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What are the effects of the fight against terrorism on humanitarian action?

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Caught up in spite of themselves in the "war on terror" launched following the 9/11 attacks, non-governmental organisations are still suffering from the collateral damage linked to this policy. Its reactivation in recent years has been associated with increasing threats and constraints for humanitarian actors. In this article, Julien Antouly gives a legal overview of this issue.

On 12 April this year, the governor of the Diffa region in Niger decided to suspend the activities of the French non-governmental organisation (NGO) ACTED and to immobilise all its vehicles for several days. He justified his decision in a letter stating that the NGO "maintains questionable and subversive links for the benefit of a terrorist organisation" [1]. This announcement was somewhat surprising since it came several months after the killing of several employees of the same NGO in the same country, in a terrorist attack in Kouré, for which the Islamic State claimed responsibility[2]. These two events concerning the same organisation thus show to what extent humanitarian actors may nowadays be as much the victims of terrorism as of counter-terrorism. This is not an isolated case and for a number of years many organisations have been worried about the impact on their activity of counter-terrorism measures, which they have no hesitation in calling contrary to humanitarian principles and international humanitarian law[3].

When challenged, donors and States in which these NGOs intervene do not deny these accusations are legitimate, but at the same time increasingly insist that the humanitarian organisations provide "proof" of these effects in order to find solutions. However, in spite of advocacy initiatives and an increasing body of literature, it is often difficult for humanitarian actors or observers to identify and describe exactly why and how counter-terrorism measures have a negative impact on their work and on the protection they enjoy under international law. This article gives some legal input in this debate. To begin with, a brief analysis of counter-terrorism measures will aim to show that the major issue is the ban on support for terrorism, from which the main measures likely to have an impact on humanitarian actors arise. It will then use a literature review as a basis for establishing a typology of the main effects of measures to counter support for terrorism on humanitarian aid.

[1] A copy of the document was published on the social networking site Twitter and viewed by the author.
[2] See in particular Philippe Ryfman, "Giving ourselves the means to fight against the impunity of attackers of humanitarian workers", *Humanitarian Alternatives*, no.15, November 2020, p.144-151, https://alternatives-humanitaires.org/en/2020/11/26/giving-ourselves-the-means-to-fight-against-the-impunity-of-attackers-of-humanitarian-workers [Editor's note].
[3] Pierre Micheletti, « Les lois antiterroristes doivent tenir compte des principes humanitaires », *Blog Ideas4Development*, 5 février 2020, https://ideas4development.org/lois-antiterroristes-principes-humanitaires

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Emergence of a legal regime to counter support for terrorism

Though initially focused on cracking down on acts of terrorism themselves, the war on terrorism has gradually come to include the prevention and prohibition of support for terrorism in all its forms (human, material, financial, etc.). A historical overview is necessary to put this wider aim in context and is essential to understanding the current issues facing humanitarian actors. In fact, terrorism has long been fought by national and international law, dating back to the 19th century in Europe, principally as a response to the anarchist movement[4]. In the 1930s, a convention for the "prevention and suppression of terrorism" was even adopted without, however, ever entering into force because of deadlock over the definition of the phenomenon. As a result, and up to the end of the 20th century, terrorist acts were mainly addressed and characterised with reference to ordinary law offences (murder, hostage taking, etc.), to which a terrorist specification was added, leading to a derogation process to facilitate its suppression (for example, extradition). Twenty or so international conventions have been developed on this model since the 1960s, and many States, including France, have adopted a similar approach in their domestic law[5].

In the 1990s, the rise of al-Qaeda was accompanied by new phenomena such as the complicity of "sponsor-States", the use of international funding networks and the recruitment of combatants from abroad. Faced with the problem of prosecuting this support for terrorism, many States found themselves up against a legal vacuum since the counter-terrorism measures in force at the time only concerned conduct already prohibited under ordinary law[6]. In response, and at the instigation of France and the United States, separate offences concerning support for terrorism, aimed at preventing conduct that is lawful *a priori* but becomes illegal when committed for terrorist purposes (training, for example), have gradually been adopted and enforced under international law. In 1999, an international convention for the suppression of the financing of terrorism was adopted. Later, the Security Council, considering it to be an issue of international peace and security after the 9/11 attacks, would gradually develop a comprehensive legal regime to counter support for terrorism, much resembling a new branch of international law[7]. This regime is very complex and difficult for non-specialists to understand as at present it is a tangled labyrinth of measures combining international and national law, extraterritorially applied legislation, administrative and penal measures, hard law and soft law. It has three main features that should be presented briefly.

Firstly, there exists under international law a duty for all States to criminalise the financing of terrorism in their domestic legislation. This obligation was laid down in the 1999 convention and then made mandatory for all States by the Security Council in 2001, before being expanded in 2019. Although nearly all States comply with this obligation, they have significant latitude in how it is enforced. In effect, as is the case for European directives, States must transpose this ban on the financing of terrorism into their national legal systems. Consequently, significant variations may arise concerning the definition of terrorism, the type of support given (monetary, human, material, etc.) or the requisite intent. More recently, new requirements have arisen along the same lines, such as the obligation to criminalise the recruitment of "foreign terrorist fighters" in domestic law.

[4] Gilles Ferragu, « L'hypothèse de la guerre contre le terrorisme : aspects historiques », *in* Julie Alix et Olivier Cahn (dir.), *L'hypothèse de la guerre contre le terrorisme : implications juridiques*, Dalloz, 2017, p. 83.
[5] Julie Alix, *Terrorisme et droit pénal*, Dalloz, 2010.
[6] Some States also initially used the tools for combatting money laundering. However, these are not applicable if the financial source is lawful, which is often the case in the financing of terrorism.
[7] Ben Saul, *Research Handbook on International Law and Terrorism*, Research Handbooks in International Law series, Edward Elgar Publishing, 2020, p.xxiv.

The second key feature in combatting support for terrorism relates to sanctions regimes. Under these, States draw up lists of persons and organisations designated as terrorists and thus subject to restrictive measures such as asset freezing and travel bans. Since the end of the 1990s, the Security Council has developed a comprehensive regime targeting the organisations al-Qaeda, Daesh and other associated entities, commonly referred to as regime 1267/1989/2253, alongside which there are fourteen coexisting sanctions regimes limited to certain States, not necessarily linked to terrorism[8]. All members of the United Nations (UN) are required to implement these sanctions regimes and may also complement them at regional or national level. For example, members of the European Union (EU) have opted for specific regimes regarding situations for which the Security Council has not put sanctions in place (Ukraine, Syria, etc.). France has no sanctions regimes in its own right but implements the UN and EU regimes through a series of laws and ordinances establishing procedures on sanction enforcement. These sanctions target a broad range of stakeholders, further widened in November 2020 so as to now include NGOs operating internationally[9]. Above all, sanctions regimes can be applied indirectly through the contractual terms imposed by certain donors. For example, the screening procedure requires funded organisations to check that all the stakeholders in their activity (employees, volunteers, contractors, and even beneficiaries) are not subject to any sanctions regime.

Finally, besides these two types of restrictive measures, the past few years have seen the advent of a new group of bodies or, for those already in existence, the extension of their mandate to include combatting support for terrorism. On the one hand, several authorities have been set up in conjunction with the financial sector, notably the Financial Action Task Force (FATF), while the UN has taken on a major role through the creation of the Counter-Terrorism Committee within the Security Council, with its Executive Directorate (CTED) to support the implementation of Security Council resolutions. The United Nations Office on Drugs and Crime (UNODC) has also an increasing role assisting States in the fight against the financing of terrorism funding. These different bodies are not merely a simple executive arm responsible for enforcing counter-terrorism measures. They play a major part in so far as they influence the way that these measures are interpreted and implemented by States at national level, thus becoming genuine setters of standards. This legal regime for combatting support for terrorism is thus distinguished by its complexity, by the quasi-legislative role played by the Security Council, and by its constant expansion since the end of the 1990s, resulting in it having a considerable impact on the protection of humanitarian aid.

Typology of the effects of measures to combat support for terrorism on humanitarian action

There is a growing and dynamic body of literature dealing with the effects of counter-terrorism on the humanitarian sector. However, it should be noted that up to now it has mainly been produced by NGOs or international organisations, it is predominantly in English and is rarely academic. Beyond reports giving real-life examples and accounts, two types of effects are often mentioned[10] but are similarly limited in that they focus only on the impacts on NGOs and not on all the stakeholders in the humanitarian aid sector. Thus, as part of our on-going doctoral research, we have carried out a comprehensive literature review enabling us to put forward a new typology differentiating between

[8] The full list of sanctions regimes in force is available at: https://www.un.org/securitycouncil/content/un-sc-consolidated-list

[9] Ordinance no.2020-1342 of 4 November 2020 reinforcing the mechanism for the freezing of assets and the prohibition of funding.

[10] Interaction, "Detrimental impacts: how counter-terrorism measures impede humanitarian action", 2021, p.4; Kate Mackintosh and Patrick Duplat, "Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action", United Nations Office for the Coordination of Humanitarian Affairs and Norwegian Refugee Council, 2013.

the effects on aid workers, the effects on potential beneficiaries of humanitarian aid, the effects on humanitarian organisations and finally the effects on the humanitarian system.

Aid workers are the first to be affected by measures to counter support for terrorism, and the risk of "criminalising" aid is systematically cited in the literature studied, even though the term is far from satisfactory[11]. In fact, much national legislation can lead to humanitarian actions being considered as supporting terrorism. In this respect, the simple fact of meeting a designated terrorist group is prohibited in Nigeria[12], while in Saudi Arabia, humanitarian or even medical assistance given to a member of such a group is explicitly considered as an act supporting terrorism[13]. In other contexts, these risks of prosecution stem from vague and imprecise wording, such as "support" or "assistance", which can then include humanitarian activities. Although rare, examples of court cases exist in several countries such as the United States[14], Australia[15] and Turkey[16]. Above all, besides the criminal prosecutions, these cases create a climate of uncertainty and worry for humanitarian actors[17], described as a chilling effect: "[Within the humanitarian community] there is still a palpable fear of prosecution of individuals or organisations that exclusively provide humanitarian aid"[18].

Secondly, counter-terrorism measures may also affect the potential beneficiaries of humanitarian aid. For example, legislation criminalising the financing of terrorism can jeopardise aid for civilian communities and detainees living in regions occupied by designated terrorist groups, as well as medical assistance for wounded combatant members of these groups[19]. Failure to deliver aid may also result from instructions from States or donors banning operations in geographical regions controlled by groups designated as terrorists, as is the case in Borno State in Nigeria[20]. According to a

[11] The term "criminalisation" is rightly used in English, since it is defined as the act of making a legal activity illegal, whereas it is wrong when translated into French as it has the meaning of transforming a misdemeanour into a felony. The preferred term in French should be "incrimination", a criminal policy measure consisting of making a particular activity an offence.
[12] Alice Debarre, "Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework", *International Peace Institute*, 2018, p.30-33.
[13] David McKeever, "International humanitarian law and counter-terrorism: fundamental values, conflicting obligation", *International & Comparative Law Quarterly*, vol.69, no.1, 2020, p.64.
[14] United States Supreme Court, Holder *et al.* v. Humanitarian Law Project *et al.*, June 2010 [Author's note: in this ruling, the Supreme Court confirms a broad interpretation of the prohibition of support for terrorism, including for example training in international humanitarian law as a form of support].
[15] Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, "Legislating against Humanitarian Principles: A Case Study on the Humanitarian Implications of Australian Counterterrorism Legislation", *International Review of the Red Cross*, vol.97, 2015, p.235-261 [Author's note: in this case, a doctor sent to Sri Lanka had provided medical training to members of the Tamil Tigers].
[16] International Federation for Human Rights, "Turkey: Ongoing judicial harassment against Dr. Serdar Küni", 18 March 2020, https://www.fidh.org/en/issues/human-rights-defenders/turkey-ongoing-judicial-harassment-against-dr-serdar-kuni [Author's note: in this case, a doctor had provided medical care to several members of the Kurdistan Workers' Party, the armed Kurdish political organisation].
[17] Secretary General's report on the protection of civilians in armed conflict, 7 May 2019 (S/2019/373), §41.
[18] Sam Adelsberg, Freya Pitts and Sirine Shebaya, "The Chilling Effect of the 'Material Support' Law on Humanitarian Aid: Causes, Consequences, and Proposed Reforms", *Harvard National Security Journal*, vol.4, 2013, p.283.
[19] Comité international de la Croix-Rouge, « Le droit international humanitaire et les défis posés par les conflits armés contemporains », 2019, p. 68. See also, concerning screening in particular, Pierre Micheletti, "Humanitarian work is coming up against a barrier: how can analysis help devise corrective strategies?", in *Humanitarian Alternatives*, no.16, November 2021, p.120-143, https://alternatives-humanitaires.org/en/2021/3/25/humanitarian-work-is-coming-up-against-a-barrier-how-can-analysis-help-devise-corrective-strategies or, to have the standpoint of several French NGOs, Collectif, « Les humanitaires doivent bénéficier de mesures d'exemption dans l'application des lois antiterroristes », *Le Monde*, 15 décembre 2020, https://www.lemonde.fr/idees/article/2020/12/15/les-humanitaires-doivent-beneficier-de-mesures-d-exemption-dans-l-application-des-lois-antiterroristes_6063485_3232.html [Editor's note].
[20] Emma O'Leary, "Principles under pressure", *Norwegian Refugee Council*, 2018, p.38.

United Nations special rapporteur, these different examples show that certain counter-terrorism measures pose a real threat to the protection of the human rights of populations[21].

Thirdly, the regime to combat support for terrorism directly affects humanitarian organisations, in particular NGOs that, as legal entities, may be subject to civil or financial sanctions. For example, in 2018 Norwegian People in Aid had to reimburse a grant of two million dollars to the United States Agency for International Development for having carried out a project in Gaza that benefited members of Hamas[22]. The literature also shows that measures combatting support for terrorism have so-called "programmatic" effects, that is, they have a direct influence on the areas of intervention and the activities of humanitarian organisations. For example, cash-based transfer programmes may be reduced or even cancelled, as was the case recently in the Lake Chad Basin[23] or in Syria in 2019[24]. Similarly, training activities are often threatened when they are delivered near areas under the control of groups designated as terrorists, even if they are humanitarian in nature (first aid, dissemination of international humanitarian law, etc.). Besides this, the implementation of sanctions regimes by certain funders through the imposition of screening may now influence the choice of beneficiaries, by excluding those subject to sanctions. Overall, as a result of these effects, some authors indicate that humanitarian organisations are no longer able to act on the basis of the urgency of the need, as required by the principle of impartiality, but according to the rules in force and the risks of prosecution[25].

Over and above this ethical dimension, humanitarian organisations also encounter operational issues since the strict enforcement of measures countering the support for terrorism leads to a significant reduction in efficiency. For example, the screening process involves considerable additional costs, a heavy administrative burden and specific skills. Furthermore, the banking sector's practice of de-risking[26] can create major and lasting obstacles for organisations, through the cancellation of transactions or the closure of bank accounts, something that is particularly significant with regard to Muslim faith-related organisations[27].

Finally, measures to counter support for terrorism have a fourth and final type of effect, which is more general and affects the entire humanitarian system. The reforms resulting from the Grand Bargain are particularly concerned and several of the commitments made have been directly hampered by counter-terrorism measures. Apart from the negative consequences on the systemisation of cash transfers already mentioned, it is clear that the process of "localising aid" has been partially impeded. In effect, the measures imposed by donors have the result of favouring large-scale humanitarian organisations able to comply with them, to the detriment of local organisations, often of more modest size[28]. Furthermore, these smaller organisations may also be excluded from indirect funding, as a result of "cascading clauses" imposed by donors, leading international NGOs to transfer their obligations to local organisations, making collaboration

[21] United Nations General Assembly, *Note by the Secretary-General on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin,* A/75/337, §26 and 33.
[22] Emma O'Leary, "Principles under pressure…", art. cit., p.17.
[23] VOICE, *Adding to the evidence: the impacts of sanctions and restrictive measures on humanitarian action*, 2019, p.11.
[24] "Syria Cash Aid Freeze, Somali Biometrics, and Poverty Porn: The Cheat Sheet", *The New Humanitarian*, 26 April 2019.
[25] Jessica Burniske and Naz Modirzadeh, "Pilot empirical survey study on the impact of counterterrorism measures on humanitarian action and comment", Harvard Law School, 2017, p.65.
[26] This is a practice of financial institutions aimed at identifying clients and/or sectors at risk of money laundering or financing terrorism, and of suspending relations with them to avoid any risk (hence de-risk), rather than having to manage this risk.
[27] Emanuela-Chiara Gillard, "Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action", Chatham House, 2017, p.19.
[28] Emma O'Leary, "Principles under pressure…", art. cit., p.26.

impossible[29]. In addition to the Grand Bargain, several reports mention the adverse impact of counter-terrorism measures, creating a climate of mistrust between donors and NGOs, which is detrimental to transparency and the coordination of aid. One report gives the example of an NGO refusing to take written minutes of meetings in certain circumstances involving groups designated as terrorists, for fear of donors imposing sanctions[30].

Thus, the historical development of counter-terrorism has led to the emergence of an overall regime of prohibition regarding support for terrorism, certain components of which directly threaten humanitarian aid and the protection it enjoys under international law. In the face of criticism from civil society, conciliation mechanisms have recently been put in place to prevent such harmful effects. For a start, a growing number of States (Chad, Switzerland, the Philippines, etc.) have adopted "humanitarian exemptions" in their criminal law or in the implementation of sanctions regimes. In addition, the Security Council passed a resolution in 2019 requiring States to "take into account the potential effects" that measures to counter the financing of terrorism may have on exclusively humanitarian activities[31]. These developments are positive, but they still raise many questions concerning their definition, their scope and their nature.

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Biography

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[29] Chatham House, "UK Counterterrorism Legislation: Impact on Humanitarian, Peacebuilding and Development Action", 2015, p.9.
[30] Sara Pantuliano, Kate Mackintosh and Samir Elhawary, "Counter-terrorism and humanitarian action: Tensions, impact and ways forward", HPG Policy Brief, 2011, p.12.
[31] United Nations Security Council, Resolution 2462, 28 March 2019 (S/RES/2462).