

## Desk review of relevant literature on the impact of counter-terrorism legislation and measures on principled humanitarian assistance

### Key recommendations

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The desk review of main articles and papers (from 2011 to 2019) on the impact of counter-terrorism (CT) legislation and measures on principled humanitarian assistance conducted by the RG3 subgroup on counter-terrorism has shown a number of recurrent recommendations made by prominent scholars and practitioners that IASC RG3 may wish to consider for its collective advocacy purposes.

The recommendations cover a range of critical aspects including: humanitarian exemptions and exceptions; CT-related language used in UN Security Council (SC) Resolutions; bank de-risking; the impact of sanctions regimes/CT on humanitarian access and space; the impact of CT measures on human rights and civic space. Therefore, key collective advocacy messages and asks could be around:

- Inclusion of **safeguards for humanitarian action** in international and national legislation;
- Improved **wording and language of UNSC Resolutions** related to CT (especially suppression of financing of CT) or resolutions establishing/renewing sanctions regimes;
- Increased **systematic monitoring** of and **reporting** on the impact of sanctions regimes/CT restrictions on humanitarian access and space;
- Greater **transparency** and **accountability** of UN counter-terrorism bodies on the implications of the international counter-terrorism framework on human rights and principled humanitarian assistance.
- Development of **risk-sharing measures** among donors, humanitarian organizations and financial institutions.

Key recommendations that IASC RG3 may wish to consider are listed below, divided by the critical aspect they address. A section of recommendations addressing specific targets is also included.

As a general note, the recurrence of similar recommendations in most articles and commentaries seems to suggest that most are yet to be implemented. It is easy to infer that main reasons for the non-implementation (or less than partial implementation) of those recommendations can be found in lack of political will, diplomatic dynamics, competing interests, internal divides within UN and Member State institutions and among decision-makers, insufficient knowledge on the topic and absence of collective advocacy positions and efforts among humanitarian practitioners.

### The absence of humanitarian safeguards in CT legislation and sanctions regimes

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#### *The problem.*

The criminalization of Non-State Armed Groups in armed conflicts due to international and national CT measures and sanctions regimes can place humanitarian actors and those who benefit from their assistance and protection in a situation where they also fall foul of these laws. This results in humanitarian actors making different choices about where to work and who to serve with their programs rather than those choices being dictated by needs alone. Therefore, ensuring compliance with counterterrorism measures could lead to compromising humanitarian principles<sup>1</sup>. In addition, CT measures pose hindrances to the operational delivery of humanitarian assistance at many levels (banking, logistics, targeting, etc.). The lack of coherence between different existing sanctions regimes and their complexity and ambiguity result in the creation of a restrictive environment for humanitarian actors<sup>2</sup>.

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<sup>1</sup> NRC, *Risk Management Tool in Relation to Counter-Terrorism Measures*, 2015

<sup>2</sup> DEBARRE, Alice, *Safeguarding humanitarian action in sanctions regime*, 2019

*Recommendations.*

- Include and implement improved safeguards, humanitarian exemption and exception clauses in sanctions regimes, UN resolutions, other UN policies on CT and domestic CT legislation to reduce their impact on principled humanitarian action;
- Reiterate in every relevant UN CT measure that CT efforts need to comply with international law, including international human rights law and IHL;
- (Security Council and Member States) conduct an assessment of the possible adverse impact of the sanctions on humanitarian action in consultation with humanitarian agencies and organizations when considering the imposition of sanctions;
- (Sanctions committees and panels of experts at UN and Member State level) systematically consult humanitarian actors;
- (Security Council) systematically request sanctions committee panels of experts to include information on the adverse impact of sanctions on humanitarian action in their reports.

**Broad and vague definitions of terrorism and “material support”**

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*The problem.*

In national and international CT legislation and measures, definitions of “terrorism” and “material support” to terrorist groups are usually broad and vague. The prohibition in criminal legislation of unqualified acts of “material support”, “services” and “assistance to” or “association with” terrorist organizations could in practice result in the criminalization of the core activities of humanitarian organizations<sup>3</sup>. Measures adopted by governments, whether internationally and nationally, aimed at criminally repressing acts of terrorism should be crafted so as not to impede humanitarian action. In particular, legislation creating criminal offences of “material support”, “services” and “assistance” to or “association” with persons or entities involved in terrorism should exclude from the ambit of such offences activities that are exclusively humanitarian and impartial in character and are conducted without adverse distinction<sup>4</sup>.

*Recommendations.*

- Raise awareness of the implication of language and wording used in UN SC Resolutions on “material support” (*towards UN SC and Member States*);
- Avoid broadly worded CT prohibitions as they may pave the way to criminalize principled humanitarian assistance (*towards UN SC and Member States*).

**Difficulties in collecting evidence of the impact of CT measures on principled humanitarian action**

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*The problem.*

Humanitarian practitioners and donors still struggle in collecting evidence of the impact of CT measures on principled humanitarian action for use in advocacy efforts and decision-making purposes. Member States are increasingly requesting specific information on the ways CT mechanisms are impacting the delivery of humanitarian assistance.

*Recommendations.*

- Increase the systematic monitoring of and reporting on the impact of sanctions regime/CT on humanitarian access and space.

<sup>3</sup> ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, 31<sup>st</sup> International Conference of the Red Cross and Red Crescent, 2011

<sup>4</sup> *Ibidem*

## Difficulties in collecting evidence of the impact of CT measures on principled humanitarian action

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### *The problem.*

In the aftermath of 9/11, the UN has equipped itself with new structures dedicated to the fight against terrorism, developing an extremely complex and – sometimes – opaque UN anti-terrorism architecture. Such structures – in particular the Counter-Terrorism Committee (CTC), the CTC Executive Directorate (CTED), the UN Office of Counter-Terrorism (UNOCT) and the Counter-Terrorism Implementation Task Force (CTITF) – have failed to constructively engage with civil society actors on counter-terrorism. Additionally, no coordination and cooperation between UN counter-terrorism bodies and UN human rights mechanisms has been coherently sought<sup>5</sup>. In fact, Member states have created a tentacular counterterrorism architecture that does not sufficiently take into account the tensions that its work and guidance create with IHL obligations<sup>6</sup>.

### *Recommendations.*

- Ensure that the UN Office for Counter-Terrorism includes humanitarian organisations in discussions;
- Ensure that the UN Counter-Terrorism Committee (CTC), as a Security Council subsidiary body and an initial point of contact for States, engage more proactively with governments and increase its responsibility for the way in which States' national implementing measures of Security Council resolutions may breach international human rights law, particularly on measures that impact civil society, including the definition of terrorism and the criminalisation of legitimate expression and opinion;
- Ensure a proactive and meaningful engagement with a cross-representation of local and international civil society actors on issues related to counter-terrorism and preventing and countering violent extremism (PCVE);
- (UN Counter-Terrorism Committee's Executive Directorate (CTED) and Office of Counter-Terrorism (OCT)) integrate better IHL considerations into their work.

## De-risking

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### *The problem.*

The issue of financial de-risking, where banks refuse to provide services for humanitarian organisations owing to concerns about counterterrorist financing regulations, has become a major hurdle for humanitarian action, particularly NGOs. Organisations are often unable to transfer money into certain areas, forcing them to use unregulated methods which fall outside formal banking systems, such as *hawala* or cash-carrying. Significant delays to programming as a result of de-risking are also experienced<sup>7</sup>. In particular, the recommendations issued by the Financial Action Task Force (FATF) on no-profit sector have been used by States as a vehicle for the imposition of restrictive legislation against civil society organizations across the globe, which are experiencing an increasing financial exclusion<sup>8</sup>. In addition, the rigid interpretation of states' obligations by FATF is exacerbating the impact of terrorist blacklisting and sanctions regimes on humanitarian assistance<sup>9</sup>.

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<sup>5</sup> OHCHR, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/40/52, 2019

<sup>6</sup> Alice DEBARRE, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework*, 2018

<sup>7</sup> NRC, *Principles Under Pressure*, 2018

<sup>8</sup> Ben HAYES, *The impact of international counterterrorism on civil society organisations. Understanding the role of the Financial Action Task Force*, 2017. See also OHCHR, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/40/52, 2019

<sup>9</sup> *Ibid.*

*Recommendations.*

- Discuss de-risking globally – especially with FATF - in a more transparent way and document the impacts it has on humanitarian action
- (States) Play a more active role in addressing banking sector restrictions, for instance, engaging directly with the banking sector to explain the programmes they fund, and the requirements they include in funding agreements to reduce the risk of diversion or abuse;
- (Humanitarian organizations) Invest the time to build relationships with their banks to assist them in developing specialist knowledge of the humanitarian sector, its business model and its approach to risk mitigation.

**Increased burden of complying with CT-related donor contract clauses**

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*The problem.*

CT measures and legislation, along with sanctions regimes, have been translated into a contractual burden on humanitarian organizations in line with donor risk management policies. Most of the contractual clauses in donors' agreements (usually related to recruitment, procurement and programming modalities) also require that these obligations be passed on to any implementing partners, contractors or sub-grantees by the primary grant recipient <sup>10</sup>.

*Recommendations.*

- (Donors) Be open to discussing and potentially to negotiating contractual clauses with humanitarian actors especially in high-risk settings;
- Include *force majeure* clauses in awards to proactively allocate and share risks between donor, prime award recipient and any sub-awardee;
- (Donors) Prioritize early dialogue with INGOs to address increased concerns related to the perceived risk of counter-terrorism material support and diversion as opposed to instituting contractual measures and other regulatory conditions;
- Undertake a process for regular consultation with partners in the field and HQ on any future regulatory requirements;
- (Donors) Cover the additional costs of risk management and compliance requirements in high-risk settings by including additional field-based indirect cost recovery lines in project budgets;
- (Donors and UN Agencies) Explore innovative ways of minimising the impact of counterterrorism measures on humanitarian organisations, starting from more clarity on contractual clauses and obligations.

**The adverse impact of CT measures on Grand Bargain Commitments**

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*The problem.*

Global humanitarian policy discussions can be negatively impacted by CT measures and legislation. For instance, the enforcement of CT measures and legislation and the subsequent risk aversion of donors can negatively impact two key elements of humanitarian effectiveness – un-earmarking and multi-year programming, especially for protracted displacement crises in the Middle East Region. In addition, low tolerance for risk threatens to disrupt the Grand Bargain commitments that have had the most success and momentum (i.e. cash). Increased compliance requirements and broader regulatory risk run counter to efforts to decrease and simplify reporting requirements. In addition, it is hard to figure out how to combine the identification and implementation of more nexus-oriented longer-term solutions especially in protracted humanitarian (and protection) crises while criminalizing any interaction with

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<sup>10</sup> Kate MACKINTOSH and Patrick DUPLAT, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, 2013

Designated Terrorist Groups and potentially hampering the ability of INGOs to partner with local NGOs. Finally, the establishment of sound partnerships between INGOs and local NGOs, along with the recognition and “operationalization” of the vital role of the latter in humanitarian response, may be jeopardized due to overcompliance and scrutiny, lack of mutual trust and excessive risk transfer.

#### *Recommendations.*

- Ensure that risk management measures, including counter terrorism measures, do not undermine the role played by national and local humanitarian actors;
- Raise awareness of the fact that CT legislation can hamper GB-related efforts (especially in terms of reporting, cash-programming and localization);
- Include and take into account the impacts of counterterrorism measures and P/CVE in ongoing humanitarian reform discussions (Nexus, Grand Bargain, etc.).

## **RECOMMENDATIONS ADDRESSING SPECIFIC TARGETS**

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### **UN Security Council**

- Urge the Security Council to expand upon and prioritize its efforts to safeguard principled humanitarian action.
- Guard against overly broad and vague notions of what constitutes unlawful support to terrorism, including in the Security Council’s own practice concerning designated individuals and entities.
- Ensure that none of the activities that underlie principled humanitarian action form part or all of the basis for subjecting individuals or entities to sanctions or other restrictive regimes.
- Include comprehensive safeguards for principled humanitarian action that are grounded in a steadfast commitment to international humanitarian law in all sanctions and counter-terror related resolutions.

### **Donors**

- Facilitate regular dialogue between humanitarian organisations, banks, financial regulators and other government departments to limit the impacts of de-risking;
- Be more responsive to requests from humanitarian organizations for guidance on the content, scope and application of counter-terrorism measures in specific contexts;
- Take steps to ensure that counter-terrorism measures do not undermine the valuable role played by national and local humanitarian actors;
- Engage in sustained and open policy dialogue with the humanitarian community on how to better reconcile counter-terrorism measures and humanitarian action. This should take place across all relevant sectors within government (security, justice, financial and humanitarian - 'whole-of-government' awareness), as well as between States and the humanitarian community at both headquarters and field level.
- Adopt explicit safeguards for humanitarian action in any legislation related to counter-terrorism and material support.

### **Financial Action Task Force (FATF)**

- Mainstream compliance with international human rights law;
- Refrain from compelling states, upon threat of FATF sanctions such as grey/blacklisting, to adopt legislation that UN human rights bodies have deemed unacceptable from a fundamental rights perspective;
- Mainstream compliance with international humanitarian law and human rights laws;

- Provide civil society organisations and the non-profit sector with equal treatment to other organised interest groups by granting them formal FATF consultative status;
- Recognise the impact that de-risking is having on non-profits and address these problems by reviewing the FATF's due diligence requirements;
- Enhance transparency of FATF's analysis and procedures.