



# Humanitarian Exemptions from Counter-terrorism Measures: A Brief Introduction

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*Proceedings of the Bruges Colloquium*

# Terrorism, Counter-Terrorism and International Humanitarian Law

**17<sup>th</sup> Bruges Colloquium**  
**20-21 October 2016**

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*Actes du Colloque de Bruges*

# Terrorisme, Contre-Terrorisme et Droit International Humanitaire

**17<sup>ème</sup> Colloque de Bruges**  
**20-21 octobre 2016**



College of Europe  
Collège d'Europe



**CICR**

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# HUMANITARIAN EXEMPTIONS FROM COUNTER-TERRORISM MEASURES: A BRIEF INTRODUCTION

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## **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'immunité 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 faveur 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 des 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*

*les protections reconnues par les Nations unies ; et enfin l'argument selon lequel des exemptions sectorielles limitées aux mesures contre le terrorisme seraient insuffisantes pour assurer la libre mise en œuvre de l'aide humanitaire.*

*En conclusion de son intervention, Dustin Lewis met en garde contre les risques que comporte chacune de ces options. S'il y a en effet un besoin de protection de l'aide humanitaire contre des mesures visant le terrorisme qui pourraient obérer sa libre mise en œuvre, le développement d'exemptions sectorielles pourrait, quant à lui, résulter en un contrôle croissant de l'aide humanitaire. Ce contrôle viendrait alors enfermer l'aide humanitaire dans une définition de plus en plus restrictive.*

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## **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.<sup>1</sup> 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 popu-

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<sup>1</sup> See, e.g., *Report of the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator*, U.N. doc. S/2016/827, 30 September 2016, paragraph 19 (stating that '[c]ounter-terrorism measures have continued to inhibit humanitarian action, increasing the perceived risk of operating in areas under Al-Shabaab control, which are the areas in which humanitarian needs are believed to be the highest. Some donor Governments have requested the introduction of specific clauses in funding contracts and partnership agreements with humanitarian organizations referring to their national anti-terrorism legislation and/or policies and making it mandatory for direct recipients to carry out detailed background checks on any implementing partner. Such caveats have continued to undermine the ability of humanitarian organizations to address all needs wherever they are'). For its part, the International Committee of the Red Cross (ICRC), initially in 2011, called attention to some 'core activities of humanitarian organizations' and their personnel at risk of being 'criminalized' due to '[t]he prohibition in criminal legislation of unqualified acts of 'material support', 'services' and 'assistance to' or 'association with' terrorist organizations (...)', ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, 31IC/11/5.1.2, Geneva, October 2011, p. 52. According to the ICRC, those activities could include (among others): visits and material assistance to detainees suspected of or condemned for being members of a terrorist organisation; first-aid training; IHL dissemination to members of armed opposition groups included in terrorist lists; assistance to provide for the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities to internally displaced persons, where individuals associated with terrorism may be among the beneficiaries.

lations in need.<sup>2</sup> In recent years, such areas have included parts of Afghanistan, Colombia, Gaza, Iraq, Mali, Nigeria, Somalia, Syria, and Yemen (among others).<sup>3</sup> 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.<sup>4</sup> I will thus largely draw on existing legal and policy analysis to sketch the main contours of the issue.<sup>5</sup> 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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2 See, e.g., Kate Mackintosh & Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, OCHA and the NRC (July 2013); Jessica Burniske with Naz K. Modirzadeh and Dustin A. Lewis, “Counter-terrorism laws and regulations: what aid agencies need to know”, in: Humanitarian Practice Network Paper, Overseas Development Institute, No. 79, November 2014.

3 See, e.g., “Counterterrorism and Humanitarian Engagement Project, Counterterrorism and Humanitarian Engagement in Somalia and Mali”, *Research and Policy Paper*, Harvard Law School, March 2013.

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/>>.

5 The analysis herein draws extensively on Katie King with Naz K. Modirzadeh and Dustin A. Lewis, “Understanding Humanitarian Exemptions: U.N. Security Council Practice and Principled Humanitarian Action”, *Working Group Briefing Memorandum*, Counterterrorism and Humanitarian Engagement Project, April 2016.



subject.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup>

## **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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6 Oxford English Dictionary Online, ‘exempt, v.’ OUP, September 2016.

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.

8 See, e.g., Phoebe Wynn-Pope *et al.*, “Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation”, *op. cit.*, pp. 237–241.

9 See, e.g., *Counterterrorism and Humanitarian Engagement Project*, “An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts”, *Research and Policy Paper*, Harvard Law School, 2014.

10 See generally *Counterterrorism and Humanitarian Engagement Project*, “An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations”, *Research and Policy Report*, Harvard Law School, May 2014.

2016 for instance, the United Nations (UN) General Assembly implicitly recognised the general underlying concern.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

### **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).<sup>15</sup> (In claiming extraterritorial jurisdiction over certain anti-terrorism offences, both Australia and the US prescribe

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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').

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.

13 See generally *Counterterrorism and Humanitarian Engagement Project*, 'An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations,' *op.cit.*

14 *Ibid.*

15 Concerning the Australian context, see Phoebe Wynn-Pope *et al.*, 'Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation,' *op.cit.*, pp. 235–261. Concerning the U.S. context, see, e.g., Naz K. Modirzadeh *et al.*, 'Humanitarian engaging under counter-terrorism: A conflict of norms and the emerging policy landscape,' *International Review of the Red Cross*, Vol. 93, no. 883, September 2011.

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.’<sup>16</sup> 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.’<sup>17</sup> (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<sup>18</sup>). Such purposes expressly include providing ‘aid of a humanitarian nature.’<sup>19</sup> However, Australian law does not establish humanitarian exemptions in respect to certain terrorism-related offences concerning training<sup>20</sup> and funds.<sup>21</sup>

US federal law penalises the provision of ‘material support or resources’ – ‘except medicine or religious materials’<sup>22</sup> – to designated terrorists or others engaged in acts of terrorism.<sup>23</sup> 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.’<sup>24</sup> 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

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16 Criminal Code, div. 102.8(4)(c).

17 Criminal Code, div. 119.2(3).

18 Australian Government, *Declared Area Offence*, <https://www.nationalsecurity.gov.au/WhatAustraliais-doing/Pages/DeclaredAreaOffence.aspx>

19 Criminal Code, div. 119.2(3)(a).

20 Criminal Code, div. 102.5.

21 Criminal Code, div. 102.6. See generally Phoebe Wynn-Pope *et al.*, ‘Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation’, *op.cit.*

22 18 U.S.C. § 2339A(b)(1).

23 18 U.S.C. § 2339A and 2339B.

24 *United States v. Farhane*, 634 F.3d 127, 143 (2d Cir. 2011) (italics original). See more broadly: Dustin A. Lewis *et al.*, *Medical Care in Armed Conflict: International Humanitarian Law and States Responses to Terrorism, Legal Briefing*, Harvard Law School Program on International Law and Armed Conflict, September 2015.

global terrorists’ (SDGTs).<sup>25</sup> IEEPA expressly exempts ‘donations (...) of articles such as food, clothing, and medicine, intended to be used to relieve human suffering.’<sup>26</sup> 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.<sup>27</sup> Over the past decade and a half, the President has repeatedly instituted such freezes in relation to armed groups or terrorism.<sup>28</sup>

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<sup>29</sup> and the more general counter-terrorism obligations line of resolutions.<sup>30</sup> (The Security Council has laid down some “bad actor” humanitarian exemptions from counter-terrorism measures<sup>31</sup>). Yet, as explained elsewhere,<sup>32</sup> 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 (...).’<sup>33</sup> 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.<sup>34</sup> Those references suggest that the Sanctions Committee and, by

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25 See Department of the Treasury, Office of Foreign Assets Control, *Terrorism*, at: <<https://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf>>.

26 50 U.S.C. § 1702(b)(2) (2001).

27 50 U.S.C. § 1702(b)(2) (2001).

28 See Antonio Galli, “The U.S. Humanitarian Assistance Facilitation Act: Maintaining Humanitarian Space in U.S. Legislation”, in: *Journal of International Humanitarian Legal Studies*, Volume 5, 130, 133 (2014).

29 U.N. Security Council, Resolution 1267 (1999) sqq.

30 U.N. Security Council, Resolution 1373 (2001),sqq.

31 E.g., U.N. Security Council, Resolution 1267 (1999), paragraph 4(a)–(b); U.N. Security Council, Resolution 1333 (2000), paragraph 11; U.N. Security Council, Resolution 1452 (2002), paragraph 1(a); U.N. Security Council, Resolution 1904 (2009), paragraphs. 7 and 34.

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.

33 U.N. Security Council, Resolution 1373 (2001), paragraph 2(e) (*italics added*).

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.<sup>35</sup>

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 designees<sup>36</sup> and because al-Shabaab is itself designated under the Eritrea and Somalia sanctions regime.<sup>37</sup> 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 (...)<sup>38</sup>

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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.

36 See ‘Other information’ concerning ‘QDe.002’ and ‘QDi.362’ in: *The List established and maintained pursuant to Security Council res. 1267/1989/2253*, at: <<https://scsanctions.un.org/en/?keywords=al-qaida>>.

37 SOe.001, in: *The List established and maintained pursuant to Security Council res. 751 (1992) / 1907 (2009)*, at: <<https://scsanctions.un.org/en/?keywords=somalia>>.

38 U.N. Security Council, Resolution 2317 (2016), paragraph 28.

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.<sup>39</sup>

#### **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 established<sup>40</sup> – 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;

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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.

40 On the diversity of the sector, see, e.g., L. Saavedra and P. Knox-Clarke, "Working together in the field for effective humanitarian response", *ALNAP Working Paper* (London: ALNAP/ODI, 2015).

- 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,<sup>41</sup> despite 'fungibility' concerns from a counter-terrorism perspective.<sup>42</sup> 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.<sup>43</sup> 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.

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41 See, e.g., U.N. General Assembly, *Outcome of the World Humanitarian Summit: Report of the Secretary-General*, UN doc. A/71/353, 23 August 2016, paragraphs. 38 and 52.

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)).

43 See, e.g., Norwegian Refugee Council, *Risk management toolkit in relation to counterterrorism measures*, Geneva, NRC, 2015.