

An Unfinished Agenda: Carving Out Space for Humanitarian Action in the UN Security Council's Counterterrorism Resolutions and Related Sanctions

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EXECUTIVE SUMMARY

Since the attacks of September 11, 2001, the UN Security Council has developed two main streams of work related to counterterrorism: (1) the sanctions regime established by Resolution 1267, which was later split into two sanctions regimes, one for the Taliban and one for al-Qaida and the Islamic State of Iraq and the Levant (ISIL) and their affiliates; and (2) a series of measures under Resolution 1373 and subsequent resolutions.

However, these counterterrorism resolutions and related sanctions regimes have been criticized for failing to safeguard and facilitate impartial humanitarian action. In response, the council has progressively incorporated language that better takes into consideration international humanitarian law (IHL) and humanitarian principles. For instance, in 2019, Resolution 2462 on countering the financing of terrorism included several provisions related to compliance with IHL and humanitarian action. Some sanctions regimes have seen the addition of “intent clauses” clarifying that their measures do not intend to negatively impact the humanitarian situation and, in some exceptional cases, humanitarian carve-outs. The Security Council has also authorized its Counter-Terrorism Committee Executive Directorate (CTED) to focus on IHL and humanitarian action through the lens of its mandate.

Despite these incremental efforts, counterterrorism resolutions and related sanctions regimes have continued to inhibit humanitarian activities. Two provisions in particular have greatly impacted humanitarian activities: (1) the asset freeze in the ISIL/al-Qaida sanctions regime; and (2) the criminalization of economic support “for any purpose” under Resolution 2462. These provisions have negatively impacted humanitarian organizations in several ways:

- Some humanitarian organizations have self-regulated beyond what is legally required (the “chilling effect”).
- Some financial intermediaries have delayed or refused to facilitate transactions with humanitarian organizations operating in “high-risk” areas (financial “de-risking”).
- Some donors have restricted humanitarian organizations from providing services in areas controlled by sanctioned entities.

- Some host states have denied humanitarian organizations access to areas controlled by sanctioned entities.
- Humanitarian organizations that inadvertently violate asset freezes could be liable to prosecution or fines.

Beyond the ISIL/al-Qaida sanctions regime, the UN sanctions regime against the Taliban has also had a major humanitarian impact, leading financial institutions, private companies, and humanitarian organizations to pull back their operations after the Taliban takeover of Afghanistan in August 2021.

The five permanent members of the Security Council have been slow to address these challenges. They continue to approach counterterrorism in a high-stakes, risk-averse manner with strict red lines. They also remain hesitant to reopen negotiations on any

previously agreed humanitarian or IHL-related language. While some elected Security Council members have advocated for further action to safeguard humanitarian action, they have faced structural and procedural limitations.

Nonetheless, two counterterrorism-related resolutions adopted by the Security Council in December 2021 demonstrate incremental progress. The most important outcome in terms of humanitarian action was the adoption of Resolution 2615 on Afghanistan which creates a humanitarian exception for the Taliban sanctions regime. While its effective implementation is uncertain, it is a step in the right direction. In comparison, Resolution 2610 on the ISIL/al-Qaida sanctions regime made more limited—though still notable—progress by incorporating an “intent clause” and stronger language on compliance with IHL.

Going forward, the questions that will increasingly be at the heart of Security Council discussions include what type of humanitarian carve-outs are most appropriate for a sanctions regime, whether a middle ground exists between a humanitarian exemption and a humanitarian exception, whether to incorporate a “standing exception” for some entities but not others, and whether humanitarian carve-outs should be timebound.

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“Gaps in the design and implementation of Security Council counterterrorism resolutions and sanctions regimes continue to prevent the effective safeguarding and facilitation of impartial humanitarian action.”

For humanitarian organizations, relevant civil society groups and UN entities, and independent experts:

1. Advocate to keep humanitarian action high on the UN Security Council's agenda.

Humanitarian organizations and relevant civil society actors should continue to monitor, identify, and report on the adverse humanitarian impact of counterterrorism resolutions and relevant sanctions. Based on this reporting, they should brief the Counter-Terrorism Committee and regularly engage with CTED, as well as with relevant sanctions committees and their panels of experts. They should also engage in common advocacy efforts with member states' permanent missions or capitals before and during negotiations on relevant resolutions.

2. Monitor implementation of the UN humanitarian exception for Afghanistan.

Humanitarian organizations, the UN Office for the Coordination of Humanitarian Affairs (OCHA), civil society, and member states should closely monitor the implementation of the humanitarian exception for Afghanistan, including how it is translated in national legislation and regulations, donor agreements, and the practices of financial institutions. Humanitarian organizations should also cooperate with OCHA to prepare for the one-year review of the exception, which could be an opportunity to course-correct and make it more effective.

3. Issue independent opinions on advisable forms of humanitarian carve-outs.

Legal and policy experts, along with humanitarian organizations, should address emerging questions around humanitarian carve-outs, which will remain a difficult issue for the Security Council. These include questions around the different forms of humanitarian exemptions and exceptions; the benefits and drawbacks of incorporating a standing exemption for some entities (but not others) within the same sanctions regime; timebound exemptions; and reporting mechanisms. Independent advice will help inform Security Council negotiations and decisions on these questions, as well as decisions on national implementation.

For the UN Security Council and other UN member states:

4. Reinforce implementation and monitoring of provisions in Security Council resolutions pertaining to IHL and humanitarian action.

Member states should adhere to their obligation to implement all binding Security Council provisions pertaining to IHL and humanitarian action in contexts covered by counterterrorism and sanctions regimes. The Counter-Terrorism Committee, with the assistance of CTED, should also continue monitoring the implementation of the relevant provisions of Resolution 2462. Additionally, donors should avoid using contractual agreements that go beyond what is expected by UN sanctions and counterterrorism resolutions.

5. Provide adequate resources to monitor the impact of UN counterterrorism measures and related sanctions on humanitarian action.

No UN body is mandated to systematically evaluate the humanitarian impact of the UN counterterrorism sanctions regime. To fill this gap, the 1267 Monitoring Team could be asked to reprioritize this part of its mandate and, in cooperation with CTED, to produce a comprehensive report on the issue. In the long term, this will require the Monitoring Team, CTED, and other relevant bodies to be given additional resources and expertise. Another option would be to reconstitute the General Working Group on Sanctions.

6. Amend language in UN counterterrorism resolutions and related sanctions regimes to facilitate humanitarian action.

Eventually, the Security Council should amend language that inhibits humanitarian activities. This includes the broad language used for the asset freeze in the ISIL/al-Qaida sanctions regime, as well as the request to criminalize all forms of economic support "for any purpose" and with no direct link to a terrorist act.

7. Empower elected members of the Security Council to be agents of change.

Relevant UN entities and civil society actors should continue raising awareness among new elected members of the Security Council about the challenges faced by humanitarian organizations in counterterrorism contexts. They should also train elected members on the council's tools to better safeguard humanitarian action and on how they can effectively bring about change during their term. Further, the permanent members of the Security Council should strive to involve the elected members earlier in negotiations to maximize their chances of constructively influencing negotiations.