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Humanitarian exemptions: Illusive progress in safeguarding humanitarian assistance in the international counterterrorism architecture?

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European University Institute

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Abstract

Given the negative effects of global counterterrorism on the work of humanitarian actors in conflict zones, scholars and humanitarian practitioners currently promote the introduction of humanitarian exemption clauses in counterterrorism frameworks. This paper challenges the assumption that humanitarian exemption clauses are the best way to safeguard humanitarian assistance from the ever-expanding scope of counterterrorism legislation. We argue that the progress promised by their emergence remains at least partially illusive. The clauses remain shaped by a security-centric conception of humanitarian assistance which manifests itself in their preoccupation with actors. As a result, they are likely to be beneficial only to the largest humanitarian actors established in the Global North while neglecting small and local humanitarian actors in conflict areas. Thereby, they contradict not only IHL's deliberate openness regarding both the actors providing humanitarian assistance and their *modi operandi*, but also violate the obligations of non-belligerent states under IHL. We show that the obligation to allow and facilitate free passage of relief consignments under IHL equally protects transnational financial support to local humanitarian actors and this regardless of who provides it. Disregard for these specific guarantees in attempts to safeguard humanitarian assistance is counterproductive. We conclude that instead of focusing on humanitarian exemptions as a 'micro-solution', advocacy should pursue a more comprehensive critical approach towards the global counterterrorism architecture.

Keywords

Humanitarian assistance, counterrorism, sanctions, securitization, exemptions, international humanitarian law, protracted conflicts, localization

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Table of Contents

1. Introduction

By now, not only scholars and humanitarian practitioners, but also parts of the security sector have recognised that global counterterrorism measures have proved detrimental to humanitarian assistance in various ways. The United Nations Security Council (UNSC) took up the issue in two resolutions in 2019, and stakeholders currently debate regulatory solutions to the conflict between international humanitarian law (IHL), governing humanitarian assistance, and counterterrorism frameworks. In this discourse, humanitarian experts in particular have endorsed the introduction of permanent humanitarian exemption clauses. However, in this paper we challenge the assumption that humanitarian exemptions to counterterrorism frameworks are the most adequate way to safeguard humanitarian assistance. Contrarily, we argue that their emergence remains, at least partly, an illusive progress.

After briefly setting the scene (2.), we show that humanitarian exemption clauses, their drafting processes and their application remain shaped by a security-centric conception of humanitarian assistance, which manifests itself in their preoccupation with actors (3.). As a result, they are beneficial only to the most prominent and powerful humanitarian organizations of the Global North – namely the ICRC or UN agencies – and their associates. A significant number of the recently introduced humanitarian exemptions are explicitly actor-based in this

way (3.1) Additionally, the security-based lens is engendered and reinforced by the clauses' embeddedness in the normative-institutional complex of global counterterrorism (3.2).
Secondly, we assess the previous findings against IHL as the minimum normative benchmark (4.). We find that humanitarian exemptions as they currently stand, bear the risk of narrowing IHL's deliberate openness towards small and local humanitarian actors. While a certain stereotype of the 'humanitarian actor' might be reflected in it (4.1), IHL is conceptually open regarding both the actors engaged in humanitarian assistance and their *modi operandi* (4.2). In line with this, the obligation to allow and facilitate free passage of relief consignments applies regardless of the actors providing humanitarian assistance and equally protects transnational financial support to local organizations (4.3) Finally, we conclude that the marginalisation of local humanitarian actors is detrimental to efforts to adapt 'traditional' humanitarian assistance to increasingly protracted conflicts (5.).

2. Safeguarding humanitarian action in the context of counterterrorism

Researchers have documented the various detrimental effects that counterterrorism frameworks can have on the delivery of humanitarian assistance in armed conflicts.[1] International, regional, and national counterterrorism measures can, for one, affect humanitarian actors through direct application.[2] Although humanitarian actors are not usually designated as "terrorist" entities in practice, their activities may still fall within the scope of counterterrorism sanctions.[3] This can happen in a number of ways. The paradigmatic case is sanctions prohibiting the provision of economic resources to entities designated as terrorist, irrespective of any intention to support them.[4] Likewise, humanitarian actors face the risk of their activities constituting criminal offences under national criminal law.[5] Additionally, donor requirements in funding agreements, on which humanitarian actors heavily depend on to carry out their work, can entail significant indirect constraints. These agreements are frequently

[1] Emanuela-Chiara Gillard, 'IHL and the Humanitarian Impact of Counterterrorism Measures and Sanctions: Unintended Effects of Well-Intended Measures' (September 2021) <https://www.chathamhouse.org/sites/default/files/2021-09/2021-09-03-ihl-impact-counterterrorism-measures-gillard.pdf>; ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (October 2019); Emma O'Leary, 'Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action' (2018) <https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/nrc-principles_under_pressure-report-2018-screen.pdf>; Jessica Burniske and Naz Modirzadeh, 'Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action' (March 2017) <http://blogs.harvard.edu/pilac/files/2017/03/Pilot-Empirical-Survey-Study-2017.pdf>; Kate Mackintosh and Patrick Duplat, 'Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action' (July 2013) <https://www.nrc.no/globalassets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf>.

[2] Humanitarian actors in various relations can be subject to counterterrorism laws: those of the host state, of the state of registration of humanitarian organizations, of the states of nationality of humanitarian staff, or of donor states.

[3] See exemplarily UNSC Res. 2610 (2021), para. 2 (c) which names "otherwise supporting" ISIL or Al-Qaida (or their affiliates, splinter groups or derivatives) as a criterion for terrorist listing.

[4] Nathalie Weizmann, 'Respecting international humanitarian law and safeguarding humanitarian action in counterterrorism measures: United Nations Security Council resolutions 2462 and 2482 point the way' (2021) 103(916/917) International Review of the Red Cross 325, 336.

[5] E.g. under the notorious material support laws of the United States, see 18 U.S. Code § 2339A and §2339B. See generally Dustin Lewis, Naz Modirzadeh and Gabriella Blum, 'Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism' (September 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657036>.

characterized by over-zealous adherence to counterterrorism frameworks and impose onerous demands on humanitarian actors that can severely compromise their ability to work.[6] For instance, donor-imposed restrictions conditional on the mere "association" of aid beneficiaries with designated entities can impede humanitarian actors from providing aid in a non-discriminatory manner in territories controlled by entities designated as 'terrorist' such as in Afghanistan or Somalia.[7] Moreover, restrictions by private service providers, particularly so-called "de-risking" strategies in the banking sector, further prevent the provision of necessary humanitarian aid in those areas.[8]

This issue was largely neglected during the past two "post-9/11" decades, which have seen a massive expansion of counterterrorism legislation and the establishment of a corresponding institutional architecture. For a long time, UNSC Resolutions and other pertinent legal documents included nothing but a generic "decorative phrase"[9] pointing, in general terms, to the obligation to comply "with international law, in particular human rights, refugee and humanitarian law".[10] More recently, however, UNSC Resolutions 2462 (2019) and 2482 (2019) acknowledged the issue more explicitly and it is now generally more prominent on the international agenda.[11] In Resolution 2462, the UNSC for the first time used binding language ("demands") in calling for compliance with the abovementioned legal frameworks.[12] Additionally, it specifically addressed the need to safeguard the unimpeded provision of humanitarian assistance by "urging" states to "take into account the potential effect of [counterterrorism] measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with

[6] See e.g. Counterterrorism and Humanitarian Engagement Project, 'An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts' (May 2014) <https://tinyurl.com/akpm79tz>; Gillard, 'IHL and Humanitarian Impact of Counterterrorism Measures' (n 1) 45–53.

[7] Alejandro Pozo Marín and Rabia Ben Ali, 'Guilt by association: Restricting humanitarian assistance in the name of counterterrorism' (2021) 103(916/917) International Review of the Red Cross 539.

[8] Emanuela-Chiara Gillard, 'Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action' (August 2017) 19–24 <https://www.chathamhouse.org/sites/default/files/publications/research/CHHJ5596_NSAG_iv_research_paper_1708_WEB.pdf>; see also FATF, 'High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF standards' (October 2021) 2 <https://www.fatf-gafi.org/media/fatf/documents/Unintended-Consequences.pdf> .

[9] Fionnuala Ní Aoláin, ''Soft Law', Informal Lawmaking and 'New Institutions' in the Global Counter-Terrorism Architecture' (2021) 32(3) European Journal of International Law 919, 931.

[10] UNSC Res. 1535 (2004), preambular para. 4 and subsequent resolutions Gillard, 'IHL and Humanitarian Impact of Counterterrorism Measures' (n 1) 17–18.

[11] See e.g. UNSC, S/PV.8822 (16 July 2021); Security Council Report, 'Arria-formula Meeting on Overcoming Challenges to Humanitarian Action in Times of Armed Conflict and Counter-Terrorism Operations' (10 August 2021) https://tinyurl.com/3c99f8z2; UNSC, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, S/2022/381 (10 May 2022) para. 56, 69ff.; See also GCTF, 'Good Practices Memorandum for the implementation of countering the financing of terrorism measures while safeguarding civic space' (September 2021) <https://tinyurl.com/muwtdhyz>; FATF (n 8).

[12] UNSC Res. 2462 (2019), para. 6.

international humanitarian law".[13] Corresponding stipulations have been reiterated *inter alia* in Resolution 2482 and the 2021 Review of the UN Global Counterterrorism Strategy.[14]

In order to implement these demands in practice, there is now increasing discussion in legal and policy circles about humanitarian safeguards in counterterrorism frameworks. Existing and debated clauses exempting humanitarian organizations vary greatly in their design, partly because neither the UNSC[15], nor the EU[16] provide concrete stipulations on the mechanisms to safeguard humanitarian assistance.[17] In terms of their regulatory technique, they can be broadly divided into "derogation clauses" and "standing exemptions".[18] The former provide for the possibility of granting derogations from counterterrorism norms for certain humanitarian activities on a case-by-case basis upon application.[19] The latter provide for the permanent non-application of certain sanctions[20] and criminal laws[21] to (some) humanitarian activities.

Until relatively recently, case-by-case derogations had been the more common practice. However, a growing amount of research on the issue and practical experiences of humanitarian actors have led to increased discontent with derogations. These concerns include lengthy and costly application procedures, cumbersome requirements as well as arbitrary decision-making by the competent authorities. Therefore both scholars and humanitarian practitioners are currently advocating for standing exemption clauses as the solution to preventing detrimental impacts on humanitarian assistance.[22] While some among

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[13] UNSC Res. 2462 (2019), para. 24.

[14] UNSC Res. 2482 (2019), para. 16; UNGA Res. 75/291 (30 June 2021) para. 109; See also UNGA Res. 70/291, (1 July 2016) para. 22; UNSC, S/2022/381 (n 11) para. 88g); Council of the EU, Council Conclusions on Humanitarian Assistance and International Humanitarian Law, 14487/19 (25 November 2019) para. 8.

[15] Agathe Sarfati, 'International humanitarian law and the criminal justice response to terrorism: From the UN Security Council to the national courts' (2021) 103(916/917) International Review of the Red Cross 267, 277.

[16] Directive (EU) 2017/541 of 15 March 2017 on combatting terrorism and replacing Council Framework Decision 2002/475/JHA and amending council Decision 2005/671/JHA, OJ L88/6, Recital 38. The exemption is only included in the Recital and not the operative part - states are thus not obliged to explicitly transpose it in national law.

[17] In contrast, so-called 'bad actor clauses' exempt designated individuals themselves for certain humanitarian-connotated aims, see Dustin Lewis, 'Humanitarian Exemptions from Counterterrorism Measures: A Brief Introduction' (2017) 47 Proceedings of the Bruges Colloquium 141, 144 <https://dash.harvard.edu/handle/1/40268420>.

[18] Terminologically, there is no clear and consistent assignment of the terms 'exemption', 'exception' or 'derogation'. We use 'exemptions' for standing statutory exemption clauses in counterterrorism laws, and 'derogations' for provisions allowing exceptions on a case-by case basis.

[19] E.g. UNSC Res. 2397 (2017) para. 25; Council Regulation (EU) 2016/2137 of 6 December 2016 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria, Art. 6a (2); Danish Penal Code Section 114j (4).

[20] E.g. UNSC Res. 2607 (2021) para. 37; UNSC Res. 2615 (2021) para. 1; Council Regulation (EU) 2016/2137, Art. 6a (1); Slovakia, Act 289/2016 Coll., para 13 (1) a).

[21] Australian Criminal Code Section 119.2, 119.3, and 102.8; Art. 260ter (2) Swiss Criminal Code; New Zealand Suppression of Terrorism Act (as amended 2021) Section 8 (5); UK Counter-Terrorism and Border Security Act (2019) Section 58B (5); Chad Loi No. 003/PR/2020, Art. 1 (4); Ethiopian Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020, para. 9 (5); Philippines Anti-Terrorism Act (2019) Section 13.

[22] See ICRC, 'Counter-terrorism measures must not restrict impartial humanitarian organizations from delivering aid' (Statement to the UNSC debate, January 2021) <https://tinyurl.com/vwpzasps>; Gillard, 'Recommendations for Reducing Tensions' (n 8) 6; David McKeever, 'International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations' (2020) 69(1) International and Comparative Law Quarterly 43, 73ff.; Tristan Ferraro, 'International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues' (2021)

them have noted that the most favourable solution would be an integrative approach, whereby counterterrorism provisions must be interpreted in light of relevant provisions of IHL,[23] the chances of counterterrorism authorities considering this approach are apparently deemed so low that humanitarian exemptions clauses have instead become the focus of advocacy efforts. This approach is also gaining support among states. While some governments remain sceptical of providing safeguards for humanitarian assistance,[24] for fear of compromising security,[25] a number of states have recently amended their national counterterrorism legislation to introduce standing humanitarian exemptions.[26]

3. Exemption clauses preoccupied with actors: Implications of a security-based lens on humanitarian assistance

Standing humanitarian exemption clauses recently introduced in several counterterrorism frameworks use differing terminology to describe their scope. They refer to humanitarian "aid"[27], "services"[28], "relief" or "assistance"[29], activities "of a humanitarian nature"[30] or "of an exclusively humanitarian and impartial nature"[31]. A minority of them directly reference IHL, stipulating for example that they apply to humanitarian activities that are conducted "in conformity with International Humanitarian Law"[32] or "in accordance with the common Article

103(916/917) International Review of the Red Cross 109, 149ff.; Weizmann, 'Respecting International Humanitarian Law' (n 4) 362; Françoise Bouchet-Saulnier, 'How counterterrorism throws back wartime medical assistance and care to pre-Solferino times' (2021) 103(916/917) International Review of the Red Cross 479, 516; O'Leary (n 1) 473; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, A/75/337 (3 September 2020) paras. 34-35. See also the endorsement of exemptions by some states in UNSC S/PV.8822 (16 July 2021).

[23] Weizmann, 'Respecting International Humanitarian Law' (n 4) 361–362; Gillard, 'IHL and Humanitarian Impact of Counterterrorism Measures' (n 1) 61.

[24] See e.g. 'Interview with H.E. Ambassador Vladimir Tarabrin' (2021) 103(916-917) International Review of the Red Cross 97; the statements of Russia and China at UNSC, S/PV.8822 (16 July 2021); the recent negotiations on a humanitarian exemption for Afghanistan: Security Council Report, 'Afghanistan: Vote on 1988 Sanctions Resolution' (21 December 2021) https://www.securitycouncilreport.org/whatsinblue/2021/12/afghanistan-vote-on-1988-sanctions-exemption-resolution.php. So far, only a few states have been actively engaged in resolving the issue, see Joint report of the Counter-Terrorism Committee Executive Directorate and the Analytical Support and Sanctions Monitoring Team pursuant to resolutions 1526 (2004) and 2253 (2015) concerning Islamic State in Iraq and the Levant (ISIL) (Da'esh), Al-Qaida and the Taliban, S/2020/493 (3 June 2020) para. 83-85.

[25] See also on the objections Katie King, Naz Modirzadeh and Dustin Lewis, 'Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action' (April 2016) 9 <https://dash.harvard.edu/handle/1/29998395>.

[26] Cf. n 21.

[27] Ethiopian Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020, para. 9 (5).

[28] Art. 260ter (2) Swiss Criminal Code.

[29] Council Regulation (EU) 2016/2137, Art. 6a.

[30] Australian Criminal Code Section 119.2, 119.3, and 102.8; UK Counter-Terrorism and Border Security Act (2019) Section 58B (9).

[31] Chad Loi No. 003/PR/2020, Art. 1 (4) (translated by the authors).

[32] Philippines Anti-Terrorism Act (2019) Section 13.

3 of the Geneva Conventions".[33] However, most of the provisions do not provide a definition or guidance on what exactly these notions comprise.[34] In the following, we demonstrate that while states tend to neglect the definition of the activities comprised by humanitarian exemptions, their main concern is *which actors* should fall under such clauses.[35] While several clauses overtly refer to certain organizations, others are based on the humanitarian actors' adherence to humanitarian principles. Some of the clauses further rely on requirements that refer to previous (administrative) decisions, making their application after all contingent on case-by-case pre-approval, for example, by governmental counterterrorism authorities.

On this basis, we argue that only those humanitarian actors deemed 'trustworthy' and 'cooperative'[36] are exempted on a permanent statutory basis. Humanitarian exemptions retain the security-based perspective of the global counterterrorism architecture which considers humanitarian and other charitable organizations primarily as entities at risk of being abused for terrorist financing. The prophylactic approach preoccupied with monitoring and supervising non-profit organizations as well as identifying those particularly at risk is now replicated in humanitarian exemptions preoccupied with actors. The circle of 'reliable' and 'familiar' humanitarian actors exempted consists of the largest 'Western-established' organizations as well as those that are either associated with them (e.g. as implementing partners) or otherwise recognized by the respective legislating state.

3.1 Actor-based character of humanitarian exemption clauses

Several humanitarian exemption clauses currently in force on the UN, EU and national level explicitly restrict their scope of application in terms of actors.

The exemption clause contained in the UNSC Somalia sanctions regime refers to "urgently needed humanitarian assistance in Somalia".[37] No guidance exists on the question of what "humanitarian assistance" should include, nor when it is "urgently needed". At the same time, this exemption clause restricts its personal scope of applicability to certain actors:

> "[…] by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, and their implementing partners including bilaterally or multilaterally funded non-governmental organisations participating in the United Nations Humanitarian Response Plan for Somalia".[38]

[33] Art. 260ter (2) Swiss Criminal Code. The Chad law declares, in a separate paragraph, that "nothing in this act shall be interpreted as derogating from international humanitarian law or international human rights law", see Chad Loi No. 003/PR/2020, Art. 1 (3) (translated by the authors).
[34] In a humanitarian exemption to a Slovakian sanction implementation law, 'humanitarian aid' is defined as comprising e.g. the provision of food, clothing, medical and health supplies or accommodation, Slovakia Act 289/2016 Coll. para. 13 (1) a).
[35] Gillard, 'IHL and Humanitarian Impact of Counterterrorism Measures' (n 1) 37.
[36] ibid 11.
[37] UNSC Res. 1916 (2010) para. 5, as recently renewed by UNSC Res. 2607 (2021) para. 37.
[38] Ibid.

Notably, only the ICRC and the IFRC currently have observer status within the UNGA,[39] while smaller and local organizations do not enjoy this status. In decisions about applications for UN funding mechanisms, "questions of reliability, a track record of operating in a principled manner and the existence of non-diversion measures" have been named as relevant.[40] Whether specially newly-created, grassroots local organizations could ever fulfil these criteria is unclear. At the EU level, the Syria sanctions regime, prohibiting the purchase or transport of petroleum products, contains a two-fold humanitarian exemption clause.[41] Actors funded by the EU or Member States benefit from a standing exemption clause in Art. 6a (1), while for all other actors Art. 6a (2) only provides that a Member States' competent authority may issue authorizations "under the general and specific terms and conditions it deems appropriate".[42] At the same time, both paragraphs refer to "humanitarian relief in Syria or assistance to the civilian population in Syria". This suggests that the focus lies much more on the actors than the activities pursued in humanitarian action. The clause even covers a comparatively broad spectrum of legitimized humanitarian activities. The juxtaposition of "relief" and "assistance" reflects the use of these terms in the Geneva Conventions, wherein "relief" is mostly used for humanitarian needs in emergency situations, whereas "assistance" is interpreted to also cover long-term, recurring or chronic needs.[43] The clause is restrictive only with regard to the actors providing these services: it establishes a clear rule for actors funded by the EU or Member States, while a high level of discretion persists when it comes to all other actors. In fact, the standing clause approximates a case-by-case approach as the administrative decision on who can provide assistance simply shifts to the level of funding grants by the EU or donor states. Non-European NGOs are excluded from the clause at least with regard to the requirement of funding by the EU as they are not eligible for funding by EU-ECHO.[44]

Similar tendencies can be observed at the national level. In 2020, for instance, the Philippines introduced a humanitarian exemption clause in a counterterrorism law, which excludes "[h]umanitarian activities by the ICRC, the Philippine Red Cross and other State-recognized impartial humanitarian partners or organizations"[45] – limiting the number of actors exempted. The Filipino "Implementing Rules and Regulations" task the Anti-Terrorism Council (consisting of cabinet members) with the determination of which actors fall within the exemption clause.[46] Again, no significant deviation from case-by-case derogations can be discerned where a prior administrative decision of the Anti-Terrorism Council is necessary for the exemption to apply. Notably, the Philippines have requested guidance from the UN on what constitutes a 'humanitarian organization', but have not made the interpretation they have received from the UN available to the public.[47] In the Netherlands, a counterterrorism bill still in the making had,

[39] UNGA Res. 45/6 (16 October 1990); UNGA Res. 49/2 (27 October 1994).
[40] Gillard, 'IHL and Humanitarian Impact of Counterterrorism Measures' (n 1) 65.
[41] Council Regulation (EU) 2016/2137, Art. 6a.
[42] Ibid, Art. 6a (2).
[43] ICRC, Commentary to GC I (2016), Art. 9, para. 1148.
[44] Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid, OJ L 163, Art. 7.
[45] Philippines Anti-Terrorism Act (2019) Section 13.
[46] Philippines, The 2020 Implementing Rules and Regulations of Republic Act No. 11479, otherwise known as The Anti-Terrorism Act of 2020 Rule 4.14. The Anti-Terrorism Council can, according to this Rule, adopt a mechanism through which it can receive assistance and recommendations on the determination.
[47] Gillard, 'IHL and Humanitarian Impact of Counterterrorism Measures' (n 1) 22.

in a previous version, envisaged a standing exemption clause similar to the exemption to the EU Syria sanctions, only for delegates of the ICRC, while other actors would have to obtain a permission.[48] It was only due to pressure from humanitarian experts that a second bill with a more broadly formulated exemption clause is now being prepared.[49] In the Australian Criminal Code, an exception to the offence of remaining in areas 'declared' to be the site of hostile activity by listed terrorist organizations enumerates separately "providing aid of a humanitarian nature" and "performing an official duty" for either the UN or its agencies, or the ICRC.[50] Notably, the defendant bears the burden of proof for these matters[51] - which would arguably assure actors pertaining to the ICRC or the UN more of their protection. They would only need to prove that they have in fact worked for the organizations, instead of having to prove that their acts were "of a humanitarian nature". A Canadian legislative act imposing (albeit economic, not counterterrorism) sanctions on South Sudan only exempts transactions to "a United Nations agency, the International Red Cross and Red Crescent Movement, or Canadian non-governmental organizations that have entered into a grant or contribution agreement with the Department of Foreign Affairs, Trade and Development".[52] Again, only the ICRC, UN agencies and those approved by a previous funding decision are exempted.
Beyond those explicitly limited exemption clauses, several other clauses utilize more general terms (e.g. aid "of a humanitarian nature"[53]) or refer to the actors' adherence to humanitarian principles.[54] However, in the following section, we argue that these clauses could implicitly favor the same Global North-"approved" humanitarian actors. For the cases listed above may be just symptoms of a larger phenomenon: the solidification of a security lens on humanitarian assistance by its integration into the normative-institutional complex of counterterrorism.

3.2. The normative-institutional complex of global counterterrorism and its influence on humanitarian exemptions

Humanitarian exemptions integrate the concerns to ensure compliance with IHL and to safeguard humanitarian assistance into counterterrorism frameworks by way of a 'rule-exception' construction. As a result, the normative-institutional complex of global counterterrorism becomes the site of interpretation of the clauses, including the IHL terms and notions they refer to. We argue that this can contribute to an exclusion of humanitarian actors not established in the Global North. This is because these structures are likely to reshape the concept of humanitarian assistance from a security perspective, rather than restricting counterterrorism frameworks to avoid impairing humanitarian assistance.

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[48] Eerste Kamer, vergaderjaar 2019–2020, 35 125, A, Art. 134b (1) https://assets.irinnews.org/s3fs-public/dutch_ct_law.pdf?UH5TSiiNvDLp98EfWMAKIWtyMMiBEKbd.

[49] See Government of the Netherlands, 'Exemption from criminal liability for aid workers and journalists for staying in areas controlled by terrorist organizations', News item (12 May 2021) https://www.government.nl/latest/news/2021/05/12/exemption-from-criminal-liability-for-aid-workers-and-journalists-for-staying-in-areas-controlled-by-terrorist-organisations.

[50] Australia Criminal Code Section 119.2 (3) (a) and (e).

[51] See ibid., Note to Subsection (3).

[52] Canada, Special Economic Measures (South Sudan) Regulations (SOR/2014-235) Section 4 (d).

[53] Australian Criminal Code Section 119.2, 119.3, and 102.8.

[54] E.g. New Zealand Suppression of Terrorism Act (as amended 2021) Section 8 (5) (b); Chad Loi No. 003/PR/2020, Art. 1 (4); the UK Counter-Terrorism and Border Security Act (2019) Section 58B (9) exempts aid complying with "internationally recognized principles and standards applicable to the provision of humanitarian aid".

UNSC Resolutions 2462 and 2482, adopted in March and July 2019, are crucial in this development. At first sight, they promise some progress for humanitarian organizations. In Resolution 2462, the UNSC "*demanded*" that States' counterterrorism measures "comply with their obligations under […] international humanitarian law."[55] For the first time, binding language was used in this regard.[56] The UNSC also specifically urged States "to take into account the *potential* effect of [counterterrorism] measures on exclusively humanitarian activities (…).".[57] Resolution 2482 reiterates those points.[58] At the same time, however, Resolution 2462 significantly broadens the scope of terrorist offences, including the indirect provision of resources "for any purpose […] even in the absence of a link to a specific terrorist act".[59] It also for the first time under this line of resolutions that the UNSC calls upon states to regularly undertake risk assessments of their non-profit sectors to determine those "vulnerable to terrorist financing".[60] Thus, Resolution 2462 ultimately imposes tighter scrutiny over the non-profit sector, while the safeguarding of humanitarian activities remains rather imprecise.[61]

As the UNSC remains divided on the issue,[62] Resolutions 2462 and 2482 ultimately left it to States to determine the interplay between counterterrorism measures and IHL *in concrete terms.*[63] States' leeway in concretizing the interplay between counterterrorism measures and IHL is not problematic in and of itself.[64] Yet, it is questionable whether solutions effectively safeguarding humanitarian assistance can succeed in an environment dominated by a global counterterrorism architecture that monitors, facilitates, and guides the implementation of counterterrorism measures.

This architecture comprises not only bodies of the UN bureaucracy, i.e., the Counter-Terrorism Committee (CTC), the Counter-Terrorism Committee Executive Directorate (CTED), and the Office for Counter-Terrorism (UNOCT), but also exclusive informal networks– "coalitions of the willing"[65] – such as the Financial Action Task Force (FATF) or the Global Counter-Terrorism Forum (GCTF). Scholars exploring the idiosyncrasies of this institutional architecture have

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[55] UNSC Res. 2462 (2019) para. 6.

[56] On the classification of "demand" as legally binding request: Nico Krisch, 'Chapter VII Powers: The General Framework' in Bruno Simma and others (eds), *The Charter of the United Nations* (3rd edn. OUP 2012) para. 56.

[57] UNSC Res. 2462 (2019) para. 24.

[58] UNSC Res. 2482 (2019) para. 16. While Res. 2462 only relates to measures to counter the financing of terrorism, Res. 2482 (2019) para. 16 concerns all counterterrorism measures.

[59] UNSC Res. 2462 (2019) para. 5. See also Human Rights Watch, 'UN: Security Council Resolution Undermines Aid, Human Rights Work' (April 2019) <https://www.hrw.org/news/2019/04/02/un-security-council-resolution-undermines-aid-human-rights-work>.

[60] UNSC Res. 2462 (2019) para. 23. Similar language concerning non-profit organizations had however been used in the lines of resolutions starting with Resolution 1267 (1999) and Resolution 1353 (2004).

[61] Scott Paul and Kathryn Achilles, 'Correcting Course: Avoiding the Collision between Humanitarian Action and Counterterrorism' (Just Security May 2019) <https://www.justsecurity.org/64158/correcting-course-avoiding-the-collision-between-humanitarian-action-and-counterterrorism/>.

[62] Sarfati (n 15), 277. See also Security Council Report, 'Afghanistan: Vote on 1988 Sanctions Resolution' (n 24).

[63] States need not interpret the resolution as demanding sectoral humanitarian exemption clauses, ibid.

[64] McKeever (n 22), 76ff.– In contrast, advocating the need – for now - to insert a legally binding exception clause in UNSC resolutions Weizmann, 'Respecting International Humanitarian Law' (n 4) 362.

[65] Alejandro Rodiles, *Coalitions of the willing and international law: The interplay between formality and informality* (CUP 2018)

characterized it as an "enforcement infrastructure"[66], endowed with "disciplinary power".[67] It produces a normative environment consisting of a plethora of technical guides, best practices, training manuals, model laws and the like.[68] Despite their soft law character, state compliance with these supposedly 'technical' "microprescriptions"[69] is surprisingly high.[70] This can be attributed to rigorous monitoring and implementation support by CTED, FATF and UNOCT, encompassing the provision of capacity-building assistance and technical expertise[71] and a dense web of review processes.[72] Within FATF, there are even procedures resembling the 'sanctioning' of states that are deemed non-compliant.[73] Therefore, the architecture exerts considerable influence on states in the interpretation and implementation of their obligations under international law in the field of counterterrorism and thus also on their relationship to obligations arising from IHL and human rights.[74]

More explicitly, CTED's mandate now includes monitoring and supporting the implementation of Resolutions 2462 and 2482,[75] and thus extends to their paragraphs relevant to safeguarding IHL and humanitarian action. Consequently, CTED included compliance with IHL and the avoidance of impairing humanitarian assistance in its implementation assessments[76] and among the issues to be covered during country visits.[77] Moreover, CTED as well as FATF and GCTF have recently dedicated new studies and publications to these issues.[78] Thus, it appears inescapable that they will, in their communication with states, address questions

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[66] Fiona de Londras, *The Practice and Problems of Transnational Counter-Terrorism* (CUP 2022) 23.

[67] Isobel Roele, 'Disciplinary Power and the UN Security Council Counter Terrorism Committee' (2014) 19(1) Journal of Conflict and Security Law 49.

[68] Ní Aoláin (n 9), 925-926, 935-935 ; Isobel Roele, 'Sidelining Subsidiarity: United Nations Security Council "Legislation" and Its Infra-Law' (2016) 79(2) Law and Contemporary Problems 189, 203–207.

[69] Roele, 'Sidelining' (n 68) 206.

[70] Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Fionnuala Ní Aoláin, A/74/335 (29 August 2019) para. 22, 28ff.

[71] Luis M Hinojosa-Martinez, 'Security Council Resolution 1373: the cumbersome implementation of legislative acts' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2020) 578–579; Londras, *Practice and Problems of Transnational Counter-Terrorism* (n 66) 24–25.

[72] Fiona de Londras, 'The Transnational Counter-Terrorism Order: A Problématique' (2019) 72(1) Current Legal Problems 203, 222, 233; Ní Aoláin (n 9), 926; Roele, 'Sidelining' (n 68) 202f. 209-211.

[73] Roele, 'Sidelining' (n 68) 212f.

[74] Report of the Special Rapporteur, A/75/337 (n 22) para. 28.

[75] UNSC Res. 2617 (2021) para. 20; UNSC, Technical guide to the implementation of Security Council Resolution 1373 (2001) and other relevant resolutions, S/2019/998, para. 423; UNSC, 'Framework document for Counter-Terrorism Committee visits to Member States aimed at monitoring, promoting and facilitating the implementation of Security Council resolutions 1373 (2001), 1624 (2005), 2178 (2014), 2396 (2017), 2462 (2019) and 2482 (2019) and other relevant Council resolutions', S/2020/731, para. 9; See also Annabelle Bonnefont, Agathe Sarfati and Jason Ipe, 'Continuity Amid Change: The 2021 Mandate Renewal of the UN Counter-Terrorism Committee Executive Directorate' (November 2021) <https://www.globalcenter.org/wp-content/uploads/2021/11/21Nov22-Final-CTED-Policy-Brief.pdf>.

[76] CTC, 'Global survey of the implementation of Security Council Resolution 1373 (2001) and other relevant resolutions by Member States' (2021) para. 715 <https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/ctc_1373_gis.pdf>.

[77] UNSC, S/2020/731 (n 75), para. 9.

[78] FATF (n 8); GCTF (n 11); CTED, 'The Interrelationship between Counter-Terrorism Frameworks and International Humanitarian Law' (January 2022) <https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2022/Jan/cted_ihl_ct_jan_2022.pdf>.

relating to the applicability of IHL, its relation to counterterrorism law and, eventually, the design of humanitarian exemptions.[79]

In a recent opinion note, Naz Modirzadeh and Dustin Lewis criticized these developments, arguing that IHL references in counterterrorism instruments "may ultimately serve in practice to empower technocratic security bureaucracies to see and assess IHL *through a counterterrorism lens*."[80] They warn that "an ever-expanding counterterrorism system [might] ultimately *redefine* what constitutes *legitimate humanitarian activities*."[81] Similar concerns were also shared by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. She expresses unease that the dynamics of the "profoundly political context in which counter-terrorism entities operate" might have a deleterious effect on the assessment of IHL.[82]

It is unlikely that the global counterterrorism architecture will also produce "micro prescriptions" and function as an "enforcement infrastructure" in favour of safeguarding humanitarian assistance.[83] Scholars have questioned the merit of exchanges on humanitarian assistance with states, given CTED's "narrow reliance on Security Council resolutions without full engagement with the totality of States' international law obligations".[84] Due to limited resources alone, CTED will focus on its core mandate.[85] Indeed, with regard to the only CTED country report publicly available, the Special Rapporteur has criticized the "worrisome lack of positive reference to enabling humanitarian exemptions".[86] While CTED committed to continue the mainstreaming of IHL in its tools and analysis,[87] its Technical Guide indicates that states are granted wide discretion in the implementation of Resolution 2462, since there exist "differing understandings with respect to the incorporation of […] international humanitarian law standards into domestic law".[88]

In contrast, the institutions set much more specific guidelines for the implementation of the obligation to undertake risk-assessments of the non-profit sector to determine those 'vulnerable to terrorist financing'. This category of 'vulnerable' encompasses, in particular, non-profit organizations that enjoy public trust and/or operate in or near areas of terrorist activity.[89] It is foreseeable from FATF's evaluation reports that humanitarian organizations and

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[79] Dustin Lewis, Naz Modirzadeh and Jessica Burniske, 'The Counter-Terrorism Committee Executive Directorate and International Humanitarian Law: Preliminary Considerations for States' (March 2020) 32 <https://dash.harvard.edu/handle/1/37367714>.

[80] Naz Modirzadeh and Dustin Lewis, 'Humanitarian values in a counterterrorism era' (2021) 103(916/917) International Review of the Red Cross 403, 410.

[81] ibid.

[82] Report of the Special Rapporteur, A/75/337 (n 22), paras. 28, 29.

[83] Cf. Londras, 'Transnational Counter-Terrorism Order' (n 72) 216.

[84] Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Fionnuala Ní Aoláin, A/76/261 (3 August 2021), para. 42, cf. Bonnefont, Sarfati and Ipe (n 75) 6.

[85] ibid.

[86] Report of the Special Rapporteur, A/76/261 (n 84) para. 42.

[87] CTED (n 78) 43.

[88] UNSC, S/2019/998 (n 75), para. 30.

[89] UNSC, S/2019/998 (n 75), para. 114, drawing verbatim on the Interpretive Note to FATF Recommendation 8, paras. 1, 3, see FATF, 'International Standards on Combating Money Laundering and the Financing of Terrorism – The FATF Recommendations' (2012, updated in October 2021) 58 <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

particularly local humanitarian organizations fall within this categorization. The categorization shall, in turn, inform the implementation of a "targeted risk-based supervision and monitoring" of the relevant subset of organizations.[90] Pertinent guidelines by FATF and CTED indicate that "first priority" ought to be given to security concerns. States' measures should avoid impacts on humanitarian action only "to the extent reasonably possible", while "this interest cannot excuse the need to undertake immediate and effective actions to advance the immediate interest of halting terrorist financing."[91] The global counterterrorism architecture thus remains preoccupied with the trustworthiness of actors.

It will often prove very difficult for humanitarian experts and civil society to contest these dynamics and contribute to a broadening of the perspective taken by CTED. An in-depth examination of CTED's activities remains impeded by the fact that the reports on its engagement with individual countries are not disclosed to the public.[92] Further, owing to the CTED's consent-based engagement with states, civil society actors are largely excluded from country visits, except for those considered "government friendly".[93] In particular, small as well as local humanitarian actors based outside the state whose counterterrorism measures affect them are precluded from expressing their concerns. This excluding effect must also be seen in the context of the fact that the options for challenging the (erroneous) non-application of the clauses are limited.

These considerations make it seem reasonable to assume, at least for now, that the security perspective in the adoption and application of humanitarian safeguards will not be subject to significant scrutiny but continues to be sustained and fostered by the global counterterrorism "enforcement infrastructure".

4. Assessment against the minimal normative standards of IHL (and IHRL)

In the following we argue that humanitarian exemptions, through their limitations and security perspective, effectively reshape the concept of the humanitarian actor – as embodied in IHL – from a counterterrorism perspective. Although IHL itself is to some extent involved in constructing a certain stereotype of the 'humanitarian actor' (4.1), it nevertheless displays a deliberate openness regarding the actors engaged in humanitarian assistance and their *modi operandi* (4.2). In line with this, transnational funding and supply streams of smaller, local humanitarian actors are also protected against interference from non-belligerent states through the obligation to grant free passage of humanitarian relief consignments (4.3). The tendency for humanitarian exemptions to benefit only the largest and most prominent humanitarian organizations of the Global North cements certain demands that are not envisaged in IHL and risks narrowing IHL's deliberate openness to, and protection of, other humanitarian actors. The emergence of a "counterterrorism lens" on humanitarian action reinforces the tendencies in IHL to "othering", i.e. marginalizing local humanitarian actors. Humanitarian exemptions lend more significance to the hierarchy among humanitarian actors and exacerbate its exclusionary effect. They thereby undermine the much-needed broader dialogue on who should be the primary provider of humanitarian assistance in largely politicized and protracted conflict contexts.

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[90] UNSC Res. 2462 (2019) para. 23; UNSC, S/2019/998 (n 75), para. 116 - 121.

[91] UNSC, S/2019/998 (n 75), para. 120; Interpretive Note to FATF Recommendation 8 (n 89), para. 4(e).

[92] Bonnefont, Sarfati and Ipe (n 75) 4; This has been criticized at length in the Report of the Special Rapporteur, A/75/337 (n 22) para 28.

[93] Bonnefont, Sarfati and Ipe (n 75) 5.

4.1 The 'humanitarian actor' stereotype in IHL

Unequal treatment of different 'categories' of humanitarian actors predates the advent of counterterrorism frameworks. As Rebecca Sutton has argued, IHL itself is reflective of and instrumental in constructing a stereotype of the 'humanitarian actor' along the lines of the Red Cross/Red Crescent Movement and its interpretation of humanitarian principles.[94] This induces 'other' humanitarian actors to assimilate for the sake of protection.[95] In addition, the stereotypical humanitarian actor envisaged by IHL is an actor *external* to the conflict environment, assisting as an uninvolved third party not embedded in the local context, helping its compatriots.[96] The stereotype and the concomitant exclusion of 'other' humanitarian actors thus has racialized and colonial overtones. Legally, the stereotype is reflected in "a hierarchy of differential protection that exceptionalizes certain categories of aid workers":[97] The Red Cross/Red Crescent Movement has the special privilege of its own protective emblem, while the UN and its associated NGOs likewise enjoy enhanced protection afforded by the Convention on the Safety of UN and Associated Personnel.[98] Relief personnel of foreign nationality are at least subject to an explicit obligation to *respect* and *protect* in Art. 71 (2) AP I,[99] unlike 'other' humanitarian actors. This differential protection of humanitarian actors is reminiscent of other hierarchies and exclusionary dynamics embedded in IHL, notably those depriving 'uncivilized other' fighters of the protections associated with combatant status.[100] However, IHL deliberately envisions a broader spectrum of humanitarian engagement in terms of the eligibility to provide humanitarian assistance and the access to territories, communities, and foreign resources. The following sections will demonstrate this.

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[94] Rebecca Sutton, 'Enacting the 'civilian plus': International humanitarian actors and the conceptualization of distinction' (2020) 33(2) Leiden Journal of International Law 429, 435–438.

[95] ibid 437.

[96] Cf. the differentiation between 'relief society' and 'humanitarian organization' by the Swiss delegate, Final Record of the Diplomatic Conference of Geneva of 1949, Plenary, Vol. II-B, 349; Claudie Barrat, *Status of NGOs in International Humanitarian Law* (BRILL 2014) 143. Sutton (n 94), 436 fn. 64 already hints at this.

[97] Larissa Fast, *Aid in Danger* (University of Pennsylvania Press 2014) 199, see also Francesco Seatzu, 'Revitalizing the international legal protection of humanitarian aid workers in armed conflict' (2017) 11 Revue des droits de l'homme, para.15.

[98] Julia Brooks, 'Humanitarians Under Attack: Tensions, Disparities, and Legal Gaps in Protection' (2015) 7 <https://hhi.harvard.edu/publications/humanitarians-under-attack-tensions-disparities-and-legal-gaps>; Kate Mackintosh, 'Beyond the Red Cross: the protection of independent humanitarian organizations and their staff in international humanitarian law' (2007) 89(865) International Review of the Red Cross 113; Sutton (n 94), 437.

[99] Both the relationship to Art. 70 AP I and Art. 71 (4) AP I imply that the personnel concerned are not nationals of the State on whose territory relief operations take place. See Alice Gadler, 'Principles Matter: Humanitarian Assistance to Civilians under IHL' (University of Trento October 2013) 100–101; ICRC, Commentary to AP I (1987), Art. 71, para. 2871.

[100] Frédéric Mégret, 'From 'savages' to 'unlawful combatants': a postcolonial look at international law's 'other'' in Anne Orford (ed), *International Law and its 'Others'* (CUP 2006); Sibylle Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford University Press 2015); Boyd van Dijk, *Preparing for War: The Making of the Geneva Conventions* (History and theory of international law, First edition, Oxford University Press 2022); Eyal Benvenisti, 'The Birth and Life of the Definition of Military Objectives' (2022) 71 International and Comparative Law Quarterly 269-295.

4.2 Conceptual openness of IHL regarding humanitarian assistance

IHL does not confine the provision of humanitarian assistance to components of the Red Cross/Red Crescent Movement and/or UN specialized agencies.

Firstly, there is no rule requiring humanitarian actors to adopt the ICRC's *modus operandi,* i.e. to subscribe to the same humanitarian principles.[101] While the stereotype conveyed by IHL may induce actors to embrace the ICRC's model,[102] IHL requires at most adherence to the principles of humanity and impartiality,[103] but not neutrality and independence.[104] The exemplary mention of the ICRC throughout the Geneva Conventions and their Additional Protocols does not imply any additional requirements for humanitarian action.[105] Accordingly, CTED's recent interpretation of the notion "exclusively humanitarian activities" in Resolutions 2462 and 2482 to encompass only activities observing the principles of "humanity, neutrality, impartiality, and independence"[106], exceeds the legal requirements under IHL.

Secondly, there is no restriction to entities with *international legal personality* or to *international* bodies in a more general sense. The negotiators of both the 1949 Geneva Conventions and the 1977 Additional Protocols consciously decided not to include criteria that would (further) restrict the circle of eligible actors. The relevant discussion in 1949 pertained to Common Article 9/9/9/10, which in its final version stipulates that an "[…] impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake [humanitarian activities]". Common Art. 3 (2) is, in relevant parts, identically formulated and refers to offers of services by "an impartial humanitarian body". The negotiators repeatedly discussed, but ultimately rejected limitations to "internationally recognized" actors or bodies of an "international character".[107] This was explicitly grounded in the importance accorded to national welfare charities and non-international humanitarian bodies.[108]

The ICRC raised the issue again in the 1970s during the expert conferences in preparation of the Additional Protocols. Its first draft and various early amendments mentioned States,

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[101] ICRC, 'The Fundamental Principles of the International Red Cross and Red Crescent Movement' (August 2015) <https://www.icrc.org/sites/default/files/topic/file_plus_list/4046-the_fundamental_principles_of_the_international_red_cross_and_red_crescent_movement.pdf>; cf. Art. 63 GC IV, stating that "other relief societies" may pursue their activities "under similar conditions" - and not the same.

[102] Sutton (n 94), 435ff.

[103] Common Art. 3 (2) GC I-IV, Art. 18 (2) AP II, Art. 70 (1) AP I, Common Art. 9/9/9/10 GC I-IV, Art. 59, Art. 61 GC IV; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary international humanitarian law* (CUP 2009) Rule 55.

[104] ICRC, Commentary to GC IV (1958), Art. 10, p. 97. This is also confirmed by the ICJ which in its *Nicaragua* judgement only refers to humanity and non-discrimination; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)* (Merits) [1986] ICJ Rep 14, para. 243.

[105] A draft of Art. 18(1) AP II referencing humanitarian principles was dropped, Official Records of the Diplomatic Conference of Geneva 1974-1977, Vol. VII, CDDH/SR.53, 149.

[106] CTED (n 78) 23–24.

[107] Final Record of the Diplomatic Conference of Geneva of 1949, Joint Committee, Vol. II-B, 111; ICRC Commentary GC III (2020) para. 1314; Nishat, 'The Right of Initiative of the ICRC and Other Impartial Humanitarian Bodies' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A commentary* (OUP 2015) para. 8. Conversely, Matthias Vanhullebusch, *The Law of International Humanitarian Relief in Non-International Armed Conflicts* (BRILL 2022) 42 claims that "the international character of humanitarian relief actions was decided and confirmed within Common Article 3(2)".

[108] Final Record of the Diplomatic Conference of Geneva of 1949, Joint Committee, Vol. II-B, 21, 60, 111; Barrat (n 97) 145.

(components of) the Red Cross/Red Crescent Movement, the United Nations and its specialized agencies as well as "other recognized societies" and "impartial humanitarian bodies" as eligible actors.[109] Eventually, however, both Art. 70 AP I and Art. 18 (2) AP II were formulated using an impersonal passive construction so as to avoid any specification and limitation.[110] The conditions enshrined in them refer exclusively to the operations undertaken, not to the actor undertaking them.[111] Therefore, these articles cover governmental and *non-governmental,* international and *local*,[112] humanitarian and *development* actors,[113] and actors pursuing political aims.[114] They "may also be performed by actors which do not qualify as impartial humanitarian organizations"[115], provided the specific activities are humanitarian and impartial in nature.

Crucially, IHL demonstrates a particular openness to local organizations. In practice, they are regularly the first responders, provide a great share of humanitarian assistance and often remain active in areas affected by protracted conflict after international support has waned. IHL recognizes their importance and prioritizes them by making external relief conditional on the local population being inadequately supplied.[116] Moreover, the Additional Protocols grant them comparatively greater scope for action, especially in non-international armed conflicts: According to Art. 18 (1) AP II, local relief societies may pursue their *"traditional functions"*, whereas external actors are limited to "*exclusively humanitarian relief actions"* in Art. 18 (2) AP II. The former was meant to cover a wide spectrum of activities beyond the distribution of essential supplies, including the collection and transmission of information on victims, civil defence tasks and the maintenance of public utility infrastructure and services.[117] Likewise, the notion of "relief society" is relatively broad. Art. 18 (1) does not formulate any preconditions and thus encompasses any legally established NGO, whether recognised or not, whether pre-existing or newly founded.[118]

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[109] Conference of Government Experts on the Reaffirmation and Development of IHL (1972), Report I p. 90, 161f.; Report II 78-80; CE/COM III/PC 81, 82, 85, 88; Conference of Red Cross Experts on the Reaffirmation and Development of IHL (1972), Report p. 37, 68.

[110] Michael Bothe, Karl J Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949* (2nd edn, Martinus Nijhoff Publishers 2013) 484; Emanuela-Chiara Gillard, 'Cross-Border Relief Operations - The Legal Framework' . OCHA Policy Series 27 <https://www.unocha.org/sites/unocha/files/dms/Documents/Legal%20Perspective%20Cross-border%20relief%20operations.pdf> accessed 7 December 2021; Barrat (n 96) 266 fn. 153.

[111] Barrat (n 96) 140.

[112] Heike Spieker, 'Humanitarian Assistance, Access in Armed Conflict and Occupation' in Rüdiger Wolfrum and Anne Peters (eds), *Max Planck Encyclopedia of Public International Law* (OUP 2008 - 2022) para. 33.

[113] ICRC Commentary to GC III (2020), Art.3, para. 827; Gadler (n 99) 442.

[114] ibid.

[115] ICRC Commentary to GC III (2020), Art. 3, para 836.

[116] Art. 59 GC IV, Art. 70 AP I, Art. 18 II AP II. Art. 63 GC IV and Art. 18 I AP II do not contain corresponding conditions.

[117] Bothe, Partsch and Solf (n 110) 800, cf. Explanations of vote by Australia and the Netherlands, Official Records of the Diplomatic Conference of Geneva 1974-1977, Vol. VII, CDDH/ SR.53 Annex, 155, 162; cf. Art. 63 (2) GC IV.

[118] Barrat (n 96) 167–168; ICRC Commentary to AP II (1987), Art. 18, para. 4872.

In fact, external relief operations were a far more controversial issue during the drafting process than the activities of local actors.[119] After all, some States feared that the provisions on external relief operations could be misused to justify outside intervention in internal conflicts.[120] At the instigation of the Global South, the provisions relating to relief during non-international armed conflict were ultimately formulated with a view to protecting sovereignty.[121] As a result, local organizations occupy a prominent position. Humanitarian exemptions endanger their position and shift attention to the security concerns of the Global North.

4.3 The obligation to allow and facilitate free movement of humanitarian relief by all actors

Humanitarian engagement – understood in the broad sense articulated above – is protected against interference through the obligation to allow and facilitate free passage of humanitarian relief. This obligation is incumbent on non-belligerent states in both international and non-international armed conflict (4.3.1). It requires states to design their counterterrorism frameworks so as not to impede humanitarian activities by *all* 'types' of actors. Notably, this obligation also protects transnational financial and material support provided by various donors to local organizations (4.3.2). While non-belligerent states may subject transfers to control, their leeway in this regard is strictly limited (4.3.3).

4.3.1 Applicability to non-international armed conflicts

The obligation to allow and facilitate rapid and unimpeded passage of transnational support follows from Art. 59 (3) GC IV for situations of occupation and Art. 23 (1) GC IV, Art. 70 (2) AP I for other international armed conflicts. It is less obvious that a similar obligation binds non-belligerent States also in situations of non-international armed conflict. AP II does not contain an explicit rule and the existence of a corresponding customary obligation seems highly uncertain, given the paucity of state practice specifically relating to non-international armed conflicts.[122]

Scholars have argued that this obligation flows from the obligation enshrined in Common Art. 1 of the Geneva Conventions[123] to 'ensure respect' by the warring parties of their obligations in relation to international relief.[124] If States were obliged to *actively* induce other States to

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[119] cf. the Indonesian delegate arguing that external relief should be channelled through the national Red Cross Society so as to "avoid problems regarding violations of sovereignty.", Official Records, Vol. XII, CDDH/II/SR.88, 351.

[120] Giovanni Mantilla, *Lawmaking under pressure: International humanitarian law and internal armed conflict* (Cornell University Press 2020) 165–166.

[121] ibid.

[122] cf. Gadler (n 99) 469f.; Dapo Akande and Emanuela-Chiara Gillard, 'Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict' (2016) para. 123 <https://www.unocha.org/sites/unocha/files/Oxford%20Guidance%20pdf.pdf>. The CIHL-Study notes isolated instances of relevant state practice but the pertinent rule within it does not address the obligations of third States in relation to humanitarian relief operations, Jean-Marie Henckaerts and Louise Doswald-Beck (n 103) Rule 55.

[123] Though AP II does not contain a provision replicating Article 1, the obligation also applies to non-international armed conflicts, Robin Geiß, 'The Obligation to Respect and to Ensure Respect for the Conventions' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A commentary* (OUP 2015) 115; ICJ, *Nicaragua* (n 104), paras. 219f.

[124] ICRC Commentary to GC III (2020), Art. 3, para. 879; Knut Dörmann and Tristan Ferraro, 'Humanitarian Assistance' in Dieter Fleck and Michael Bothe (eds), *The handbook of international*

comply with IHL, they must *a fortiori* refrain from obstructing compliance by those States.[125] However, there is no need to construct the obligation to allow and facilitate transit from the obligation to 'ensure respect' by others. Unlike direct participation in relief operations,[126] permitting transit is not about acting upon a party to the conflict, but about compliance by the non-belligerent state itself. Therefore, we can instead rely on ´the other component of Common Article 1: The obligation to 'respect' IHL.[127]

This obligation is tantamount to the obligation contained in Art. 26 VCLT, according to which treaties must be performed in good faith.[128] It requires contracting parties to "refrain from any acts calculated to prevent the due execution of the treaty" and from obstructing the realization of its object and purposes.[129] Accordingly, the contracting parties are obliged to create and maintain the "underlying conditions for a proper execution" of the individual provisions. Thus, the principle of good faith highlights the existence of implicitly presupposed obligations.[130]

Given the explicit provisions in GC IV and AP I and given that a similarly explicit draft for AP II was deleted at the last minute in 1977, one could be tempted to hold that states have not assumed an obligation with regard to the transit of humanitarian assistance – not even implicitly. However, the drafters merely aimed at simplifying the text, removing "unnecessary details" in the words of the delegate behind the proposal.[131] The *erga omnes* obligation of parties to the conflict in Art. 18 (2) AP II creates a legitimate expectation that non-belligerent States will not obstruct compliance with this provision. Consequently, the duty to respect this provision and to perform it in good faith, implies an obligation for third States to allow and facilitate the passage of those operations.[132] This obligation would require not only to refrain from enacting counterterrorism legislation that unduly restricts humanitarian activities, but also, for instance, active regulatory measures to mitigate harmful practices such as "de-risking".[133]

In support, the obligation of states to allow unimpeded passage of humanitarian relief destined at affected populations in third states can also be supported by international human rights law

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humanitarian law (Fourth edition. OUP 2021) para. 11.04 §5; Nathalie Weizmann, 'Ensuring respect for IHL as it relates to humanitarian activities' in Eve Massingham and Annabel McConnachie (eds), *Ensuring respect for international humanitarian law* (Routledge Taylor & Francis Group 2021) 202.

[125] Weizmann, 'Respecting International Humanitarian Law' (n 4) 28.

[126] Eve Massingham, 'The Obligation to Respect and Ensure Respect for International Humanitarian Law: A Potential Source of Assistance in Combating Humanitarian Cross-border Challenges Created by Armed Conflict' in Leon Wolff and Danielle Ireland-Piper (eds), *Global Governance and Regulation: Order and Disorder in the 21st Century* (Routledge 2018) 214.

[127] Cf. Birgit Kessler, *Die Durchsetzung der Genfer Abkommen von 1949 in nicht-internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1* (Duncker & Humblot 2001) 121.

[128] Geiß (n 123) 117; ICRC Commentary to GC III (2020), Art. 1, para. 176.

[129] ILC, *Yearbook of the International Law Commission* 1964, Vol. II, p. 7, Robert Kolb, *La bonne foi en droit international public* (Graduate Institute Publications 2000) Titre II, Partie I, para. 283-284; ICJ, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 7, § 142; Salmon, in: Corten/Klein (eds.), *The Vienna Convention on the Law of Treaties*, (Oxford University Press 2011) Art. 26 VCLT, para. 39-40.

[130] Robert Kolb, *Good Faith in International Law* (Hart Publishing 2017) 69.

[131] Judge Mushtaq Hassan, quoted in Mantilla (n 120) 166–167; Flavia Lattanzi, 'Humanitarian Assistance' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A commentary* (OUP 2015) para. 81 fn.68.

[132] See also Ferraro (n 22), 136f.

[133] See also Kosuke Onishi, 'The relationship between international humanitarian law and asset freeze obligations under United Nations sanctions' (2021) 103(916/917) International Review of the Red Cross 363.

(IHRL). There are good arguments for assuming that counterterrorism-legislating third states have an extraterritorial obligation to respect the economic, social and cultural rights (ESCR) of people in counterterrorism-affected territories.[134] At least, however, states parties to the International Covenant on Economic, Social and Cultural Rights generally assume an obligation to cooperate internationally for the realization of ESCR.[135] The Committee on Economic, Social and Cultural Rights has stated that the minimum core content of ESCR enjoys special priority within the international obligation to cooperate.[136] Also, the Committee as well as Maastricht Principles specifically held with respect to sanctions regimes – some of which are comparable to counterterrorism regimes in terms of their negative socio-economic side effects – that at least the minimum core content of ESCR must not be compromised by sanctions regimes.[137] Arguably, thus, the obligation to cooperate internationally includes the minimum requirement that counterterrorism-legislating states do not negatively interfere with efforts to realize the minimum core ESCR abroad.

4.3.2 Protecting transnational financial support for local organizations

These obligations of non-belligerent states – whether explicitly enshrined in the treaty or derived from it – do not only apply to the stereotypical 'humanitarian convoys' of international humanitarian organizations. In line with IHL's conceptual openness outlined earlier, these obligations apply to all humanitarian relief operations that involve a transnational element. We submit that they also protect transnational financial support provided by various donors to local organizations against interference by non-belligerent states. This presupposes two things: For one, that financial resources are considered humanitarian consignments and, for another, that transnational financial support to local organizations qualifies as international relief under Art. 70 (1) AP I and Art. 18 (2) AP II, triggering the obligation to allow and facilitate passage. Both are substantiated hereinafter.

The obligation to allow and facilitate passage directly relates to "(relief) consignments" only. However, it should be understood to also include donations and other money transfers, which are of paramount relevance in the context of countering terrorist financing. Humanitarian organizations have always needed financial resources on the ground to remunerate their staff, purchase commodities and services and pay various fees.[138]. Moreover, humanitarian actors now increasingly attempt to preserve local market structures and respect beneficiaries' agency and therefore increasingly resort to cash-based assistance. Recent studies even suggest that

[134] This would be in line not only with the doctrine of the CESCR, see CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11) contained in Document E/C.12/1999/5 (12 May 1999) para. 36; General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) contained in Document E/C.12/2000/4 (11 August 2000) para. 39; General Comment No. 15 para. 31; But also with Principle 9 of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), https://www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf.

[135] This not only follows from Art. 2(1) ICESCR, but also from Arts. 55, 56 UN-Charter.

[136] CESCR, General Comment No. 14, para. 45; General Comment No. 15, para. 38; see also Maastricht Principles (n 134) Principle 32b).

[137] CESCR, General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights E/C.12/1997/8 (12 December 1997), para. 7; Maastricht Principles (n 134), Principle 22.

[138] ICRC Commentary to GC III (2020), Art. 3, para. 829.

cash transfers are more efficient than in-kind assistance.[139] Thus, distinguishing between material humanitarian goods and monetary assets with regard to the notion of 'relief consignment' is unconvincing. The German Constitutional Court also seems to draw this conclusion by finding – with reference to Arts. 23 (1), 59 (3) GC IV and Art 70(2) AP I – that "[e]ven financial donations to areas controlled by terrorists" may have to be "granted 'free passage' as means of humanitarian aid".[140]

There are also well-founded arguments for qualifying cross-border funding streams as external relief under Art. 70 (1) AP I and Art. 18 (2) AP II, triggering the obligation to allow and facilitate relief under IHL. Essentially, the qualification depends on whether the *determining* factor of the interaction is the local organization or the foreign source of funding. As regards foreign funding of local humanitarian NGOs in times of armed conflict, IHL seems to prioritise the external component over the local component: Art 71 (1) AP I indicates that external personnel are not necessarily part of 'relief actions' in the sense Art. 70 (1) AP I and thus implies that even the mere provision of funding and commodities for distribution by local actors constitutes an *external/international* relief operation. Furthermore, the rationale underlying the distinction between local and international relief in Art. 18 AP II is arguably based on the fact that the latter brings additional resources into the territory under armed conflict and could thus provide an advantage to one of the warring parties.[141] This focus on the origin of resources is consistent with the fact, that Art 18 (2) AP II deliberately refrains from identifying an actor by using an impersonal passive construction.[142] Accordingly, transnational financial support qualifies as international relief, implemented on the ground by domestic organizations. At the same time, this means that support to local organizations is subject to the stricter conditions set out in Art. 18 (2) AP II.[143] The International Court of Justice in its *Nicaragua* judgement accordingly applied conditions equivalent to those in Art. 18 (2) AP II [144] even though it was only concerned with "the provision of relief items at the border to actors operating in-country."[145]

While it is significant that financial resources are of foreign origin, it does not matter which actor they come from.[146] The Geneva Conventions and their Additional Protocols do not contain any rule about donors. The ICRC Commentary notes that – considering the overwhelming needs of conflict-affected populations – the contributions "of any person, organization or institution" are welcome.[147] Charities and for-profit companies can support humanitarian efforts, as can

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[139] E.g. Dahyeon Jeong and Iva Trako, 'Cash and In-Kind Transfers in Humanitarian Settings: A Review of Evidence and Knowledge Gaps' (April 2022) World Bank Policy Research Working Paper 10026 https://openknowledge.worldbank.org/handle/10986/37369.

[140] BVerfG, Order of the First Senate of 13 July 2018 – 1 BvR 1474/12, para. 137.

[141] Gadler (n 99) 91.

[142] See above.

[143] cf. also the ILC Draft Articles on the Protection of Persons in the Event of Disasters in which the ILC wanted to avoid addressing activities of domestic NGOs. To achieve this, the drafters felt compelled to include an explicit limitation to actors external to the affected state (in the commentary), as the mere limitation to 'external assistance' would not have clearly excluded domestic organisations receiving foreign assistance, ILC, *Yearbook of the International Law Commission* 2016, Vol. II, Part 2, p. 31; UN Doc. A/CN.4/SR.3213, p. 6f.; UN Doc. A/CN.4/SR.3310, p. 6.

[144] ICJ, *Nicaragua* (n 104), paras. 242, 243.

[145] Emanuela-Chiara Gillard, 'The Law Regulating Cross-Border Relief Operations' (2013) 95(890) International Review of the Red Cross 351, 370 with further references.

[146] Gadler (n 99) 440.

[147] ICRC Commentary to GC IV (1958), Art. 59, p. 321.

public funds and donations by individuals, including those belonging to the diaspora. As a result, basically any transnational transfer of essential goods and funds, whoever the donor and recipient, is protected by the obligation to allow and facilitate passage if the recipient organization uses them for distributions to the civilian population, which are humanitarian and impartial in nature.[148]

Accordingly, it is troublesome if donor jurisdictions solely exempt the activities of "humanitarian organisations" from counterterrorism frameworks, as individuals and other entities supporting humanitarian aid could still be held responsible for financing terrorism. Yet many humanitarian exemptions do just that.

4.3.3 Limited leeway to control transnational humanitarian transfers

States will argue that they are pursuing legitimate security interests in limiting exemptions to international organizations deemed trustworthy. However, IHL already takes such security interests into account and hence sets boundaries for their consideration.[149] Such interests could be invoked in the context of the requirement of consent to humanitarian relief or the possibility to prescribe 'technical' arrangements for its passage. Scholars disagree on whether the consent of non-belligerent states concerned is required in international armed conflicts and on whether they are strictly obliged to consent.[150] In any case, the withholding of consent must not be arbitrary.[151] Compared to parties to the conflict, non-belligerent states have much less leeway to withhold consent in a non-arbitrary manner.[152] In particular, it is difficult to see how the *a priori* exclusion of entire 'categories' of humanitarian actors in all conflicts involving entities designated as terrorists would not be arbitrary. Moreover, withholding consent due to a concern that could be considered as a matter of technical arrangements must be deemed arbitrary.[153] Finally, in light of a systemic integration of IHL and the ICESCR,[154] withholding consent is arbitrary if it violates obligation to respect the minimum core of relevant economic, social and cultural rights.[155] While Common Art. 3 to the GCs and Art. 18 (2) AP II do not regulate the issue in non-international armed conflicts, the above applies analogously.[156]

5. Outlook: Detrimental effects of humanitarian safeguards

In this paper we challenged the assumption that exemption clauses in counterterrorism legal frameworks are the most effective means to safeguard humanitarian actors against the negative impact counterterrorism has on their work. Firstly, we demonstrated that humanitarian

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[148] For a related conclusion but without regard to transit obligations, cf. Gadler (n 100) 440.

[149] Necessity as a matter of the Law of State Responsibility cannot be invoked to preclude the wrongfulness of a conduct contrary to the provisions on humanitarian assistance since IHL exhaustively defines the scope of necessity; see Marco Sassòli, 'State responsibility for violations of international humanitarian law' (2002) 84(846) International Review of the Red Cross 401, 415f.

[150] Akande and Gillard (n 122) para. 100ff.; ICRC, Commentary to AP I (1987), Art. 70, para. 2807.

[151] ibid para. 104, 105.

[152] ibid para. 110.

[153] Tzvi Mintz, 'Substantive Technicalities: Understanding the Legal Framework of Humanitarian Assistance in Armed Conflicts through the Prescription of Technical Arrangements' (2019) 227(3) Military Law Review 275, 315.

[154] Art. 31(3)(c) VCLT.

[155] Akande and Gillard (n 122) para. 50, 51; See also Amrei Müller, *The relationship between economic, social and cultural rights and international humanitarian law* (Martinus Nijhoff Publishers 2013) 242ff.

[156] Akande and Gillard (n 122) para. 106, 107.

exemptions currently in force either explicitly or implicitly refer only to a restricted set of actors. These are the largest humanitarian actors mostly established in the Western hemisphere – such as the ICRC and UN agencies – or organizations that are either closely associated with them or otherwise state-recognized. Especially smaller diaspora or local organizations do not benefit from the same protection, so that counterterrorism continues to restrict their activities while they are, for various reasons, excluded from integrating their concerns into the discourse. Secondly, we have shown that IHL, as the minimum normative benchmark for counterterrorism, is not only conceptually open and to a certain degree protective of a broader range of humanitarian actors, small and local actors in particular. Further, we have argued that counterterrorism-legislating states are obliged to grant free passage of humanitarian relief consignments from all kinds of donors, to all kinds of humanitarian actors. On this basis, we argue that the current emergence of humanitarian exemption techniques remains, at least partly, an illusive progress. Their focus on certain actors, a result of the security-based lens inherent in them, conflicts with the obligation of free passage of humanitarian relief. Beyond that, it unduly restricts the openness of IHL for a timely evolution of humanitarian assistance.

Such an evolution would, however, be much needed in light of the challenges posed by contemporary protracted armed conflicts. Seemingly endless conflicts which often feature a strong presence of entities designated as terrorist and provoke long-lasting humanitarian crises, demand a restructuring of the 'traditional' way humanitarian assistance is provided. This in turn calls for a regulatory framework within which humanitarian organizations can flexibly develop new approaches to tackle not only symptoms but also underlying structural issues of such crises.

Humanitarian actors have been debating for years now about their role in terms of addressing long-term needs in protracted conflicts through infrastructure reconstruction, support for urban systems, and economic rehabilitation. This is also connected to the still unresolved issue of the humanitarian sector's relation with the development sector in protracted conflicts. That the global counterterrorism architecture constructs and cements the stereotype of 'humanitarian action' as emergency relief will undermine such important debates. For example, while the exemption clause to the UNSC Resolution 1988 (2011) sanctions regime allows for humanitarian assistance in Afghanistan, the temporal limitation impedes longer-term planning to address the structural causes of the severe humanitarian crisis in the country.[157] The key actors in addressing these issues and associated needs are local organizations.[158] Together with the increasing recognition of the need to decolonize the humanitarian sector,[159] this explains the prominence of calls for localization of humanitarian aid.[160] The modalities of

[157] see UNSC Res. 2255 (2015), para. 1 and the humanitarian exception introduced by UNSC Res. 2615 (2021), para. 1.

[158] Sultan Barakat and Sansom Milton, 'Localisation Across the Humanitarian-Development-Peace Nexus' (2020) 15(2) Journal of Peacebuilding & Development 147, 149; Kristina Roepstorff, 'A call for critical reflection on the localisation agenda in humanitarian action' (2020) 41(2) Third World Quarterly 284, 287f.

[159] Peace Direct, 'Time to Decolonise Aid: Insights and lessons from a global consultation' (May 2021) <https://www.peacedirect.org/wp-content/uploads/2021/05/PD-Decolonising-Aid-Report-2.pdf>; Roepstorff (n 158), 286f.

[160] Cf. Inter-Agency Standing Committee, 'The Grand Bargain 2.0 – Endorsed framework and annexes' (June 2021) 7ff. https://interagencystandingcommittee.org/system/files/2021-

implementation of the localization agenda might still be subject to discussions among humanitarian experts. However, counterterrorism legislation which considerably privileges the most prominent international humanitarian organizations – which are expected to be always uninvolved in the local situation – over smaller diaspora or local organizations, can restrict or prevent such discussions altogether.

Against this background, we suggest that humanitarian exemptions as a 'micro-solution' might be counterproductive and should therefore not be the centre of advocacy efforts. Arguably, built-in safeguards for IHL, regardless of their actual effectiveness, could serve as a basis for states to legally justify that their counterterrorism frameworks are consistent with their international legal obligations to protect the human person.[161] Eventually, they can also help them to morally justify the imposition of counterterrorism sanctions.

But instead, the recognition for the various adverse impacts of counterterrorism measures on humanitarian action could also provide an occasion for a broader, more general discussion on the legitimacy (and effectiveness) of counterterrorism sanctions. We argue that humanitarian advocacy should pursue and more clearly articulate a more structural and overt critique of the entire normative-institutional complex of counterterrorism. Part of such a more structural critique could be the demand for more powerful, independent, and comprehensive oversight over the global counterterrorism architecture and its ways of working and law-making. Moreover, a structural critique would demand that more attention and scientific research is devoted to potential underlying flaws of the counterterrorism architecture, e.g, the extent to which structural racism manifests itself in this system. Related to this latter point, it also seems important that attention is directed at who can express critique. The demand for more involvement of civil society in international counterterrorism fora is not new;[162] but the civil society to be involved would also need to be diversified. Not only the ICRC or OCHA, but also smaller diaspora actors and local actors from all kinds of societal groups in affected areas should have a substantial say in relevant discussion venues. Notably, this is something to be ensured not only by the gatekeepers of the counterterrorism fora, but also by established Western humanitarian actors within the humanitarian sector itself.

What we suggest here is admittedly a rather utopian approach. Yet, we deem it necessary to consider it if sustainable humanitarian action in protracted crises is not to be constantly stalled by the transnational enforcement of powerful states' national security agendas.

07/%28EN%29%20Grand%20Bargain%202.0%20Framework.pdf; Agenda for Humanity, UN Doc. A/70/709 para. 111-113.

[161] Already, recently, it has been argued in legal scholarship that introducing humanitarian exceptions to sanctions regimes could prevent the actors imposing such sanctions (such as UNSC members or implementing states) from being liable under the law of state responsibility, see Vanhullebusch (n 107) 78.

[162] See e.g. Franziska Praxl-Tabuchi, Jason Ipe and Eric Rosand, 'A Blueprint for Civil Society-Led Engagement in UN Counterterrorism and P/CVE Efforts' (March 2022) <https://www.globalcenter.org/wp-content/uploads/2022/03/Blueprint_for_Civil_Society-Led_Engagement_Web.pdf.>