone interview with US sanctions expert, April 2019.

243 Interview with member-state representative, New York, April 2019.

244 It is important to note that using the *Nullbescheid* model for humanitarian work would require some tweaking in practice. The *Nullbescheid* is currently used mainly for dual-use items and the Federal Office of Economics and Export Control (BAFA), which issues the *Nullbescheid*, is staffed with technical and legal experts who look at goods being exported from Germany, not humanitarian goods or funds specifically. Using this for humanitarian work would require a significant investment into bringing in the necessary expertise. See: www.bafa.de/DE/Aussenwirtschaft/Ausfuhrkontrolle/Antragsarten/Nullbescheid/nullbescheid_node.html.

245 Financial and Administrative Framework Agreement between the European Union represented by the European Commission and the United Nations, December 31, 2018, available at https://ec.europa.eu/europeaid/sites/devco/files/adaptation_un_fafa_consolidated_2018.pdf

246 Skype interview with EU sanctions expert, April 2019.

247 Interview with EU expert, Brussels, September 2019.

history of the group's enforcement record with OFAC, the sanctions harm that may have resulted from the transaction, and the charity's compliance procedures."²⁴⁸ The UK Office of Financial Sanctions Implementation states that it considers whether organizations voluntarily disclosed violations when deciding what action to take following a breach.²⁴⁹ At the EU level, individuals or entities are not liable if they did not know, and had no reasonable cause to suspect, that their actions would violate sanctions.²⁵⁰

Some donors continue to ensure that their grant agreements do not contain restrictive clauses with extensive reporting and other requirements. However, there is an increasing trend to include such clauses in donor agreements, which are not always easy to identify and can be extensive. For example, USAID requires a grant recipient to certify that "to the best of its current knowledge, [it] did not provide, within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide, material support or resources to any individual or entity" that engages in terrorist acts.²⁵¹ Allegations that organizations have violated these clauses can trigger whistleblower complaints and government investigations, which can, among other things, lead to civil and criminal fines and penalties. For example, a number of cases have recently been brought against humanitarian organizations under the False Claims Act.²⁵²

The UN has also, albeit rarely, set up mechanisms to lighten the burden of humanitarian actors operating within the context of sanctions. In Sudan, a UNDP-run procurement office for medicines, medical and laboratory equipment, and consumables was created, permitting exporters and financial intermediaries to have certainty that transactions are not violating any sanctions.²⁵³ This

is an interesting model, although it tackles only a portion of the needs and is mostly meant to address chronic diseases.²⁵⁴

What Could Be Done

Humanitarian actors need to be more vocal about the time and resources they invest in compliance. It would be beneficial for them to better communicate and explain the extensive measures they take to governments and financial institutions. They need to show that secure procedures are in place and understand the scrutiny under which banks operate. In a similar vein, governments and banks need to do a better job of assessing the humanitarian sector. For example, banks should invest in the necessary expertise to better understand the humanitarian sector and make informed decisions on risk.²⁵⁵ In its 2019 guidance, the FATF notes that a "comprehensive understanding of the features, nature and activities of the sector is a vital prerequisite to understanding the [terrorist financing] risks posed to some [nonprofit organizations]."²⁵⁶ Some humanitarian actors, however, are wary of governments publishing risk assessments of organizations as they fear that this again places the compliance burden on the humanitarian organizations that would provide the data for such assessments.²⁵⁷

Donors could ensure that their funding agreements provide for an adequate risk-management budget if the agreement contains compliance requirements. At the very least, they could provide flexible funding that organizations can then allocate to setting up robust due-diligence and risk-management processes. Structures like the UN Risk Management Unit could be better used to support humanitarian actors in managing the risk of operating in the context of sanctions. Such a unit could provide support in vetting contractors, vendors, and partners, but could also take on a

248 US Department of the Treasury, "Risk Matrix for the Charitable Sector," p. 4.

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

250 See, for example, European Council Regulation 36/2012, Art. 28.

251 USAID, "Certifications, Assurances, Representations, and Other Statements of the Recipient: A Mandatory Reference for ADS Chapter 303," July 6, 2018.

252 See, for example, Charity & Security Network, "False Claims Act Lawsuits," available at: www.charityandsecurity.org/False-Claims-Act-Lawsuits.

253 UNDP Sudan, "UNDP and Ministry of Health Reach an Agreement on Broad-scale Procurement of Essential Medicines," November 27, 2016; UN General Assembly, *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on His Mission to the Syrian Arab Republic*, UN Doc. A/HRC/39/54/Add.2, October 8, 2018.

254 Skype interview with UN representative, July 2019.

255 Keatinge, "Uncharitable Behavior," p. 19.

256 Financial Action Task Force, "Terrorist Financing Risk Assessment Guidance," July 2019, p. 44.

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

broader role in providing advice on the interpretation of applicable sanctions regimes. This would require investing in the right legal expertise. Alternatively, such a structure could be set up outside of the UN as some kind of “help desk” that humanitarian actors could contact to engage with experts who could answer their questions and provide advice. In the 1990s, the Commission on Security and Cooperation in Europe and the European Community formed a sanctions liaison group to provide technical assistance for the implementation of UN sanctions against Yugoslavia.²⁵⁸ Something along these lines could be considered to support humanitarian activities.

A number of practices could be considered to ensure better risk sharing and a more balanced approach. Donors should consider abstaining from including strict compliance requirements in grants due to the heavy burden they place on humanitarian actors. Governments could provide guarantees of non-prosecution to humanitarian organizations and financial institutions regarding the scope and enforcement of sanctions. To address derisking in particular, financial institutions need stronger, more explicit, or more formal guarantees from member states that sanctions will not be enforced on humanitarian actors with proper risk-management procedures in place. For many financial institutions, anything less than a written statement will not be sufficient to justify taking on the risk sanctions regimes pose. In particular, many financial institutions will want a guarantee from the US Treasury, as even institutions outside of the US will be concerned about secondary sanctions and secondary enforcement action.

Governments could also consider providing incentives to banks that facilitate transfers for humanitarian activities. This could take the form of tax breaks for engagement with the humanitarian sector, or even an indemnity against fines for providing services to principled humanitarian actors if they are following a predetermined

standard for compliance procedures. According to a number of private sector interviewees, what banks ultimately want is protection from liability. More thought could also be given to developing humanitarian banking channels, or even a stand-alone humanitarian bank. One interviewee suggested exploring the option of banks moving money to an escrow account at the World Bank that would act as a firewall between that bank and the bank in a sanctioned context.²⁵⁹ Another interviewee noted that the World Bank works according to governments’ priorities, which challenges the need for humanitarian operations to be neutral.²⁶⁰ However, arrangements could be framed so as to preserve humanitarian actors’ capacity to operate in a principled manner.

Having a special bank to conduct transactions for humanitarian purposes would address concerns related to humanitarian principles and decrease issues related to reputational risk. However, such a bank would likely still rely on correspondent banks, which creates due-diligence challenges that require time and resources to address. It would likely also require some type of assurance from the US regarding enforcement. An interesting practice this year has been the EU’s creation of the Instrument in Support of Trade Exchanges (INSTEX), a special-purpose vehicle to “facilitat[e] legitimate business with Iran” in the context of strong US sanctions.²⁶¹ Its scope is restricted to the trade of goods such as medicines, medical devices, and food. However, it faces many challenges, as the US has made clear it would strictly enforce its sanctions, including against INSTEX staff.²⁶²

Another way to share risk is for governments to ensure clear and proportionate enforcement standards, move away from strict liability, and to take into account good faith and robust due diligence. Under the UK’s 2010 Bribery Act, for example, a company found to be connected to an act of bribery is not guilty if it can show it had adequate procedures in place to prevent people

258 Cortright and Lopez, *The Sanctions Decade*, pp. 68–69.

259 Phone interview with private sector representative, April 2019.

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

261 European Union External Action Service, “Chair’s statement Following the 28 June 2019 Meeting of the Joint Commission of the Joint Comprehensive Plan of Action,” June 28, 2019.

262 François Murphy, “EU-Iran Trade Vehicle Unlikely to Meet Anti-money-laundering Norms: U.S.,” Reuters, May 7, 2019; Siobhan Dowling, “INSTEX: Doubts Linger over Europe’s Iran Sanctions Workaround,” *Al Jazeera*, July 1, 2019; Jonathan Stearns and Helene Fouquet, “U.S. Warns Europe That Its Iran Workaround Could Face Sanctions,” Bloomberg, 29 May 2019.

associated with it from undertaking the act.²⁶³ This approach could be transposed to sanctions regimes.²⁶⁴ In the US, NGOs have reportedly been pushing for such an approach and have suggested laying out conditions under which humanitarian transactions and activities should be exempt from sanctions enforcement by the US Treasury.²⁶⁵

Finally, the UN could also play a bigger role in sharing risk with the humanitarian sector. For example, the special rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights recommended the creation of a specialized UN procurement office in Syria with full authority to obtain humanitarian goods and services and manage financial transfers in compliance with sanctions. With the assistance of experts from those countries that impose sanctions, such an office would be a single point of reference for all actors and responsible for ensuring that humanitarian organizations' financial transactions and imports of goods and services comply with sanctions regimes.²⁶⁶

Conclusions and Recommendations

The adverse impact of sanctions measures on humanitarian activities in a number of contexts is clear. It is important to note that although concrete measures to address this impact are lacking, a consensus has emerged in the last couple of years on the reality of these challenges, and there has been progress at the political and normative levels. The language in Security Council Resolutions 2462 and 2482 urging states to take into account the potential consequences of counterterrorism measures on principled humanitarian action when designing and implementing such measures is an important step.

Although these are positive steps, there is a continued need for raising awareness of how sanctions regimes impact humanitarian action. Given that sanctions regimes are mostly targeted and that member states are bound to uphold the principles in the UN Charter and IHL (where it

Table 1. Risk management support and risk sharing options

	Risk-management support	Risk sharing
Member states	Fund risk management/provide unearmarked funding	Avoid strict compliance requirements in donor agreements
	Conduct better risk assessments of the humanitarian sector	Provide guarantees to financial institutions and humanitarian actors on the scope and enforcement of sanctions
	Support the creation of a “help desk” on sanctions regimes	Set up a humanitarian banking channel or a stand-alone humanitarian bank
		Provide incentives to financial institutions to support transfers for humanitarian activities
		Ensure proportionate enforcement standards
UN	Create a “help desk” on sanctions regimes	Create a UN office that can manage financial transfers and the import of humanitarian goods and services

263 UK Ministry of Justice, “The Bribery Act 2010: Guidance about Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing,” February 2012, p. 6.

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

265 Skype interview with humanitarian representative, April 2019.

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

applies), sanctions should protect and not inhibit humanitarian action. Where sanctions hinder aid, the impact on civilians is immediate, and efforts to backtrack will always come too late. Going forward, member states, the UN, financial institutions, and humanitarian actors should proactively and preventively tackle this problem. To do so, the UN Security Council, UN sanctions committees and groups of experts, other UN entities, humanitarian organizations, member states, regional organizations, and private sector actors can take a number of concrete measures:

UN Security Council

- **Consider exceptions for humanitarian action:** The Security Council should include language that safeguards humanitarian activities in sanctions resolutions. It should consider a cross-cutting exception for humanitarian activities or, if that is unfeasible, regime-by-regime exceptions. Given the political dynamics around exceptions, and keeping in mind the challenges it may create, the Security Council could also consider developing a “white list” of organizations that would be exempted from a particular sanctions regime.
- **Make it clear that the implementation of sanctions must comply with IHL:** The Security Council should make it clear that humanitarian activities, including medical activities, carried out by impartial humanitarian actors in a manner consistent with IHL should not be criminalized. It should also systematically demand that those implementing sanctions comply with their obligations under IHL.
- **Request assessments of the impact of sanctions on humanitarian action:** The Security Council should request assessments of the impact of sanctions on humanitarian activities and mandate reporting on this impact. It should also regularly assess how member states ensure that their implementation of sanctions does not violate IHL. It could consider including such assessments and reporting in groups of experts’ mandates.

UN sanctions committees and groups of experts

- **Increase monitoring and reporting on the impact of sanctions on humanitarian action:** Sanctions committees should ask groups of experts or other UN or non-UN entities about the impact of sanctions on humanitarian activities more consis-

tently and organize briefings with humanitarian actors on this issue. Groups of experts, for their part, should interpret their mandates in coordination with their respective sanctions committees to include looking at how sanctions regimes are impacting humanitarian activities.

- **Develop more guidance on sanctions regimes:** Sanctions committees should develop more guidance on the scope of sanctions regimes generally and how they interact with humanitarian activities specifically.
- **Streamline exemption processes:** Where the sanctions regime provides for an exemption process, sanctions committees, particularly the DPRK sanctions committee, should ensure the process does not delay the humanitarian response and that requests for exemptions are not held up for political purposes.

Other UN entities

- **Raise awareness of the impact of sanctions:** The Security Council Affairs Division (SCAD) and the Office for the Coordination of Humanitarian Affairs (OCHA) should raise awareness about the impact of sanctions on humanitarian activities. SCAD could include this issue as part of its training for incoming Security Council members.
- **Support engagement between the sanctions and humanitarian communities:** SCAD and OCHA could convene discussions and workshops on this issue, including on particular country contexts and with private sector actors. An interagency working group could also be created to enable and support exchanges between the sanctions and humanitarian communities.
- **Coordinate efforts and monitor impact:** OCHA should take a leading role in coordinating efforts of the humanitarian sector to address the impact of sanctions on humanitarian activities. To the extent possible, it should also contribute to monitoring this impact to enable adequate reporting on this issue.
- **Help humanitarian actors manage risk and increase risk sharing:** At the country level, the UN could develop and, where they exist, strengthen risk-management units to support humanitarian actors in managing risk. Such structures could also advise on the interpretation of applicable sanctions regimes. The UN could also develop offices that support the humanitarian sector by

managing financial transactions and importing goods in compliance with sanctions.

Humanitarian organizations

- **Improve internal and external coordination:** Both internally and with each other, humanitarian actors should better coordinate efforts to ensure sanctions do not negatively impact their work.
- **Engage more with sanctions experts:** Humanitarian actors should more proactively and strategically have discussions with sanctions experts in the UN, EU, and member states and explain the concrete implications of sanctions for their work and the risk-management processes they have in place.
- **Collect more data:** Humanitarian organizations should more systematically collect information and data on the impact of sanctions on their operations to contribute, to the extent possible, to monitoring and reporting and to inform policymaking.

Member states and regional organizations

- **Include exceptions and streamline and clarify exemptions:** Member states and regional organizations should include exceptions for humanitarian activities in their sanctions regimes, or at the very least, they should allow for exemptions in all sanctions regimes. Where there are exemptions, member states implementing regional sanctions or with autonomous sanctions regimes should set up clear and efficient processes that enable humanitarian actors to remain flexible in their response. Regional organizations could also provide more detailed rules on the implementation of existing exemptions.
- **Clarify that humanitarian action should not be criminalized:** Member states and regional organizations should make it clear that humanitarian activities, including medical activities, carried out by impartial humanitarian actors in a manner consistent with IHL should not be criminalized.
- **Ensure engagement between sanctions and humanitarian experts:** Internally, member states and regional organizations should ensure cross-disciplinary engagement and collaboration between sanctions and humanitarian experts, including through the creation of multi-stakeholder fora with relevant government entities, humanitarian organizations, and the

private sector. Member states should consider having cross-ministerial focal points for issues related to sanctions and humanitarian action. They should also institute processes to monitor the impact of sanctions on humanitarian activities.

- **Provide better guidance:** Member states and regional organizations should provide better guidance on the scope of sanctions and on enforcement standards and issue revised guidance for financial institutions based on the revision of FATF's Recommendation 8. Member states and regional organizations should also consider supporting the creation of a "help desk" on sanctions for humanitarian actors.
- **Clarify enforcement standards and ensure they are proportionate:** Member states should ensure they have clear and proportionate enforcement standards for sanctions and should avoid strict liability for violations. They could also provide guarantees to humanitarian organizations and financial institutions regarding the scope and enforcement of sanctions.
- **Fund and support risk management:** Donors should ensure they provide funding for risk management. They also should not include restrictive clauses in their donor agreements that place a heavy burden on humanitarian actors. Donors should be equipped to support partners facing issues in relation to sanctions, including by identifying clear focal points to be contacted when issues arise.
- **Facilitate financial transactions:** Member states could consider providing incentives to financial institutions that facilitate transfers for humanitarian activities. They could also support the creation of humanitarian banking channels or of a stand-alone humanitarian bank.

The private sector

- **Improve understanding of the humanitarian sector:** Financial institutions should invest in humanitarian expertise to better understand the humanitarian sector.
- **Use a risk-based approach:** Financial institutions should use a risk-based approach in assessing the humanitarian sector, keeping in mind that not all nonprofit organizations represent the same level of risk, with some representing little or no risk at all.

Annex: Examples of Language Safeguarding Humanitarian Activities in Sanctions Regimes²⁶⁷

Sanctions regime	Language	Comment
UN Security Council		
DPRK	<p>“Reaffirms that the measures imposed... are not intended to have adverse humanitarian consequences for the civilian population of the DPRK or to affect negatively or restrict those activities, including economic activities and cooperation, food aid and humanitarian assistance..., and the work of international and non-governmental organizations carrying out assistance and relief activities in the DPRK for the benefit of the civilian population of the DPRK and decides that the Committee may, on a case-by-case basis, exempt any activity from the measures imposed by these resolutions if the committee determines that such an exemption is necessary to facilitate the work of such organizations in the DPRK or for any other purpose consistent with the objectives of these resolutions, and further decides that the measures specified... shall not apply with respect to financial transactions with the DPRK Foreign Trade Bank or the Korea National Insurance Corporation if such transactions are solely for the operation of diplomatic or consular missions in the DPRK or humanitarian assistance activities that are undertaken by, or in coordination with, the United Nations.” Resolution 2371 (2017)</p> <p>The embargo “shall also apply to any item, except food or medicine, if the State determines that such item could directly contribute to the development of the DPRK’s operational capabilities of its armed forces, or to exports that support or enhance the operational capabilities of armed forces of another Member State outside the DPRK, and decides also that this provision shall cease to apply to the supply, sale or transfer of an item, or its procurement, if: (a) the State determines that such activity is exclusively for humanitarian purposes or exclusively for livelihood purposes which will not be used by DPRK individuals or entities to generate revenue... provided that the State notifies the Committee in advance of such determination and also informs the Committee of measures taken to prevent the diversion of the item for such other purposes.” Resolution 2270 (2016)</p>	<p>The DPRK sanctions regime’s exemption process requires considerable investment of time and resources. However, the process has improved since the publication of the implementation assistance notice on obtaining exemptions.</p>

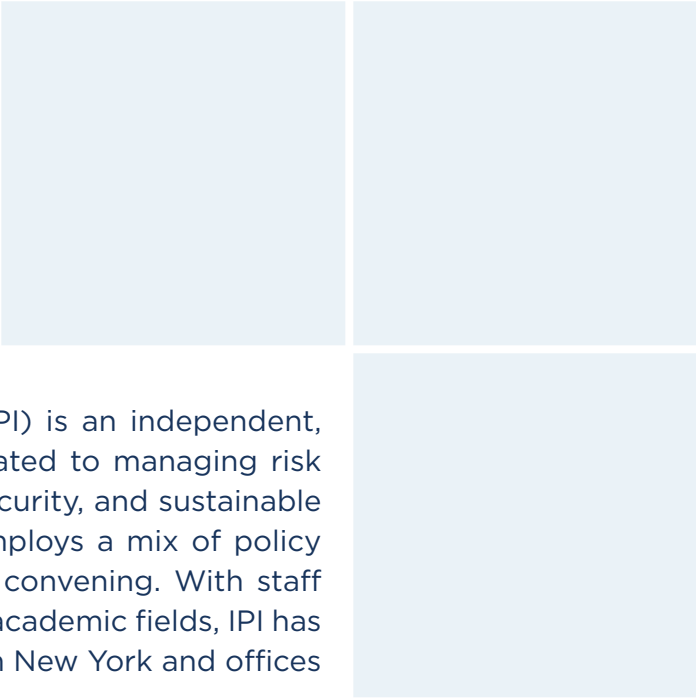
²⁶⁷ All emphasis added by author.

Sanctions regime	Language	Comment
ISIL (Da'esh) & Al Qaida	<p>“Urges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.” Resolution 2462 (2019)</p> <p>“Urges Member States to ensure that all measures taken to counter terrorism comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, and urges states to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.” Resolution 2482 (2019)</p>	These provisions in two broader counterterrorism resolutions can be interpreted to mean that in their efforts to implement the asset freeze imposed in the UN’s ISIL (Da’esh) and Al-Qaida sanctions regimes, member states must take into account the potential effect on humanitarian activities.
Afghanistan/ Taliban	<p>“Reaffirming the necessity for sanctions to contain adequate and effective exemptions to avoid adverse humanitarian consequences on the people of Afghanistan, and that they be structured in a way that will not impede, thwart or delay the work of international humanitarian assistance organizations or governmental relief agencies providing humanitarian assistance to the civilian population in the country.”</p> <p>“Decides further that the Committee shall maintain a list of approved organizations and governmental relief agencies which are providing humanitarian assistance to Afghanistan, including the United Nations and its agencies, governmental relief agencies providing humanitarian assistance, the International Committee of the Red Cross and non-governmental organizations as appropriate, that the prohibition imposed... shall not apply to humanitarian flights operated by, or on behalf of, organizations and governmental relief agencies on the list approved by the Committee.” Resolution 1333 (2000)</p>	This “white list” approach is a form of limited exception for humanitarian flights. ²⁶⁸ While this provision no longer exists in the Taliban sanctions regime, at the time it reportedly worked well, in part because only a small number of humanitarian organizations were working in Taliban-controlled areas.

268 Approved list of humanitarian relief providers for Afghanistan, January 19, 2001, available at: www.un.org/press/en/2001/afg123.doc.htm. See also Security Council Committee Concerning Afghanistan Adds Humanitarian Relief Providers to Initial list, AFG/133-SC/7039, 23 March 2001; AFG/134, SC/7046, 10 April 2001.

Sanctions regime	Language	Comment
Somalia	<p>“The obligations imposed on Member States... shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners.” Resolution 1916 (2010)</p>	<p>The Somalia sanctions regime is the first and only UN sanctions regime to include a broader exception for humanitarian actors. It has been renewed every year since its adoption in 2010. Humanitarian actors often point to it as an important precedent.</p> <p>However, it does not cover organizations that do not have observer status with the UN or that are not UN implementing partners and does not cover humanitarian protection activities.</p>
DRC	<p>The arms embargo “shall not apply to:... (c) Other supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance and training, as notified in advance to the Committee.” Resolution 1807 (2008)</p>	<p>This form of limited exception also applies in the UN sanctions regimes in the Central African Republic, Libya, South Sudan, and Sudan.</p>
Syria	<p>“By way of derogation..., the competent authorities of the Member States..., may grant, under such terms and conditions as they deem appropriate, an authorisation for technical assistance or brokering services, or financing or financial assistance related to equipment, goods or technology..., provided that the equipment, goods or technology are intended for food, agricultural, medical or other humanitarian purposes, or for the benefit of United Nations personnel, personnel of the Union or its Member States.” Art. 3(3) Council Regulation No 36/2012</p> <p>“The prohibitions ... shall not apply to the purchase or transport in Syria of petroleum products or to the related provision of financing or financial assistance by public bodies or by legal persons, entities or bodies which receive public funding from the Union or Member States to provide humanitarian relief or assistance to the civilian population in Syria, provided that such products are purchased or transported for the sole purposes of providing humanitarian relief in Syria or assistance to the civilian population in Syria.” Art. 6(a)(1) Council Regulation No 36/2012</p>	<p>The fuel exception is limited, but it reportedly works well. However, the exemption process has created challenges for the humanitarian response. Furthermore, the text leaves the implementation of exemption processes entirely up to member states, which can make it as restrictive as they want it to be.</p>

Sanctions regime	Language	Comment
Canada		
DPRK (autonomous sanctions)	<p>Sanctions measures do not apply to “goods consigned to one of the following organizations for the purpose of safeguarding human life, disaster relief, stabilization or the providing of food, medicine, medical supplies or equipment, and for which an export permit, if required, has been issued under the <i>Export and Import Permits Act</i>:</p> <ul style="list-style-type: none"> (i) international organizations with diplomatic status, (ii) United Nations agencies, (iii) the International Red Cross and Red Crescent Movement, or (iv) non-governmental organizations;” <p>“any services provided by or to one of the following organizations for the purpose of safeguarding of human life, disaster relief, stabilization or the providing of food, medicine, medical supplies or equipment:</p> <ul style="list-style-type: none"> (i) international organizations with diplomatic status, (ii) United Nations agencies, (iii) the International Red Cross and Red Crescent Movement, or (iv) a non-governmental organization that has entered into a grant or contribution agreement with the Department of Foreign Affairs and International Trade or the Canadian International Development Agency;” <p>Regulations, SOR/2011-167</p>	<p>Canada includes similar exceptions for certain types of goods and services provided by certain types of organizations in its Syria, Zimbabwe, and Myanmar sanctions regimes.</p> <p>The exception for services provided is narrower, as it is restricted to NGOs that have a grant or contribution agreement with the Canadian government.</p>



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