Humanitarian Exemptions from Counter-terrorism Measures: A Brief Introduction

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I. PROCEEDINGS OF THE BRUGES COLLOQUIUM/ACTES DU COLLOQUE DE BRUGES

Opening Remarks
Jörg Monar, Rector of the College of Europe

WELCOME ADDRESS
Walter Fülemann, Head of the ICRC Delegation to the EU, NATO and the Kingdom of Belgium

DISCOURS DE BIENVENUE
Christine Beerli, Vice-President of the ICRC

KEYNOTE ADDRESS

Session 1
Setting the scene
Chairperson: Paul Berman, Legal Service of the Council of the EU

Sandra Krähenmann, Geneva Academy of IHL and Human Rights

LEGAL FRAMEWORK ADDRESSING TERRORISM AND COUNTER-TERRORISM
Tristan Ferraro, ICRC Legal Division

INTERACTION AND OVERLAP BETWEEN COUNTER-TERRORISM LEGISLATION AND INTERNATIONAL HUMANITARIAN LAW
Gert-Jan van Hegelsom, EEAS Legal Affairs Division

THE EUROPEAN UNION APPROACH TO COUNTER-TERRORISM AND INTERNATIONAL HUMANITARIAN LAW

DISCUSSION (EN)

Session 2
Legal parameters of the fight against terrorism
Chairperson: Elżbieta Mikos-Skuza, University of Warsaw and College of Europe

Marco Sassòli, University of Geneva

LEGAL QUALIFICATION OF THE FIGHT AGAINST TERRORISM
Rogier Bartels, International Criminal Court

TERRORIST GROUPS AS PARTIES TO AN ARMED CONFLICT
Noam Lubell, University of Essex

LIMITS OF THE GEOGRAPHICAL SCOPE OF APPLICATION OF IHL IN COMBATING TERRORISM

DISCUSSION (EN)
Session 3
The use of force and other measures of constraint in the fight against terrorism
Chairperson: Andres Munoz Mosquera, SHAPE Legal Office

Claire Landais, French Ministry of Defence
LEGAL CHALLENGES IN FIGHTING ARMED GROUPS EXTRA-TERRITORIALLY p. 75
Françoise Hampson, University of Essex
THE CONDUCT OF HOSTILITIES VERSUS THE LAW ENFORCEMENT PARADIGM p. 84
Frederik Naert, Legal Service of the Council of the EU and Catholic University of Leuven
EU COUNTER-TERRORISM SANCTIONS AND IHL BEFORE THE EU COURT OF JUSTICE p. 92
DISCUSSION (EN) p. 102

Panel discussion
State responses to foreign fighters
Moderator: Elizabeth Wilmshurst, Chatham House p. 107
Panellists:
Vaios Koutroulis, Free University of Brussels
Christophe Paulussen, T.M.C. Asser Institute
Christian Ritscher, German Office of the Federal Public Prosecutor General

Session 4
Criminalisation of humanitarian action
Chairperson: Ann-Kristin Sjöberg, Geneva Call

Patrick Duplat, International Rescue Committee
IMPACT OF COUNTER-TERRORISM MEASURES ON HUMANITARIAN ACTION p. 135
Dustin Lewis, Harvard Law School
HUMANITARIAN EXEMPTIONS FROM COUNTER-TERRORISM MEASURES: A BRIEF INTRODUCTION p. 141
Kim Eling and Maria Lensu, Cabinet of the Commissioner for Humanitarian Aid and Crisis Management
HUMANITARIAN ACTION IN TERRITORIES CONTROLLED BY DESIGNATED TERRORIST GROUPS: A DONOR’S PERSPECTIVE p. 151
DISCUSSION (EN/FR) p. 157

Panel discussion
Preventing and countering violent extremism
Moderator: Pascal Daudin, ICRC Policy Cell p. 161
Panellists:
Stephan Husy, Swiss Federal Department of Foreign Affairs
Dick Clomén, Swedish Red Cross
Fulco van Deventer, Human Security Collective

Concluding Remarks
Christine Beerli, Vice-President of the ICRC p. 183

II. LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS p. 187
III. PROGRAMME (EN) p. 195
IV. SPEAKERS’ BIOS/BIOGRAPHIES DES ORATEURS p. 198
Résumé

Dans le cadre de la session sur les risques de criminalisation de l’aide humanitaire, Dustin Lewis examine la notion d’exemption humanitaire dans les législations relatives à la lutte contre le terrorisme. Pour ce faire, M. Lewis s’emploie à en définir le concept, à en dresser la raison d’être, à en fournir quelques exemples et à dégager les principaux points de controverse que suscite cette notion.

Les « exemptions » humanitaires, bien qu’elles n’aient pas de définition universellement reconnue, signifient que des garanties d’immunité judiciaire sont accordées à certains, en dérogation à la règle générale à laquelle sont soumises les autres personnes. Au-delà de leurs formes et modalités variables, il existe deux grands types d’exemptions humanitaires : celles qui accordent l’immunisation des poursuites à des terroristes afin de leur permettre de bénéficier de traitements humanitaires auxquels l’accès leur serait normalement défendu par les lois relatives au terrorisme, et celles, les exemptions « sectorielles », qui visent à protéger les personnes et organisations humanitaires. Cela a le but d’assurer la libre mise en œuvre de l’action humanitaire basée sur les principes d’humanité, d’impartialité, d’indépendance et de neutralité.

La raison d’être de ces exemptions est bien entendu le souhait d’assurer que l’aide humanitaire ne soit pas entravée par les mesures de lutte contre le terrorisme. Des exemples de pareilles exemptions peuvent être trouvés au niveau national (par exemple en Australie et aux États-Unis) ainsi qu’au niveau international (par exemple dans certaines résolutions du Conseil de sécurité de l’ONU). L’orateur nous en livre les détails.

M. Lewis termine son exposé en relevant les éléments en faveurs et ceux en défaveur des exemptions humanitaires sectorielles. Parmi les avantages de telles exemptions figurent le gain de cohérence et de clarté de la protection juridique de l’action humanitaire ainsi que l’encouragement à fournir cette aide dans les zones contrôlées par des groupes armés désignés comme terroristes. Les éléments en défaveur d’une exemption sectorielle incluent, quant à eux : la crainte qu’une telle protection n’incite des acteurs peu scrupuleux à abuser de l’action humanitaire pour servir des objectifs terroristes ; la crainte aussi que cette protection supplémentaire ne dévalorise les protections consacrées par ailleurs dans le droit international humanitaire, le droit national et
1. Introduction

Some humanitarian stakeholders are increasingly interested in exemptions from counter-terrorism laws. The background concern is that counter-terrorism measures – whether in the form of laws, policies, or regulations and whether at domestic or international level (or both) – may be interpreted or applied in ways that could impede humanitarian action.\(^1\) That concern is articulated perhaps most sharply in relation to situations of armed conflict where designated terrorist entities effectively control access to, or otherwise exercise power over, civilian pop-
lations in need. In recent years, such areas have included parts of Afghanistan, Colombia, Gaza, Iraq, Mali, Nigeria, Somalia, Syria, and Yemen (among others). Exemptions – in short, grants of immunity from liability to which others are subject – are seen by some humanitarian organisations as a (partial) remedy to those counter-terrorism measures. The basic idea is that a humanitarian exemption, if suitably crafted and prudently applied, would preclude the otherwise applicable counter-terrorism based liabilities from attaching to principled humanitarian action. The larger question of whether humanitarian exemptions are desirable and feasible implicates an array of cascading concerns that merit scrutiny from various perspectives.

In this brief analysis, I aim to summarise and reflect upon some of the research on humanitarian exemptions from counter-terrorism measures undertaken by the Counter-terrorism and Humanitarian Engagement (CHE) Project of the Harvard Law School Program on International Law and Armed Conflict. I will thus largely draw on existing legal and policy analysis to sketch the main contours of the issue. I am grateful to the International Committee of the Red Cross (ICRC) and the College of Europe for the opportunity to raise this topic – which has been the focus largely on policy- and practitioner-oriented discussions – for international-law scholars at the seventeenth Bruges Colloquium.

2. Four Framework Issues

Four issues are central to understanding the debate on humanitarian exemptions from counter-terrorism measures. Those issues concern the definitions, the logic, and the relevant examples of humanitarian exemptions, as well as the range of arguments for and against such exemptions.

a. Defining humanitarian exemptions

There is no generally accepted definition in international law of ‘exemption’. Nonetheless, the Oxford English Dictionary outlines some basic contours: to ‘exempt’, in its current use, generally means ‘[t]o grant (a person, etc.) immunity or freedom from a liability to which others are

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4 The research and analyses of, and more information about, the CHE Project are available online, at: <https://pilac.law.harvard.edu/counterterrorism-and-humanitarian-engagement-project/>.

subject. Among the listed examples of what the grant of immunity or freedom from liability may be from include a fine, the control of laws, a penalty, or a burden.

A review of legal sources, policy documents, and academic commentaries reveals at least two types of ‘humanitarian exemptions’: (neither, however, is a legal term of art). The first might be thought of in terms of “bad actor” humanitarian exemptions. These exemptions grant immunity from counter-terrorism measures in respect to designated terrorists so that, for instance, an individual may obtain medical care by accessing funds or conducting travel that would otherwise be prohibited. The second type – and the focus here – might be thought of in terms of “sectoral” humanitarian exemptions. These exemptions grant immunity from counter-terrorism measures in respect to those individuals and entities involved in (principled) humanitarian action. ‘Principled’, in this context, is often defined in relation to such humanitarian principles as humanity, impartiality, independence, and neutrality.

As with many other exemptions, sectoral humanitarian exemptions from counter-terrorism measures may take a range of forms and may exhibit various characteristics. For instance, sectoral humanitarian exemptions may be of a general or of a specific character. They may apply indefinitely or be time-bound. They may arise from domestic law, international law, partnership agreements or contracts, or other sources. They may apply in respect to all relevant organisations or only to a subset of them. And they may apply only in relation to counter-terrorism measures or (also) in relation to other anti-diversion (or pro-beneficiary) regimes, such as anti-bribery, anti-corruption, and anti-money laundering frameworks.

b. Why some counter-terrorism laws exempt certain forms of humanitarian action

Drafters of some counter-terrorism measures have recognised – expressly or implicitly – that those measures are capable of functioning in a way that could prohibit or otherwise impede forms of humanitarian action (see the next section for examples of such exemptions). In July

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7 Ibid. ‘Exemption’ is often framed as an umbrella concept under which certain sub-categories fall. Those sub-categories include a license (in short, an authorization to conduct certain activity that would otherwise be prohibited), a safe harbor (in short, a legal provision to reduce or eliminate liability in certain circumstances so long as designated criteria are met), and the like.
2016 for instance, the United Nations (UN) General Assembly implicitly recognised the general underlying concern.\textsuperscript{11} For its part, the ICRC – first in 2011 and again in 2015 – used similar logic in issuing calls for States to ensure that counter-terrorism measures do not impede humanitarian action.\textsuperscript{12}

It might be considered somewhat artificial to distinguish, in this context, humanitarian exemptions from counter-terrorism measures, on the one hand, and humanitarian exemptions from other anti-diversion (or pro-beneficiary) restrictive regimes, on the other. That is because counter-terrorism measures and certain other restrictive regimes often overlap.\textsuperscript{13} Thus, while the focus here is in relation to counter-terrorism measures, it merits emphasis that certain other forms of restrictive measures – such as those entailed in some anti-bribery, anti-corruption, or anti-money laundering frameworks – might also be capable of functioning in ways that could impede forms of humanitarian action.\textsuperscript{14}

c. Examples of existing humanitarian exemptions from counter-terrorism measures

Humanitarian exemptions from counter-terrorism measures have been established by some States in their domestic laws, as well as – in some respects – by the United Nations Security Council. Certain limited humanitarian exemptions in domestic counter-terrorism law arise, for example, in the contexts of Australia and the United States (US).\textsuperscript{15} (In claiming extraterritorial jurisdiction over certain anti-terrorism offences, both Australia and the US prescribe

\textsuperscript{11} U.N. General Assembly, Res. 70/291, The United Nations Global Counter-Terrorism Strategy Review, paragraph 22, UN Doc. A/RES/70/291, 1 July 2016 (‘Urges States to ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law’).

\textsuperscript{12} ICRC, “International humanitarian law and the challenges of contemporary armed conflicts”, 31IC/11/5.1.2, Geneva, October 2011, p. 53 (‘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’); ICRC, ‘International humanitarian law and the challenges of contemporary armed conflicts,’ 32IC/15/11, Geneva, October 2015, p. 21.


\textsuperscript{14} Ibid.

legislative jurisdiction over conduct in foreign territories where principled humanitarian action might occur in relation to situations of armed conflict involving designated terrorists).

Some of the Australian counter-terrorism law provisions that seem capable of impeding forms of humanitarian action contain humanitarian exemptions while other such provisions do not. For instance, provisions in Australian law on the offence concerning terrorism-related ‘association’ identify several exemptions to that offence. Included among those exemptions is association for the sole purpose of ‘providing aid of a humanitarian nature.’\(^\text{16}\) In a similar vein, the provision in Australian law concerning the offence relating to intentionally entering, or remaining in, an area of a foreign country that the Minister of Foreign Affairs has labelled a ‘declared area’ includes an exemption for those remaining ‘solely for legitimate purposes.’\(^\text{17}\) (The Minister for Foreign Affairs may ‘declare’ an area in a foreign country if he or she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area\(^\text{18}\)). Such purposes expressly include providing ‘aid of a humanitarian nature.’\(^\text{19}\) However, Australian law does not establish humanitarian exemptions in respect to certain terrorism-related offences concerning training\(^\text{20}\) and funds.\(^\text{21}\)

US federal law penalises the provision of ‘material support or resources’ – ‘except medicine or religious materials’\(^\text{22}\) – to designated terrorists or others engaged in acts of terrorism.\(^\text{23}\) A federal appeals court, however, interprets that ‘medicine’ exemption rather narrowly: in short, that exemption ‘shields only those who provide substances qualifying as medicine to terrorist organisations.’\(^\text{24}\) For its part, the International Emergency Economic Powers Act (IEEPA) authorises the President to freeze certain assets, including in connection with individuals or entities listed by the President or the Department of the Treasury as ‘specially designated

\(^\text{16}\) Criminal Code, div. 102.8(4)(c).
\(^\text{17}\) Criminal Code, div. 119.2(3).
\(^\text{19}\) Criminal Code, div. 119.2(3)(a).
\(^\text{20}\) Criminal Code, div. 102.5.
\(^\text{23}\) 18 U.S.C. § 2339A and 2339B.
global terrorists’ (SDGTs). IEEPA expressly exempts ‘donations (...) of articles such as food, clothing, and medicine, intended to be used to relieve human suffering.’ Yet the President is authorised to freeze those donations if they would ‘seriously impair’ his or her ability to respond to the emergency, are a result of coercion, or would endanger US military forces engaged in hostilities. Over the past decade and a half, the President has repeatedly instituted such freezes in relation to armed groups or terrorism.

The UN Security Council has not established a sectoral humanitarian exemption in either of its two primary counter-terrorism related sets of resolutions: the (now) Islamic State of Iraq and the Levant (ISIL) and al-Qaeda line of resolutions and the more general counter-terrorism obligations line of resolutions. (The Security Council has laid down some “bad actor” humanitarian exemptions from counter-terrorism measures). Yet, as explained elsewhere, in principle, some of the obligations laid down in those two sets of resolutions could be interpreted to impede certain forms of principled humanitarian action, such as impartial wartime medical care to wounded and sick terrorists hors de combat. For instance, the Security Council has imposed on UN Member States a general obligation to ‘[e]nsure that any person who participates (...) in supporting terrorist acts is brought to justice (...)’ More specifically, as a part of the basis for listing two individuals and two entities under the Security Council’s ISIL and al-Qaeda sanctions, the relevant Sanctions Committee has referenced – alongside more traditional grounds for a terrorist designation, such as funding associated with al-Qaeda – certain medical activities. Those references suggest that the Sanctions Committee and, by

25 See Department of the Treasury, Office of Foreign Assets Control, Terrorism, at: <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf>.
32 See generally: Dustin A. Lewis et al., Medical Care in Armed Conflict: International Humanitarian Law and States Responses to Terrorism, op.cit., pp. 102–111.
34 See Dustin A. Lewis et al., Medical Care in Armed Conflict: International Humanitarian Law and States Responses to Terrorism, op.cit.
extension, its supervisory body (the Security Council) view certain types of medical care and medical supplies as forms of impermissible support to al-Qaeda and its associates.35

However, the Security Council has established a limited sectoral humanitarian exemption in relation to the Eritrea and Somalia sanctions regime. That regime overlaps with the Security Council’s counter-terrorism approach to ISIL and al-Qaeda because association with al-Shabaab is referenced as part of the basis for two ISIL and al-Qaeda sanctions-related designees36 and because al-Shabaab is itself designated under the Eritrea and Somalia sanctions regime.37 Beginning in Resolution 1916 (2010), the Security Council established a limited sectoral humanitarian exemption from the Eritrea and Somalia related asset freeze. The most recent version of that (partial) sectoral humanitarian exemption, established in Resolution 2317 (2016), provides, in a binding decision of the Security Council, that until 15 November 2017,

\[T\]he [asset-freeze] measures imposed by paragraph 3 of resolution 1844 (2008) shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, and their implementing partners including bilaterally or multilaterally funded non-governmental organizations participating in the United Nations Humanitarian Response Plan for Somalia (….)38

35 Somewhat paradoxically, while the Security Council has clarified that the al-Qaeda asset freeze does not apply to funds that the relevant state has determined to be necessary for basic expenses – such as ‘medicines and medical treatment’ – of the designee, in principle a person who provides medical care or medical supplies to someone associated with al-Qaeda or any of its derivatives remains susceptible to designation herself to the extent such care constitutes ‘otherwise supporting’ al-Qaeda. On the limited exemption for ‘medicines and medical treatment,’ see U.N. Security Council, Resolution 1452 (2002), paragraph 1(a); on the ‘otherwise supporting’ al-Qaeda basis for listing, see U.N. Security Council, Resolution 1617 (2005), paragraphs. 2 and 3; U.N. Security Council, Resolution 1822 (2008), paragraphs. 2(d) and 3; U.N. Security Council, Resolution 1904 (2009), paragraphs 2(d) and 3; U.N. Security Council, Resolution 1989 (2011), paragraphs 4(c) and 5; U.N. Security Council, Resolution 2083 (2012), paragraphs 2(c) and 3; U.N. Security Council, Resolution 2161 (2014), paragraphs 2(c) and 4.


Since first establishing in 2010 a (partial) sectoral humanitarian exemption concerning Eritrea and Somalia, the Security Council has regularly requested that the Emergency Relief Coordinator report to the Council on any impediments to the delivery of humanitarian assistance in Somalia.39

d. Elements of the debate concerning humanitarian exemptions from counter-terrorism measures

Among certain humanitarian organisations and their supporters, there is increased interest in obtaining sectoral humanitarian exemptions from counter-terrorism measures. Yet to date the humanitarian community as a whole – to the extent that such a unitary community and its views can be established40 – seems to lack unanimity as to whether to pursue such exemptions. Admittedly however, there is little scholarly writing or empirical evidence concerning this issue.

Several arguments in favour of and against sectoral humanitarian exemptions can be discerned. Those favouring such exemptions often emphasise that sectoral humanitarian exemptions might:

• provide legal cover and clarity and would thereby boost confidence in conducting principled humanitarian action, including in relation to areas under the de facto control of designated terrorists;
• reaffirm States’ support of principled humanitarian action; and
• strengthen, and possibly help standardise, legal protections for all humanitarian stakeholders (for instance, by augmenting legal protections for humanitarian organisations who do not benefit from UN privileges and immunities).

Arguments against sectoral humanitarian exemptions from counter-terrorism laws have been articulated along the following lines:

• some governments and experts are concerned that sectoral humanitarian exemptions could be abused by unscrupulous players to support acts of terrorism;
• calls for such exemptions might be inferred to imply that, where applicable, existing protections for principled humanitarian action in International Humanitarian Law, in domestic law or in UN privileges and immunities, are insufficient;

39 The most recent such request is made in U.N. Security Council, Resolution 2317 (2016), paragraph 29; the most recent report is the Report of the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, U.N. doc. S/2016/827, 30 September 2016.
• if limited to counter-terrorism measures, sectoral humanitarian exemptions may not be broadly effective, considering other restrictive measures, (such as those laid down as part of anti-bribery, anti-corruption, or anti-money laundering framework); and
• calls for exemptions raise the possibility of creating a perception that humanitarian organisations endorse counter-terrorism approaches, which, in turn, might implicate those players’ (perceived) neutrality and independence.

3. Conclusion

If the analysis above is correct, then much seems to be at stake in the debate concerning sectoral humanitarian exemptions from counter-terrorism measures. Against that broader backdrop, several trends and trajectories – and the intersections between them – might merit close monitoring.

For instance, more domestic counter-terrorism legal cases might adjudicate, if indirectly, what constitutes ‘legitimate’ humanitarian action, including in relation to armed conflicts involving designated terrorists conducted outside – sometimes, far outside – the State where the legal proceedings are instituted. There may be more demand for, and scrutiny of, principled humanitarian action, perhaps especially in areas where designated terrorists control access to civilian populations in need. Cash programming in humanitarian response seems likely to increase, despite ‘fungibility’ concerns from a counter-terrorism perspective. New and expanded due diligence and other anti-diversion (or pro-beneficiary) measures seem likely to be imposed – whether internally, externally, or both – on humanitarian organisations. More broadly, the web of overlapping, converging, and diverging legal obligations, other requirements and policies incumbent on principled humanitarian stakeholders seems likely to become even more intricate. Finally, if sectoral humanitarian exemptions are pursued further, there might be new, or renewed, attempts to certify humanitarian players in order to establish what does and does not constitute ‘legitimate’ humanitarian action.

42 Holder v. Humanitarian Law Project, 561 U.S. 1, 31, 130 S. Ct. 2705, 2725, 177 L. Ed. 2d 355 (2010) (‘Money is fungible, and ‘[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.’ (citing to McKune Affidavit, App. 134, 9)).