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Screening of final beneficiaries – a red line in humanitarian operations. An emerging concern in development work

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Abstract

Funding agreements for humanitarian action frequently include restrictions and requirements in their grants that aim to ensure that recipients of the funding comply with counterterrorism measures and sanctions adopted by the donor. These measures can be problematic if they prevent humanitarian actors from operating in accordance with humanitarian principles or are incompatible with international humanitarian law. While attention has focused primarily on requirements in grants for humanitarian action, increasingly donors to development work have also started including sanctions- and counterterrorism-related restrictions in their

grants. The present article focuses on one such measure that is currently a live concern: requirements to screen and, thus, potentially exclude final beneficiaries. It explains why these requirements go over and above what sanctions and counterterrorism measures require, and why they are inconsistent with humanitarian principles and international humanitarian law. The article also explores the position in relation to development interventions.

Keywords: counterterrorism, sanctions, screening of final beneficiaries, humanitarian operations, development work.

Introduction

Humanitarian organizations must comply with counterterrorism measures and sanctions[1] that are directly binding on them: those adopted by the States where the organizations are registered – and these may be more than one – and by the States where they operate. Their staff is bound by the measures adopted by their State of nationality, although this does not render these rules applicable to the organizations. The measures adopted by other States may also become applicable. For example, transactions conducted in United States (US) dollars through formal banking channels must comply with US sanctions. The most significant way in which counterterrorism measures and country-specific sanctions that are not directly applicable to a particular humanitarian organization can become so "indirectly" is by means of contractual obligations assumed in funding agreements.[2]

Institutional donors to humanitarian action – States and inter-governmental organizations such as the European Union (EU) – frequently include restrictions and requirements in their grants that aim to ensure that recipients of the funding comply with counterterrorism measures and sanctions adopted by the donor. This is a way for the donor to comply with its own obligations, sometimes referred to as "downward re-risking". A particular focus of the restrictions is ensuring that funded activities do not benefit persons or entities designated under sanctions or counterterrorism measures.[3]

1 This article uses the term "counterterrorism measures" to cover laws and other measures whose objective is preventing and suppressing acts of terrorism. They can include measures criminalizing certain acts of violence or support to persons or groups designated as terrorist as well as sanctions that prohibit making funds or other assets available directly or indirectly to such persons or groups. It uses the term "sanctions" to refer to sanctions imposed for other objectives, either in relation to specific contexts, or "horizontally" to achieve specific policy objectives such as, for example, the promotion of human rights.

2 This article uses the terms "funding agreements" and "grants" interchangeably.

3 The restrictions may have other objectives too, like promoting the donor's political agenda in a particular context. For example, the restrictions on contact with Hamas in the United States Agency for International Development's (USAID's) funding agreements for Gaza are aimed at not giving Hamas any political legitimacy or visibility. USAID/WEST BANK/GAZA, April 26, 2006, Notice No. 2006-WBG-17, and USAID/WEST BANK/GAZA, June 21, 2007, Notice No. 2007-WBG-18.

Requirements are by no means uniform. They vary from donor to donor, context to context and, frequently, also with the recipient of the funding, depending on their status – i.e. whether they are United Nations (UN) agencies, other international organizations or non-governmental organizations – and also because donors may impose more restrictive obligations on actors that they are less familiar with, or because a particular recipient has successfully negotiated less restrictive measures. The nature of the funded activities is also a consideration, with programmes that entail the provision of cash being more tightly regulated.

This is a challenging area to analyse, as donors and recipients are reluctant to share information on the arrangements that they have concluded. Donors may not want to grant all recipients the less onerous terms that they have agreed to with some organizations.[4] On their side, recipients may be "embarrassed" by what they have agreed to as it may undermine their capacity to operate in accordance with humanitarian principles; or they may be concerned that shining a light on the agreements may reveal that they have not been fully compliant with contractual obligations. While understandable, this wariness makes it difficult for humanitarian organizations to develop common bargaining positions, and to identify and replicate good practices that meet donors' concerns but do not impede principled action.

Despite this, it is possible to identify a number of particularly problematic requirements and restrictions compliance with which could prevent humanitarian actors from operating in accordance with humanitarian principles, and that, in some cases, are incompatible with international humanitarian law (IHL). The present article focuses on one such requirement that is currently a live concern: requirements to screen and, thus, potentially exclude, final beneficiaries.[5]

To date, attention has focused primarily on requirements in grants for humanitarian action. However, increasingly donors to development work have also started including sanctions- and counterterrorism-related restrictions in their grants. This raises numerous new challenges: both because of the limited familiarity with the issues among development stakeholders, and also because the substantive bases of arguments for pushing back against problematic restrictions and requirements are different.

The bigger "multi-mandate" or "double-hatted" organizations that implement humanitarian and development activities frequently operate in

4 For a thorough and still relevant analysis, see Counterterrorism and Humanitarian Engagement Project, "An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts", Research and Policy Paper, May 2014, available at: http://blogs.harvard.edu/cheproject/files/2013/10/CHE_Project_-_Counterterrorism-related_Humanitarian_Grant_Clauses_May_2014.pdf (all internet references were accessed in September 2021).

5 For the sake of clarity, the present article uses the term "beneficiaries" as this is the expression that is used in the discussions on requirements in funding agreements. It is important to note that this term has been criticized because of its connotation of passivity and failure to recognize people's agency, and that humanitarian organizations are increasingly using other expressions such as "crisis-affected people", "clients", or "participants", and, in development work, "target group" or "change agents". See, for example, Dayna Brown and Antonio Donini, "Rhetoric or Reality? Putting Affected People at the Centre of Humanitarian Action", ALNAP/ODI, London, 2014, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/alnap-rhetoric-or-reality-study.pdf.

situations of armed conflict and so have been tackling the tensions raised by sanctions and counterterrorism measures for many years. Organizations whose work is exclusively development-focused appear to be less familiar with the issues.

The same holds true for donors. While donors to humanitarian action are now well aware of concerns and positions, this is not the case for donors to development work. Although these are frequently the same States or intergovernmental organizations, and despite the World Humanitarian Summit-prompted elaboration of the "New Way of Working", and related endeavours to achieve "collective outcomes",[6] institutional arrangements and silos within governments are such that staff working on development are not necessarily aware of the issues and positions adopted by their own colleagues in relation to humanitarian funding, and the reasons underlying these.

Equally challenging is the normative framework. As will be elaborated, organizations operating in situations of armed conflict and other complex emergencies have been successful in resisting requirements to screen final beneficiaries by relying on arguments based on humanitarian principles and IHL. When activities funded under development grants are conducted in contexts where IHL is applicable, or humanitarian principles relevant, these can be invoked. However, as contexts where the funded activities are undertaken shift along the humanitarian/development continuum, these bases become progressively less relevant, and arguments must be based on development principles and human rights law. Precisely how these interact with sanctions and counterterrorism measures is an issue that is currently unexplored.

Without detracting from the importance of striving to achieve "collective outcomes", the differences in the regulatory framework governing humanitarian and development work must be acknowledged. The laws and principles that regulate these activities (IHL and humanitarian principles, and human rights law and development principles, respectively) are different, although there may be moments of transition when the two frameworks overlap. An additional challenge is the fact that many donors have different institutional structures and arrangements for funding the two types of action. The approaches that they have adopted for funding in humanitarian settings are often different from those for development settings.

The first section of this article briefly presents provisions in funding agreements that may require or lead to the screening, and thus potentially the exclusion, of final beneficiaries. It also clarifies the difference between screening and vetting. The second section focuses on screening and exclusion of final beneficiaries of grants for humanitarian action. It explains why this goes over and above what sanctions and counterterrorism measures require, and why it is inconsistent with humanitarian principles and IHL. It concludes by presenting current practice by certain key donors and humanitarian actors. The third section turns to development activities. It starts off by outlining the development sector's

6 UN Joint Steering Committee to Advance Humanitarian and Development Collaboration, "The New Way of Working", available at: https://www.un.org/jsc/content/new-way-working.

criteria for selection of contexts where to operate. It then turns to the regulatory framework that underpins development work. The section ends with some recent examples of how restrictions in funding agreements have undermined the effectiveness of development interventions. The article concludes with some reflections on next steps.

Funding agreements and screening: some general considerations

One of the most common requirements in funding agreements is a duty to avoid funds or other assets provided under the agreements being made available directly or indirectly to persons or entities designated under sanctions or counterterrorism measures that are binding on the donor.

Nature of obligation to avoid making funds or assets available to designated persons or entities

While this is a shared objective, States formulate the precise nature of this duty in different ways. Some donors impose what has been described as an "obligation of result": recipients must ensure that assistance does not reach designated persons or entities. This is a high standard – probably unrealistically so – that many humanitarian actors are uncomfortable committing to. A preferable approach is that of donors which frame this as an "obligation of means" that requires recipients to take "reasonable measures" or "use their best endeavours", in this regard.[7] The standard of effort that must be undertaken to avoid assets reaching designated persons or entities is one of the first issues to consider when reviewing the sanctions- and counterterrorism-related sections of grants.

Some grants specify which measures must be taken to comply with this requirement, for example, by expressly requiring recipients to screen certain categories of people involved in the funded activities. Others leave it to recipients to choose the modalities for doing so. Most frequently, this is done by screening a range of actors involved in the implementation of the programmes to ensure that they are not included in lists of individuals or entities designated under relevant international or domestic sanctions or counterterrorism measures.

What is "screening"? And what is "vetting"?

Although the terms are frequently used interchangeably, screening must be distinguished from vetting. Screening is carried out by humanitarian

7 See examples in Counterterrorism and Humanitarian Engagement Project, above note 4, p. 24; and Kate Mackintosh and Patrick Duplat, "Study on the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action", 2013, pp. 47–71, available at: https://www.nrc.no/globalassets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf. While dated, these give examples of the different approaches.

organizations themselves. They check that a range of persons and entities involved in the implementation of funded programmes are not designated under UN, EU and other relevant sanctions and counterterrorism measures. Various commercial programmes exist for doing this.

Vetting requires humanitarian actors to provide the identity information of certain persons and entities to the donor, which will carry out the checks itself. Only a small minority of donors require vetting, and even those only in grants for certain contexts. Applications for certain US government funding for operations in certain contexts require partner vetting – i.e. the provision of personal information of certain "key individuals" in the organization applying for funds, including principal officers of its governing board, directors, officers and other staff members with significant responsibilities for the management of the funded programme. In some contexts, this has also included the vetting of final beneficiaries who receive more than a proscribed amount of assistance in cash or in kind, or who participate in training activities.[8]

Vetting raises additional concerns to screening, including in terms of data protection and privacy in relation to the personal information provided to the donor.[9] Vetting can also undermine perceptions of the independence of humanitarian actors providing such information from the state donors requiring it. If the donor is a party to an armed conflict, the provision of information can also affect the perceived neutrality of humanitarian actors, with potentially serious consequences for access and staff safety.

To add to the confusion, the term "vetting" is sometimes also used in a more general way to refer to due diligence measures that may be undertaken for a variety of reasons.

In view of this, it is important to use terminology as accurately as possible, to determine precisely what donors require. The rest of this article will focus on screening, as explained above.

8 USAID, "ADS Chapter 319 – Partner Vetting", revised January 2021, available at: https://www.usaid.gov/sites/default/files/documents/319.pdf. In March 2021 USAID Partner Vetting is required for USAID contracts and assistance agreements for Afghanistan, Iraq, Lebanon, Pakistan, Syria, Yemen and the West Bank and Gaza. USAID, op. cit., Chapter 319.1. USAID can impose additional vetting requirements. For example, in relation to Gaza it requires recipients of funds to also provide information on beneficiaries who received more than a specified amount of assistance or participated in training.

9 Neal Cohen, Robert Hasty and Ashley Winton, Counterterrorism and Humanitarian Engagement Project, "Implications of the USAID Partner Vetting System and State Department Risk Analysis and Management System under European Union and United Kingdom Data Protection and Privacy Law", Research and Policy Paper, March 2014, available at: http://blogs.harvard.edu/cheproject/files/2013/10/CHE-Project-US-Partner-Vetting-under-EU-and-UK-Data-Protection-and-Privacy-Law.pdf. While the precise details of the vetting programmes may have changed since this paper was published, the data protection concerns outlined endure, and have probably become more acute following the adoption of the EU Global Data Protection Regulation.

How is the requirement to screen and/or exclude final beneficiaries formulated?

Although the discussion – including in the present article – is often framed in terms of the problems raised by screening of final beneficiaries, it is not screening *per se* that is problematic, but rather its objective: the exclusion of certain people from programmes.

Requirements to screen and/or exclude final beneficiaries from funded programmes can either be implied or express. Most frequently, they are implicit in provisions that prohibit recipients from making available funds or assets to entities, individuals or groups of individuals designated under counterterrorism measures or sanctions. If these provisions do not expressly indicate that this requirement does not cover final beneficiaries, there is a real risk that the expression could be interpreted by the donor as including them. At other times, clauses leave no room for doubt that final beneficiaries must also be excluded from funded activities, as they are expressly mentioned.

Screening and exclusion of final beneficiaries of humanitarian programmes

Screening is not problematic *per se*. It is simply a tool for determining whether a person or entity has been designated under counterterrorism measures or country-specific sanctions. Screening of a range of persons and companies involved in the delivery of humanitarian programmes, including sub-grantees, contractors and vendors, is an acceptable way of ensuring that funds or other assets are not provided to designated persons or entities in the course of operations.

Screening becomes problematic if it leads to people's exclusion from the humanitarian assistance that they have been determined as requiring. It is for this reason that humanitarian organizations have drawn a "red line" at provisions in grants that expressly or implicitly entail screening of final beneficiaries of humanitarian programmes.

Once someone has been determined as requiring humanitarian assistance on the basis of the eligibility criteria developed by a humanitarian organization – which are frequently shared with the donor – depriving that person of this assistance is more restrictive than what is required by the underlying sanctions, and is incompatible with IHL and humanitarian principles. These different grounds will be considered in turn.

Exceeding underlying restrictions

The purpose of screening requirements in funding agreements is to ensure compliance with sanctions and counterterrorism measures. However, these very measures include exemptions allowing designated persons to access basic services,

such as medical care, food and accommodation.[10] This is a clear indication that they are not intended to deprive designated persons of essential services and goods.

The same holds true when rather than designated persons acquiring these basic goods and services directly, they are provided in the form of humanitarian relief. In a Guidance Note of 2020, the European Commission expressly restated its well-established and consistent position that EU sanctions do not prohibit the provision of humanitarian assistance. It did so both in general terms, reasserting that "the provision of humanitarian aid should not be prevented by EU restrictive measures",[11] and also in a reply to a specific question on screening of final beneficiaries:

> Should the Humanitarian Operators vet [sic] the final beneficiaries of … humanitarian aid?
>
> No. According to International Humanitarian Law, Article 214(2) of the Treaty on the Functioning of the European Union and the humanitarian principles of humanity, impartiality, independence and neutrality, humanitarian aid must be provided without discrimination. The identification as an individual in need must be made by the Humanitarian Operators on the basis of these principles. Once this identification has been made, no vetting [sic] of the final beneficiaries is required.[12]

It is thus undisputed that sanctions do not prohibit designated persons from acquiring basic goods and services – food, medical care and shelter – either directly using their own funds, or indirectly, when these are provided by humanitarian assistance. Despite this, a disconnect has developed between the restrictions in sanctions and the measures in funding agreements purportedly giving effect to them. When grants for humanitarian action expressly or

10 The UN Security Council Islamic State of Iraq and the Levant (ISIL)/Al-Qaeda sanctions, for example, include an exemption to the financial sanctions for funds and other financial assets or economic resources "necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services": UN Security Council Resolution 2368 (2017), UN Doc. S/RES/2368 (2017), 20 July 2017, section 81(a). The exemption covers both aspects of financial sanctions. It allows frozen assets to be used for these purposes, and also the relevant goods or services to be provided.

The EU's autonomous counterterrorism sanctions include a similar exemption "for essential human needs of a natural person included in the list referred to in Article 2(3) or a member of his family, including in particular payments for foodstuffs, medicines, the rent or mortgage for the family residence and fees and charges concerning medical treatment of members of that family": Council Regulation (EC) No 2580/2001 of 27 December 2001, on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, Art. 5(2)(a).

Although reference is made here just to sanctions imposed for counterterrorism objectives, similar exemptions for the benefit of designated persons are systematically included in financial sanctions in UN and EU country-specific sanctions.

11 European Commission, *Commission Notice, Commission Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures*, C(2021) 5944 final, 13 August 2021, pp. 7, 9, 13, 17, 19, 31, 41, 47–8 and 51.

12 *Ibid*., pp. 13, 24, 33, 45 and 51.

implicitly exclude final beneficiaries that might be designated, they are going over and above the underlying sanctions.

Moreover, sanctions and most counterterrorism measures prohibit making funds or assets available to designated persons. They do not cover training.[13] Requirements to screen and thus potentially exclude participants in training programmes also go beyond the underlying measures.

Incompatibility with international humanitarian law and humanitarian principles

The precise entitlement to assistance under IHL varies with the type of assistance, the situation in which people find themselves (e.g. in situations of occupation, deprived of their liberty, otherwise *hors de combat*), and their status: civilian or fighter.[14]

Everyone who is wounded and sick – civilian and fighter – is entitled to the medical care required by their condition, with no discrimination other than on medical grounds.[15] Everyone who is deprived of their liberty – civilian and fighter – is entitled to food, water and clothing.[16] Even when not deprived of their liberty, civilians are entitled to objects indispensable to their survival including food, water, medical items, clothing and bedding. If the party to the conflict depriving people of their liberty or otherwise in control of civilians is unable or unwilling to provide these, they may be provided by means of humanitarian relief operations.[17] Children are entitled to education, including if they are deprived of their liberty.[18]

13 Training falls within the scope of prohibited support as a matter of criminal law under the US Material Support Statute, U.S.C. § 2339A.

14 The term "fighter", while not found in IHL treaties, is used colloquially to refer to members of States' armed forces and of organized armed groups. The definition of "wounded and sick" for the purposes of IHL requires fighters to be refraining from acts of hostility: ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016 (hereafter *ICRC Commentary*), para. 1345.

15 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 12; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 12; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 10; and Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 7.

16 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Arts 15 and 25–30; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 89–92; and AP II, Art. 5.

17 GC IV, Arts 55, 56 and 59; common Arts 3 and 9/9/9/10 of the GCs, AP I, Arts 69–71; and AP II, Art. 18 (2). See generally, Dapo Akande and Emanuela-Chiara Gillard, "Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict", 2016, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Oxford%20Guidance%20pdf.pdf.

18 GC IV, Arts 50 and 94; and AP II, Art. 4(3).

Once a person has been determined as being in need of the requisite type of assistance, the humanitarian principle of impartiality requires such assistance to be provided with no discrimination, other than prioritization on the basis of greatest need. Depriving people of the assistance to which they are entitled because they are designated under sanctions or counterterrorism measures would be inconsistent with IHL and humanitarian principles.

The position is different for fighters who are not *hors de combat* by sickness, wounds, detention or any other cause, to use the words of Article 3(2) common to the four Geneva Conventions. They do not have the same entitlement as civilians to other objects indispensable to their survival, such as food. However, this does not mean that screening and excluding designated persons from programmes providing these other forms of assistance is acceptable.

From a legal perspective, domestic law determines who is member of a State's armed forces, and criteria have been elaborated to identify "targetable" members of an organized armed group for the purpose of the rules of IHL on the conduct of hostilities. The same cannot be said for designations. Sanctions set out the grounds on which a person can be designated, but these are framed in terms of the threat they pose to broad policy objectives such as international peace and security, respect for IHL and human rights law, undermining peace processes and counterterrorism. Most frequently, the designations are based on the provision of types of support – political and financial, for example – that would not affect a person's status as civilian under IHL. The narrative summaries setting out the grounds for designation of particular people indicate that this is rarely the type of behaviour that would render them "fighters" for the purposes of IHL.

There is thus simply no equivalence between being a "fighter", and thus not entitled to certain forms of humanitarian assistance, and being designated. Screening risks depriving people of the humanitarian relief to which they are entitled under IHL.

In addition, and more operationally, the eligibility criteria that humanitarian organizations develop for their programmes, and oversight of their implementation in practice go a long way in ensuring that assistance is not provided to groups of fighters. Although framed in terms of good humanitarian programming and oversight rather than in order to avoid the provision of assets to designated persons and entities, these measures have played an important role in providing reassurance to some donors.

The positions adopted by humanitarian organizations and key donor States to date

For these reasons, while humanitarian organizations have been willing to comply with requirements to screen key members of staff, sub-grantees, contractors and vendors, they have drawn a "red line" at screening final beneficiaries. On the whole, this red line has been accepted by key donors to humanitarian action.

Some States' funding agreements, like those of Ireland,[19] Norway and Switzerland, for example, do not include provisions that could exclude final

beneficiaries. Grants from humanitarian aid by SIDA, the Swedish International Development Cooperation Agency, expressly exclude the provisions on compliance with sanctions found in its General Conditions.[20]

As far as the EU is concerned, the November 2020 version of ECHO's Humanitarian Aid General Model Grant Agreement requires recipients to ensure that the EU grant does not "benefit any affiliated entities, associated partners, subcontractors or recipients of financial support to third parties" subject to EU sanctions. Importantly, it expressly adds that "[t]he need to ensure the respect for EU restrictive measures must not however impede the effective delivery of humanitarian assistance to persons in need in accordance with the humanitarian principles and international humanitarian law. Persons in need must therefore not be vetted."[21] (Here the term "vetted" is used to refer to screening by the humanitarian organization.)

In a similar vein, in 2019 the EU issued a letter clarifying that the provisions in the 2018 Financial and Administrative Framework Agreement between the EU and the UN do not prohibit or preclude the provision of humanitarian assistance using EU funds to persons who are in need, including where these persons have been designated under EU sanctions.[22]

The position of the United States Agency for International Development (USAID) is more complex. Its stated position is that it does not require screening of final beneficiaries of in-kind assistance of the humanitarian programmes it funds. In practice, however, its approach is not quite so clear cut. The precise sanctions and counterterrorism requirements in funding agreements vary recipient-by-recipient and context-by-context. At their most onerous, they come into play in three different ways in the contractual relationship.

First, when applying for USAID funding, non-governmental organizations (NGOs)[23] must sign a counterterrorism certification stating that, to the best of their knowledge they have not, in the previous three years, knowingly engaged in transactions with, or provided material support or resources to, any individual or entity who was, at the time, subject to US counterterrorism sanctions or UN sanctions. This requirement expressly does not cover

19 Irish Aid, "Irish Aid Programme Grant II (2017–2021) and HPP (2019–2021) Programme Cycle Management Guidelines 2019", para. 41, available at: https://www.irishaid.ie/media/irishaid/whatwedo/respondingtoemergencies/Programme-Grant-II-and-Humanitarian-Programme-Plan-2019-PCM-Guidelines.pdf.

20 SIDA, *Grant Agreement for Humanitarian Action*, September 2019, section 13.6. On file with authors.

21 European Commission, Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO), "Humanitarian Aid (HA) General Model Grant Agreement", November 2020, Annex 5, pp. 76 and 77, available at: https://www.dgecho-partners-helpdesk.eu/download/referencedocumentfile/162.

22 European Commission Service for Foreign Policy instrument letter of 6 February 2019 to Deputy Controller, UN and Deputy Director of the UN Development Programme. On file with authors.

23 Anti-terrorism certifications are not required for *inter alia* public international organizations: US Government Accountability Office, *Report to Congressional Committees, West Bank and Gaza Aid*, GAO-21-332, March 2021, p. 11.

> [t]he furnishing of USAID funds, or USAID-financed commodities or other assistance, to the ultimate beneficiaries of USAID-funded humanitarian or development assistance, such as the recipients of food, non-food items, medical care, micro-enterprise loans or shelter, *unless* the applicant knew or had reason to believe that one or more of these beneficiaries was subject to U.S. or U.N. terrorism-related sanctions.[24]

This exception suggests that providing assistance to a final beneficiary is only problematic for the purpose of the certification if the NGO knew or had reason to believe that the person was designated.

The second moment the issue can arise is in contexts where USAID imposes partner vetting requirements. As discussed above, some recipients of USAID funding in such contexts are required to vet final recipients of cash or in-kind assistance of more than a specified amount, and participants in training programmes of a certain duration.[25]

This is a vetting requirement, rather than an automatic exclusion of these final beneficiaries from the programmes in question. Nonetheless, it can be presumed that the donor would not authorize their participation if it were to be established that they were on a list of designated persons. This said, the requirement only applies to certain activities: participation in training programmes and transactions above a certain sum. Implicit in this appears to be acceptance that no one must be excluded from humanitarian activities to meet essential needs.

Finally, funding agreements themselves include express provisions on the provision of resources to designated persons or entities. The precise requirements vary significantly according to the status of the recipient of USAID funds: public international organization or NGO.[26] The latter must comply with more onerous requirements. The relevant clauses are revised periodically, and the most recent iteration, adopted in May 2020, prohibits NGOs from engaging in transactions with, or providing resources or support to, any individual or entity that is subject

24 USAID, "Certifications, Assurances, Representations, and Other Statements of the Recipient: A Mandatory Reference for ADS Chapter 303", partially revised 18 May 2020, Part I.4, available at: https://www.usaid.gov/sites/default/files/documents/1868/303mav.pdf (emphasis added).

25 See, for example, USAID Mission Order 21 in relation to the West Bank and Gaza. The precise vetting requirements are set out in US Government Accountability Office, *Report to Congressional Committees, West Bank and Gaza Aid*, GAO-21-332, March 2021, p. 8. Similar requirements also apply in relation to operations in Syria: USAID, "Syria Vetting Standard Operating Procedures", 25 May 2016, available at: https://www.usaid.gov/sites/default/files/documents/1866/USAID_Syria_Vetting_Procedures_04-25-2016.pdf.

26 USAID, *Standard Provisions for Cost-Type Agreements with Public International Organizations (PIOs) – A Mandatory Reference for ADS Chapter 308*, partially revised 4 December 2020, pp. 15–16; USAID, *Standard Provisions for U.S. Nongovernmental Organizations – A Mandatory Reference for ADS Chapter 303*, partially revised 18 May 2020, section M12; and USAID, *Standard Provisions for Non-U.S. Nongovernmental Organizations – A Mandatory Reference for ADS Chapter 303*, partially revised 31 March 2021, pp. 24–5. While the obligations imposed on NGOs are significantly more onerous, there are also significant variations in the nature of the obligation imposed on various types of public international organizations.

to UN or US sanctions. This language does not appear to exclude final beneficiaries from this prohibition.

Recent challenges

Despite the ambiguity in USAID's position, the humanitarian community – UN agencies, International Committee of the Red Cross (ICRC) and NGOs alike – have been successful in refraining from screening final beneficiaries of humanitarian programmes. In the past couple of years, however, this red line has been put to the test by some donors.

On the US front, USAID funding agreements concluded with certain humanitarian actors in contexts where certain groups designated as terrorist by the US are operative, including Boko Haram and the Islamic State of West Africa Province (ISWAP) in Nigeria, and Islamic State of Iraq and the Levant (ISIL) in Syria and Iraq, have included clauses requiring recipients to seek prior authorization from USAID before providing assistance to individuals whom the recipient "affirmatively knows" to have been "formerly affiliated" with these groups "as combatants or non-combatants".[27]

Sometimes referred to as the "Lake Chad Basin clause", as it was funding agreements for activities in this context that brought the issue to the fore, this requirement raises numerous concerns.[28] USAID has not provided definitions or guidance of what amounts to having been "formerly affiliated" with a designated group. However, this is likely to be a larger group than those who are designated, so people who are not even designated could potentially be excluded from humanitarian programmes. USAID has also not provided guidance on what constitutes "affirmative knowledge" of a person's former affiliation.

This pre-authorization requirement means that recipients of funding must identify – by whatever means they choose – and thus potentially exclude from humanitarian action, an even broader category of people than those who are designated. This exacerbates the problems underlying screening.

Admittedly, the requirement neither requires recipients of funding to provide the names and other personal data of the persons in question, nor does it automatically preclude assistance from being provided. It is for USAID to decide what the consequences of any notification are. Nonetheless, there is a very real risk that this requirement may exclude people from life-saving assistance, including measures to treat and reduce the spread of COVID-19. Not providing medical assistance – even just pending authorization – would violate IHL and be contrary to medical ethics.

27 The precise requirements vary from context to context. Some of the clauses in funding for operations in Iraq/Syria exclude "civilian populations who only resided in areas that were at some point in time controlled by the groups" from the pre-authorization requirements. Personal interviews, November 2020.

28 Obi Anyadicke, "Aid Workers Question USAID Counter-terror Clause in Nigeria", *The New Humanitarian*, 5 November 2019, available at: https://www.thenewhumanitarian.org/news-feature/2019/11/05/USAID-counter-terror-Nigeria-Boko-Haram. See also, Norwegian Refugee Council (NRC), Private Briefing Note, *Lake Chad Basin Clause*, May 2019.

Even more alarming, in view of the potential number of contexts in relation to which it could apply, is recent EU practice. As of 2018, funding agreements concluded by European Commission divisions other than ECHO,[29] including the Directorate-General for International Cooperation and Development (DEVCO) and under the EU Instrument Contributing to Peace and Stability (IcSP),[30] have included a clause providing that recipients "must ensure that there is no detection of sub-contractors, natural persons, including participants to workshops and/or trainings and recipients of financial support to third parties" in EU sanctions.[31] This clause has been included in grants relating to Iran, Iraq, Syria and Sudan, and is expected to be rolled out more generally in European Commission funding agreements for international cooperation and development work, other than those by ECHO.[32]

There is no reason why the EU's stated position that the provision of humanitarian aid must not be prevented by EU sanctions, and that once a person has been determined as an individual in need no screening of final beneficiaries is required, should not also apply to these funding agreements.

The "funding stream" or division within an inter-governmental organization or State that provides the funding is irrelevant. What is determinative is the context in which the funded activities are being conducted. Is it one where IHL applies, or to which humanitarian principles are otherwise relevant, such as during and in the aftermath of man-made or natural disasters?[33] And the nature of the funded activities: are they humanitarian in nature? Do they aim to prevent and alleviate human suffering in order to preserve people's lives, security, dignity and physical and mental well-being?[34] Both questions must be answered on the basis of the facts on the ground, and not the institutional identity of the donor.

In view of this there has – rightly – been significant pushback to the inclusion of this requirement, most particularly in relation to activities that are being conducted in conflict settings, such as Syria. Some NGOs have terminated the grants that included it, returning the funds. Others have successfully argued that the requirement should only apply to the parts of the grant relating to cash-

29 ECHO is responsible for overseas humanitarian aid and civil protection.

30 In January 2021 DEVCO became the Directorate-General for International Partnerships (INTPA). It formulates the EU's development policy abroad. Other parts of the European Commission that use the same General Conditions include the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR), the Service for Foreign Policy Instruments (FPI) and the Directorate-General for Structural Reform Support (DG REFORM).

31 "Annex I: General Conditions Applicable to European Union-Financed Grant Contracts for External Actions Financed by the European Union or by the European Development Fund", July 2019, Art. 7.4, available at: https://www.eucap-som.eu/wp-content/uploads/2020/01/B2-Annex-I-General-Conditions.pdf.

32 The clause is included in the 2020 version of the "PRAG", the Practical Guide on Contract Procedures, applicable to European Commission funding for international cooperation and development work other than civil protection and humanitarian aid operations by ECHO: Basic Rule 2.4, available at: https://ec.europa.eu/europeaid/prag/document.do?nodeNumber=1.

33 Good Humanitarian Donorship Initiative, *24 Principles and Good Practice of Humanitarian Donorship*, Principle 1.

34 *ICRC Commentary*, above note 14, para. 811.

based activities, as only these are covered by EU sanctions, returned that element of the grant, and carried out the other activities without screening final beneficiaries.

Adopting these principled positions is essential to maintaining the red line. It is nonetheless regrettable that it was necessary to return the funds as this left people without the assistance they had been determined to need.

These are troubling developments. They are relatively new, and because of the siloed nature of inter-governmental organizations it is possible that they were introduced without appreciating the problems that they pose to principled humanitarian action. There may still be a window of opportunity to push back against them. Doing so requires the adoption of concerted positions by the entire humanitarian community affected by the measures in particular context, coupled with calls for changes of approach at EU-headquarters level by humanitarian actors and supportive Member States.

Screening and exclusion of final beneficiaries of development programmes

The humanitarian actors' red line against screening of final beneficiaries has a firm foundation in IHL and humanitarian principles in situations of armed conflict or other contexts where humanitarian action is being conducted. To what extent and on what basis can arguments be made to oppose screening and potential exclusion of final beneficiaries' requirements in grants for development programmes?

Restrictions in counterterrorism measures and sanctions can also apply in development contexts and, over the years, the funding agreements of Organisation for Economic Co-operation and Development's Development Assistance Committee (OECD-DAC) States and inter-governmental organizations such as the EU via DEVCO have started including provisions to promote compliance therewith. Some States have also included such restrictions in their bilateral funding agreements. For example, the Agence Française de Développement has started including requirements to screen final beneficiaries of programmes it funds, many of which are implemented in contexts that are not humanitarian.

As highlighted by the ongoing debates on the humanitarian–development continuum or nexus, it is frequently impossible in practice, in addition to undesirable as a matter of policy, to draw a sharp distinction between the two types of response. Inevitably there will be times, particularly in the aftermath of conflicts or natural disasters,[35] when humanitarian and development activities will be conducted in the same context, and thus when humanitarian and development principles apply in tandem. In such circumstances, as just discussed

35 Caution should be exercised when using the expression "natural disasters". See, for example, Ksenia Chmutina, Jason von Meding, J. C. Gaillard and Lee Bosher, "Why Natural Disasters Aren't All That Natural", *openDemocracy*, 14 September 2017, available at: https://www.opendemocracy.net/en/why-natural-disasters-arent-all-that-natural/.

above in relation to DEVCO requirements for Syria, IHL and humanitarian principles remain relevant. This said, and while the institutional source of the funds is not relevant *per se*, as activities are conducted in situations that are progressively more along the development side of the continuum, humanitarian principles will diminish in relevance and arguments will have to be based on development principles.

Drawing a sharp distinction between "humanitarian" and "development" actors and contexts is artificial and frequently inaccurate. There are many "hybrid" organizations that conduct both types of activities, as frequently do Red Cross/Red Crescent National Societies. Similarly, as evidenced by ongoing triple nexus discussions, it is equally artificial to refer to situations as being either "humanitarian" or "development" contexts. The reality is much more nuanced and fluid. In fact, one of the challenges is determining precisely when IHL and humanitarian principles can no longer be relied upon to oppose requirements to screen final beneficiaries.

Nonetheless, for the sake of simplicity, this section of the article refers to "development" actors, contexts and interventions, to contrast them with their exclusively humanitarian counterparts discussed in the previous sections.

The impact of counterterrorism measures, sanctions and restrictions in funding agreements for development work has received less attention than in relation to humanitarian work. One reasons for this is that development actors have a greater degree of choice as to where they work.

Latecomers to the discussions

Unlike humanitarian work, the majority of development projects are generally not implemented in countries in relation to which sanctions have been imposed, or where groups designated under counterterrorism measures have a significant presence or, indeed, in areas of acute humanitarian need.

In taking strategic decisions on the areas and scope of their interventions, development actors take various factors into account. These include poverty, marginalization, vulnerability and exclusion indicators, as well as the expected outcomes. Aid effectiveness is also a strong imperative: the development sector can decide to stay out of areas that are too heavily impacted by violence and recurring disasters, on the basis of low- or no-impact assessments. Finally, political will at the national level is also a factor, as well as the possibility of operating in coordination with large development actors such as the UN Development Programme, USAID, EU DEVCO, the World Bank and the regional development banks.

This means that development actors have more strategic freedom to decide where to operate than humanitarian actors. There is no overarching imperative that dictates where and how development actors should operate. This flexibility has given development actors the choice of strategically avoiding areas where designated people and groups are active, to reduce potential legal liabilities and restrictive requirements in funding agreements.

This has also meant that the development sector has not yet elaborated a coherent approach and collective understanding of the implications of counterterrorism measures and sanctions.

Since the impact of counterterrorism measures and sanctions are increasingly also being felt in the development domain, opting out no longer seems to be a viable option. However, at present, there appears to be a lack of strategic coherence within the multi-mandated organizations on this issue. It tends to be dealt with at an operational level and programme staff tries to find ways to deal with the issues on a country-by-country basis. This can lead to the adoption of less than ideal and sometimes inconsistent positions even among the same organization. Organization positions and policies must be adopted at headquarters level and implemented consistently. Equally, importantly agencies should elaborate common positions.

The development sector, therefore, needs to urgently review how development principles can guide it to elaborate a collective position on counterterrorism measures and sanctions, that will allow it to implement its objectives of supporting poverty alleviation and socio-economic development.

A less clearly articulated and well-established underlying regulatory framework

In pushing back against problematic restrictions in funding agreements humanitarian actors can rely on a well-established and clearly articulated regulatory framework: IHL and humanitarian principles. In contexts where development activities are being conducted these are not applicable; consequently, it is necessary to rely upon arguments based on human rights law and development principles – and neither offers as firm a basis.

As a matter of law, it is the framework of social and economic rights that is most relevant to development work, and States' obligations in this regard. At present there is little analysis of how restrictions in sanctions, counterterrorism measures or funding agreements that aim to give effect to them could impair these rights, as well as the right to development, as articulated by the General Assembly in 1986.[36]

Some General Comments by the UN Committee on Economic, Social and Cultural Rights have touched upon the potential impact of sanctions on protected rights, but the issue has not been considered in detail. In 1997 the Committee adopted General Comment 8 on the relationship between economic sanctions and respect for economic, social and cultural rights. Here the Committee noted that these rights "must be taken fully into account when designing sanctions", and that a State that imposes sanctions has an obligation "to take steps, individually and through international assistance and cooperation, especially

36 Declaration on the Right to Development, adopted by General Assembly Resolution 41/128 of 4 December 1986.

economic and technical" to respond to any "disproportionate suffering experienced by vulnerable groups within the targeted country".[37]

More recently, in General Comment 14 on the right to health, the Committee stated that States party to the International Covenant on Social, Economic and Cultural Rights should "refrain at all times from imposing embargoes or similar measures restricting the supply of another state with adequate medicines and medical equipment".[38]

The interplay between sanctions and protected rights needs to be revisited in greater detail by the Committee on Economic, Social and Cultural Rights, which does not appear to have considered the impact of counterterrorism measures yet. The Expert Mechanism on the Right to Development established by the Human Rights Council in 2019 could also play a useful role in analysing the regulatory framework.

In addition to the legal framework, the principles underlying development work are also not as clearly articulated and as well established as humanitarian principles. There are simply no clear and unifying principles. Instead, there is a patchwork of criteria, guidelines and beliefs. More analysis is necessary also in this area to distil key elements that can be relied upon to oppose measures that adversely affect development interventions.

The first criteria for development work were elaborated in 1961 by the OECD-DAC, to establish a set of criteria for identifying countries and territories eligible to receive official development assistance from the OECD-DAC. These criteria have evolved over the years and it is the 2005 Paris Declaration on Aid Effectiveness that has shaped the current thinking around development aid. As a practical, action-oriented roadmap to improve the quality of aid and its impact on development, the Declaration sets out a series of specific implementation measures and establishes a monitoring system to assess progress and ensure that donors and recipients hold each other accountable to their commitments. The Paris Declaration sets out five "partnership commitments" for making aid more effective, that emphasize that local ownership and local partnership are fundamental for achieving development results.[39] Counterterrorism measures and

37 UN Committee on Economic, Social and Cultural Rights, General Comment 8 on the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. E/C.12/1997/8, 12 December 1997, paras 12 and 14.

38 UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4, 11 August 2000, para. 41.

39 The Paris Declaration is based on the following five partnership commitments:
- Ownership: Developing countries set their own strategies for poverty reduction, improve their institutions and tackle corruption.
- Alignment – Donor countries align behind these objectives and use local systems.
- Harmonisation: Donor countries coordinate, simplify procedures and share information to avoid duplication.
- Results: Developing countries and donors shift focus to development results and results get measured.
- Mutual accountability: Donors and partners are accountable for development results.

Available at: https://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm#:~:text=The%20Paris%20Declaration%20on%20Aid%20Effectiveness&text=It%20gives%20a%20series%20of,other%20accountable%20for%20their%20commitments

sanctions can negatively affect local ownership and partnership, because they can disempower local partnership and local agency.

The Sustainable Development Goals (SDGs) are the leading global framework for sustainable development up to 2030. The outcome statement of the June 2012 UN Summit on Sustainable Development (Rio+20) proposed the Global SDGs.[40] At the SDG summit on 25 September 2015, UN Member States adopted the 2030 Agenda for Sustainable Development, in which they committed to achieving the seventeen SDGs.

SDG 16 is particularly relevant to the interplay of development work with sanctions and counterterrorism measures. States commit to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". Counterterrorism measures and sanctions can impair achieving this goal if they lead to the exclusion of certain people and groups from society in social, political and economic terms.

Examples of the adverse impact of counterterrorism measures on development objectives

Current examples can provide insights into how screening requirements in funding agreements can undermine development objectives, by excluding beneficiaries from the funded programmes, and also from political processes and dialogue.

Local ownership

The Paris Declaration emphasizes that local ownership is fundamental for achieving development results. The SDGs are objectives, underlined by the principle that the development agenda must be locally owned and driven by local and civic-driven change actors. Screening and exclusion can disempower certain groups and undermine local ownership through top-down exclusion mechanisms.

A case in point is a project in Burkina Faso. Religious leaders in the northern Sahel region of Burkina Faso started a network on intra-religious dialogue to deal with extremist religious messaging and to discuss how to understand Sufi and Salafi teaching from a Burkinabé perspective to support non-violent co-existence. Fundraising for this network became complicated when some of the religious leaders were screened and excluded on the basis of their relation to Jihadi groups in the Sahel. Only some of the religious leaders were allowed to participate, which made the network and the effort less diverse, less legitimate in the eyes of communities and, therefore, less effective.

40 UN, "Future We Want – Outcome Document", available at: https://sustainabledevelopment.un.org/futurewewant.html.

Aid effectiveness

Exclusion of groups that have a support base in local communities on the basis of screening requirements imposed by donors has proved counter-productive to achieving the programme goals, and at times also in terms of attaining the broader development and peace-building objectives.

A more recent example occurred in Cabo Delgado, in Mozambique. In March 2021 the U.S. Department of State added Islamic State in Iraq and Syria (ISIS) affiliate Ansar al-Sunna Mozambique to its list of terrorist entities.[41] This designation has caused problems for many development projects funded by the international community. One of these is conducted by AIAS, the governmental water and sanitation agency that implements clean drinking water projects in Cabo Delgado. When AIAS implements these projects, it engages youths by training them on technical skills required in the water project. The youths become part of AIAS's temporary staff and earn some income. Due to the listing, AIAS has had to pause the project and screen some groups that were involved in its implementation. In some communities AIAS has even had to stop the projects because of the presence and indirect influence of members of the listed group. The Ansar al-Sunna Mozambique group used this situation as an example of the absence of local services and good governance for local communities as part of its compelling narrative to gain a support base. This is an instance of the listing of a group becoming counter-productive and possibly undermining its counterterrorism objectives.

Do no harm and conflict sensitivity

In the 1990s the principle of "do no harm" was adopted by the development sector. It sets out a minimum obligation for any development action or intervention in and on conflict: to do no harm. It requires development interventions to actively look for and seek to avoid or mitigate negative impacts. These could include worsening divisions between conflicting groups; increasing danger for participants in development activities; reinforcing structural or overt violence; or disempowering local people.

Conflict transformation (peacebuilding) has been part of the development portfolio since the beginning of this century when the UN and the World Bank started to report that development impact cannot be sustained without peace and respect for human rights. The nexus between security and development has become stronger and more evident. Development is an essential precondition to sustaining peace. Sustainable and inclusive development interventions are

41 U.S. Department of State, "State Department Terrorist Designations of ISIS Affiliates and Leaders in the Democratic Republic of the Congo and Mozambique", 10 March 2021, available at: https://www.state.gov/state-department-terrorist-designations-of-isis-affiliates-and-leaders-in-the-democratic-republic-of-the-congo-and-mozambique/.

necessary to address the root causes of conflicts and facilitate long-term conflict transformation processes.

Requirements in funding agreements to screen and potentially exclude certain stakeholders on the basis of supposed membership or alignment with designated entities, should be assessed against the do no harm principle.

By way of example, in important peacebuilding processes, harm has been done by the exclusion of certain groups from formal dialogues. Recently in Mali the international community drew a distinction between those armed groups that were allowed to sign the 2015 Accords and the non-signatory groups associated with Al-Qaeda and ISIS. The latter were excluded from the negotiations and turned into spoilers for future implementation of the peace agreement.

More generally, when development interventions become or are perceived as instrumental to a Western security agenda, they do harm in terms of being perceived as not legitimate and potentially fuelling existing conflicts, putting project staff and implementing communities at risk.

Concluding reflections

States are not under a legal obligation to fund humanitarian programmes, but if they do, they must not include provisions that are incompatible with IHL, or that put recipient humanitarian organizations in a situation where they cannot operate in accordance with humanitarian principles or medical ethics.

It is clear that requirements that could lead to the exclusion of people from the assistance that they have been determined as requiring would do so. Humanitarian actors have a strong basis for opposing such requirements, and there have been positive instances of donors removing problematic clauses in response to common positions by humanitarian actors. These are extremely valuable precedents.

Although progress still needs to be made in elaborating the analytical framework for addressing the tensions between sanctions, counterterrorism measures and development interventions, the adverse impact of exclusion on effectiveness of development activities and peacebuilding is being increasingly highlighted. This should be taken into account in triple nexus discussions. The good practices that are being elaborated in respect of work in humanitarian settings should be carried through to development and peacebuilding activities.