

Guilt by association: Restricting humanitarian assistance in the name of counterterrorism

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Abstract

In certain contexts associated with counterterrorism, some governments and military forces have stigmatized civilians, not because of the acts they perform but rather from loose associations with groups perceived as “terrorists”, based on geographical proximity or common social, ethnic and religious backgrounds. Access to humanitarian assistance has been affected by this stigmatization, and in specific

* The Centre for Applied Reflection on Humanitarian Practice website is available at: <https://arhp.msf.es>. The authors would like to thank the many Médecins Sans Frontières (MSF) colleagues interviewed for their input, and to the reviewers of the article for their valuable comments and suggestions. All opinions expressed in this paper are those of the authors alone and do not necessarily correspond to the position of MSF.

geographical areas it has been blocked, restricted, made conditional or undermined. This article draws on recent literature and examples to argue that certain counterterrorism frameworks and practices have inhibited the impartial delivery of aid to all affected populations.

Keywords: counterterrorism, humanitarian assistance, Médecins Sans Frontières, MSF, humanitarian access.

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Introduction

Certain counterterrorism frameworks, policies, practices and narratives have blocked, restricted, conditioned or undermined impartial humanitarian assistance to specific geographical areas. This article will briefly examine how the impartial receipt of aid by all affected populations has been inhibited, sometimes because of tenuous associations with armed groups. It will use recent examples in the last decade, primarily from several contexts where the conditions for humanitarian access were significantly affected, including Central Mali, the South-East of Niger, North-East of Nigeria, West Cameroon and Mosul (Iraq). It will also use examples to illustrate how the stigma of being perceived as connected to designated “terrorist” groups can impede access to humanitarian assistance. The contents of this article are based on desk research and analysis of publicly available information and documents, as well as external and internal Médecins Sans Frontières (MSF) reports, complemented with feedback from and semi-structured interviews with a dozen experts and MSF field and headquarters managers about their concrete experience in the field. Interviews were conducted online or in person, either in Barcelona or in the field.

This article looks at the restriction or blocking of access for humanitarian workers to certain areas or populations, analysing the implications arising from the stigmatization and demonization of people in need, based on alleged connivance or support to people or groups considered “terrorists”. This can lead to an overriding of their needs, for instance, by imposing onerous screening procedures before they can receive humanitarian assistance. The first section of the article deals with the restrictions imposed to humanitarian access, while the second section examines the implications of a perceived association with designated terrorist groups for humanitarian aid and assistance. Unfortunately, the concerns exposed are due to the stigmatization of civilians whose guilt is assumed by mere association with “the enemy” by an audience primed to accept these counterterrorism frameworks and practices.

Restriction of humanitarian access in times of counterterrorism

Under international law, States bear the primary responsibility for ensuring that the basic needs of the civilian populations are met. However, if they are unable or

unwilling to carry out this responsibility, international humanitarian law (IHL) provides for humanitarian assistance, including medical care, to be undertaken by impartial humanitarian organizations, subject to the consent of the State concerned in times of armed conflict. Parties to the conflict should not impede the provision of care by preventing the passage of medical personnel and must facilitate access to the wounded and sick. According to Common Article 3 of the Geneva Conventions, which applies to both international and non-international armed conflicts, “the wounded and sick shall be collected and cared for”.¹ IHL does not provide an unconditional right of access, but both treaty law and customary law specify that the wounded and sick must “receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition”, and that “no distinction may be made among them founded on any grounds other than medical ones”.²

In the United Nations (UN) General Assembly non-binding resolution 73/174 of January 2019 on terrorism and human rights,³ Member States acknowledged the importance of not impeding humanitarian action, including medical activities, in the context of counterterrorism legislation whenever IHL is applicable. In particular, paragraph 14, on not impeding humanitarian and medical activities or engagement with all relevant actors, can be considered an exemption for humanitarian action.⁴ Although it was adopted without a vote, the United States has partially criticized and objected to the text of the resolution.⁵ The relevance

1 Article 3 common to the four Geneva Conventions.

2 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; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 7; and rule 110 of customary international humanitarian law (IHL) (“Rule 110. Treatment and Care of the Wounded, Sick and Shipwrecked”). In situations of occupation, Art. 59 of 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) states that “all Contracting Parties shall permit the free passage”, in particular “of the provision of consignments of foodstuffs, medical supplies and clothing”. Art. 69 of AP I also says that the Occupying Power shall ensure the provision of supplies essential to the survival of the civilian population of the occupied territory. The impeded passage of relief consignments, equipment and personnel are also stated in Art. 70(1) of AP I, Art. 18(2) of AP II and customary IHL rule 55 of customary IHL (“Rule 55. Access for Humanitarian Relief to Civilians in Need”).

3 United Nations General Assembly, *Resolution Adopted by the General Assembly on 17 December 2018*, UN Doc. A/RES/73/174, Seventy-third Session, Agenda Item 74 (b), 17 January 2019, available at: <https://undocs.org/en/A/RES/73/174> (all internet references were accessed in August 2021).

4 *Ibid.*, para 14: “14. Also urges States to ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counterterrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law.”

5 The representative of the United States “disassociated from the text’s excessively broad call on States to ensure that counter-terrorism efforts do not impede on humanitarian aid. While expressing support for the work of humanitarian actors, she said there is no obligation to allow the unrestricted delivery of humanitarian assistance to terrorist groups or individual terrorists.” United Nations General Assembly, *General Assembly Endorses Landmark Global Compact on Refugees, Adopting 53 Third Committee Resolutions, 6 Decisions Covering Range of Human Rights*, Seventy-third Session, 55th and 56th Meetings, UN Doc. GA/12107, 7 December 2018, available at: <https://www.un.org/press/en/2018/ga12107.doc.htm>.

of this objection rests not only because the United States is a major warfighting power but also because it is one of the most important humanitarian donors.

The main access limitation for MSF teams in the contexts examined in this article is the insecurity associated with places affected by armed conflict, and that the actors restricting access are often organizations designated as “terrorists” by one or several States involved in the armed conflict. Examples include the difficulty of negotiating access to affected populations because of lack of acceptance by and access to Boko Haram (JAS) and Islamic State of Iraq and Syria (ISIS)-West Africa (ISWA)⁶ in North-Eastern Nigeria and South-Eastern Niger.

Nevertheless, in certain areas, counterterrorism regulations have further undermined access by humanitarian actors, including for MSF. In order to deliver medical–humanitarian assistance, MSF needs engagement and solid communication with armed groups in the areas where they are active, but in those contexts, these contacts can be made difficult under domestic legislation and humanitarian workers can even be prosecuted for it. Access may also be limited or restricted by governments to avoid an international actor bearing witness against their actions or to deny any potential benefit to non-state armed groups. On the other side, non-state armed groups may also be unwilling to accept the presence of a foreign organization or foreign workers that originate from the same countries that have criminalized membership of their group and designated them as “terrorists”. They may perceive aid workers as legitimate targets or as an opportunity to gain political or economic profit or visibility. In this way, security is compromised by the mentality that “all’s fair in the fight against terrorism”.⁷

Examples of restricting access

MSF has experienced counterterrorism-related restrictions of access in several contexts, including Central Mali, the South-East of Niger, North-East of Nigeria and West Cameroon.⁸ In such contexts, the organization has undergone varying levels of restriction of access justified on security reasons, as we shall see in the following examples provided.

In Niger, the government has expressly banned access by humanitarian workers to certain areas where armed groups tagged as “terrorists” operate.⁹

6 JAS stands for Jama’atu Ahlis Sunna Lidda’awati wal-Jihad, the organization led by Abubakar Shekau. ISWA stands for Islamic State in West Africa, the splitting faction led by former JAS’s Abu Musab al-Barnawi.

7 Alejandro Pozo Marín with Françoise Bouchet-Saulnier, *The Moral Relativism of Subordinating Civilians to Terrorists. MSF Reflections After a Tragic Year of Hospital Bombings*, Centre for Applied Reflection on Humanitarian Practice – MSF, Barcelona, June 2017, available at: https://arhp.msf.es/sites/default/files/The%20moral%20relativism_Alejandro%20Pozo_ARHP01.pdf, p. 11.

8 The particular case of Mosul (Iraq), also mentioned in the introduction, will be examined in the next section.

9 Trygve Thorson, *Follow up Case Study. Diffa, September 2016 – September 2017*, MSF Emergency Gap Series, February 2018, available at: <https://arhp.msf.es/sites/default/files/ENGLISH-Diffa%202017-Follow%20up%20Case%20Study.pdf>.

Some areas were made inaccessible in May 2015, when the state of emergency was declared in the Diffa region. In March 2017, the government also declared a state of emergency in the western areas bordering Mali in Tillabéry and Tahoua regions. As stated in an MSF report:

Access is still tightly controlled by military forces, and humanitarian actors have been denied the right to work on the islands in Lake Chad and some areas in Bosso. Despite military claims that there are no civilians left on the islands, many humanitarian actors believe that there are. There is very little information available on the situation, and the authorities, following a counter-insurgency or counter-terrorism logic, are not interested in having humanitarian organizations working in these areas, according to several actors.¹⁰

International non-governmental organizations in Niger have made public calls demanding access.¹¹ The government only considered allowing humanitarian actors to access these areas if they accepted moving with an armed military escort. MSF generally refuses armed escorts to maintain a distinction between military and humanitarian operations, and has not accepted this condition, among other reasons, because of the potential risks it entails in terms of security for the MSF teams and acceptance of its services by the population. While access to the islands in Lake Chad and the bordering area with the lake was deemed impossible, negotiated access was still possible in other zones near the lake. However, this was not easy, and the likelihood of access significantly decreased during military operations. Whilst officially the restriction of access was ostensibly for the safety of humanitarian workers or ongoing military operations, there had been critical voices in the humanitarian sector alluding to a different, double rationale. Firstly, impeding access ensures that there are no foreign actors to observe what is happening (so-called “witnessing”); and secondly, assistance is effectively denied to populations perceived as sympathizing with the insurgents.¹²

In Nigeria, restrictions on access have been much stronger than in Niger. According to the UN Office for the Coordination of Humanitarian Affairs (OCHA), by the end of 2019, 85 percent of Borno State was considered inaccessible by international humanitarian agencies.¹³ Insecurity was the main limitation, but the restrictions of movements of personnel or assistance by military or civilian authorities continued to be constraints on humanitarian access in Borno, Adamawa and Yobe states. OCHA stated that the movement restrictions prevented access to populations living in areas where armed groups

10 T. Thorson, above note 9, p. 13.

11 Taken from T. Thorson, above note 9; see also Niger NGOs, “Six Months After the Oslo Conference. Niger NGOs Call for Fulfilment of Commitments for Diffa”, no date, available at: <https://www.rescue-uk.org/sites/default/files/document/1514/sixmonthsafterosloconferenceberlinmeetingversionconsolidee.pdf>.

12 Confidential interviews with two senior humanitarian staff responsible for programmes in Niger, held on 14 and 19 June 2018.

13 OCHA, *Humanitarian Response Plan: Nigeria*, March 2020, available at: https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ocha_nga_humanitarian_response_plan_march2020.pdf, p. 33.

were perceived to be active, hampering the delivery of assistance beyond security perimeters set by the Nigerian military in garrison towns outside Maiduguri.¹⁴ For instance, in Abadam, a Local Government Area of Borno State bordering Niger, access was denied to MSF by the Nigerian Army stating that there was no population and the security situation was too risky for the humanitarians. However, the reasons underlying the denial of access may also include the double rationale mentioned above: avoiding “witnessing” and preventing aid from reaching people associated with the enemy. Other local government areas in Nigeria were also considered zones completely inaccessible to humanitarian organizations. In other areas, access to locations beyond the control of the Nigerian army has been conditional on being escorted by them, a ban enforced by a hyper-controlled perimeter dotted with checkpoints. While humanitarian actors were not able to work in many of these zones due to security constraints and lack of negotiated access with armed groups, the Army has not permitted access to certain areas that MSF teams and certain humanitarian actors consulted believe were reachable. Humanitarian actors including MSF showed an interest in accessing these zones, but, in practice, many of them were not even working in the areas under the control of the army. This included in particular the UN humanitarian agencies, who had a very poor presence in certain Government-controlled areas outside Maiduguri, the capital of Borno State, partially as a consequence of a very restrictive security policy. Funding seemed not to be as significant a limitation for programming and implementing humanitarian action as it was in other contexts, and nearly a 100 aid groups work in Maiduguri. Yet donors were said to struggle to find implementing partners willing to accept the security risks for programmes outside of the city.¹⁵

In Mali, there is no official prohibition of travel in any part of the country,¹⁶ and contrary to Niger and Nigeria, authorities have not required MSF to use armed escorts. However, restrictions were imposed in the past. For instance, French and Malian military forces refused MSF’s repeated demands to access Konna in Mopti Region, where intense fighting occurred.¹⁷ MSF knew that, because of the ground and air fighting, the population had significant medical and humanitarian needs and had brought in two trucks loaded with medical supplies and medicine and had the necessary capacity to intervene successfully. But despite repeated requests, the organization was prohibited from entering the area.¹⁸ More recently, from 1 February 2018 to 8 August 2019, the Malian armed forces banned the use of motorcycles and pick-up vehicles in certain geographical areas, saying that

14 *Ibid.*

15 Luis Eguiluz, “The Situation in Northeast Nigeria is Deteriorating After Years of Conflict”, MSF, 18 July 2018, available at: <https://www.msf.org/situation-northeast-nigeria-deteriorating-after-years-conflict>.

16 Except curfews and interdiction to use motorcycles and pick-up vehicles, but no area has been imposed as a “no-go zone” for humanitarian actors.

17 UN News Service, “Humanitarians Unable to Access Mali Combat Zones”, 18 January 2013, available at: <https://www.refworld.org/docid/50ffee722.html>.

18 “The Worst Thing Would be to Get to Konna too Late”, MSF, 24 January 2013, <https://www.msf.org/mali-worst-thing-would-be-get-konna-too-late>.

such assets were used by militants to undertake attacks.¹⁹ An outcome of this ban from MSF's perspective is reduced access of populations to humanitarian assistance, as these are the most common types of transport for the population.²⁰ Whilst many have adapted by using bicycles and donkey carts, this ban, combined with a context of volatility and violence, forced people to use medical facilities only when their condition had significantly deteriorated, causing avoidable death and suffering. For instance, when the ban was enforced, MSF recorded a 40 percent decrease in admissions to a hospital that MSF supports in Douzenta.²¹

In Cameroon, parts of the north-west and south-west regions have been inaccessible for international aid organizations due to insecurity and restrictions on movement, and only a few national aid organizations have had occasional access. Large numbers of people displaced into rural areas have not received any assistance.²² In the assessment of MSF, all parties to the armed conflict have been responsible for disrupting healthcare services and access, and for attacks against medical facilities and health workers, which have been not only frequent but also intentional: "hospitals are deliberately being attacked or occupied, ambulances are being blocked, and medical personnel are being threatened, abducted, subjected to violence, or killed".²³ In the 10 months leading up to March 2019, MSF teams documented 61 attacks on healthcare facilities and 39 attacks against medical professionals.²⁴

As displayed in the aforementioned examples, governments and armed forces have argued that security and military reasons justify denial of access to MSF in places where groups tagged as "terrorists" operate. While these justifications may be legitimate or mere excuses, the restriction of access to populations who need humanitarian assistance may be facilitated or even motivated by the perceived association of those populations with the enemy. As we shall see in the next section, people may be treated as suspects (and therefore be denied assistance) by the mere fact of where they live and/or because of their ethnic, religious or cultural identity.

Implications of a perceived association with designated terrorist groups for humanitarian aid and assistance

Humanitarian organizations must comply with counterterrorism laws of several States: countries where they operate, countries where they are registered, countries that fund their activities, national countries of their staff, and other

19 "Mopti, Ségou et Tombouctou : Suspension de l'interdiction de circulation des motos et des pick-up", *Malijet.co*, 13 August 2019, available at: <http://malijet.co/nord-mali/mopti-segou-et-tombouctou-suspension-de-linterdiction-de-circulation-des-motos-et-des-pick-up>.

20 MSF internal report, May 2018.

21 "Insecurity has Pushed People to their Limits". Interview with Jamal Mrrouch, *MSF*, 13 July 2018, available at: <https://www.msf.org/%E2%80%9Cinsecurity-has-pushed-people-their-limits%E2%80%9D>.

22 "Five Things to Know About the Violence in North-West and South-West Cameroon", *MSF*, 23 May 2019, <https://www.msf.org/five-things-know-about-violence-cameroon>.

23 *Ibid.*

24 *Ibid.*

countries with laws of extraterritorial reach. In 2018, the Norwegian Refugee Council (NRC) published a report updating the findings of a 2013 publication with OCHA.²⁵ The first finding was that “counterterrorism measures limit organizations’ ability to implement programmes according to needs alone, and oblige them to avoid certain groups and areas”.²⁶ The report suggested that little had changed for the better in the previous five years. While the trend of increasing restrictions via donor country legislation is of great concern²⁷ and despite efforts, the trend does not seem to be improving,²⁸ and additional concerns are raised by the restrictions imposed by donors on humanitarian organizations via financial grants. Both responses, the increasingly strict conditions for funding and increasingly rigid counterterrorism legislation, are said to “run counter to the long-established humanitarian principles” and to risk “undermining the basis of the modern humanitarian system”.²⁹ As stated in the NRC report, the wording in grant agreements varies from general requirements of “reasonable efforts” to prevent the diversion of aid, to explicit requirements to vet staff and partners for links to those groups.³⁰

This section will explore how humanitarian groups may be forced today to screen the political nature of the people they assist and make aid conditional to such identification. This may challenge the principle of impartiality, according to which humanitarian assistance should be solely needs-driven. Moreover, new wording used by donors includes the mere “association” of civilians with armed groups designated as terrorists. As we shall see, humanitarians are forced to subjectively identify such links, an antipode of principled humanitarian action.

Donors require humanitarian non-governmental organization (NGOs) to demonstrate that they address the requirements of the donor states’ anti-terrorism legislation and avoid the diversion of aid to designated terrorist groups or other armed groups. For instance, the template for implementing partners by

25 Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, OCHA-Norwegian Refugee Council, July 2013, available at: <https://www.nrc.no/globalassets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf>.

26 Norwegian Refugee Council, *Principles under Pressure*, 2018, available at: https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/1nrc-principles_under_pressure-report-screen.pdf.

27 For instance, Australia’s counterterrorism legislation is seen as undermining humanitarian principles. See 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, No. 897/898, 2016, pp. 235–261.

28 The European Union (EU) adopted on 15 March 2017 the directive (EU) 2017/541 that compels Member States to criminalize acts defined as terrorist or terrorism-related offences. Recital 38 of the directive states that “[t]he provision of humanitarian activities by impartial humanitarian organizations recognized by international law, including international humanitarian law, do not fall within the scope of this Directive...”. However, this exemption of humanitarian activities was finally adopted as a consideration at the preamble, not as an article with a clearer and stronger obligation for Member States to adopt a similar legal exemption in their domestic legislation. Moreover, the phrase “impartial humanitarian organizations recognized by international law, including humanitarian law”, is applicable to the International Committee of the Red Cross (ICRC) and other international organizations founded on a treaty (such as UN agencies). But the situation for national or international NGOs such as MSF remains unclear.

29 P. Wynn-Pope *et al.*, above note 27, p. 242.

30 Norwegian Refugee Council, above note 26, p. 16.

the International Humanitarian Assistance Directorate (IHA) within the Canadian Government's Department of Foreign Affairs, Trade and Development (DFATD), requested, between 2014 and 2017, an analysis of the specific risks related to terrorism and operational measures to manage these risks.³¹ The template refers to the Canadian law defining a terrorist group as an entity listed in the Canadian official list of designated terrorist groups³² or "an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity".³³ In practice, this may mean that, in the likely scenario that a person or an armed group does not present themselves under a name included in the official list, the implementing partner has to subjectively discern their "terrorist" nature by analysing the type of activity conducted by the organization. The disjunctive conjunction "or" in the definition of terrorist group may also mean that the surveillance and precautionary measures requested by the donor are also applicable to a group that is not necessarily listed as terrorist. The authors are not aware of cases of rejection of funding, and the request to put operational measures in place to reduce the risk of diversion of funds can be seen as a positive development. But it is worth recalling that, in practice, the risk of negative unintended impact of humanitarian assistance in war settings is inherent and intrinsic, and cannot be completely eliminated. This risk includes deviation of aid, legitimization of leaders of armed groups or the opportunistic use of humanitarian action for political objectives, among others.³⁴ There is only one real way to fully guarantee no risk of negative unintended impact generated by the humanitarian presence and this is simply not to be present in such areas.

Associating civilians to designated terrorist groups

Certain donors require not only that humanitarian actors identify and avoid providing assistance to fighters, but also to people "associated" with fighters. This has been at least the practice of two major humanitarian actors: the U.S. Agency for International Development (USAID) and UNICEF. In its proposal guidelines for implementing partners, the Office of U.S. Foreign Disaster Assistance

31 Government of Canada, *International Humanitarian Assistance – Funding Application Guidelines for Non-Governmental Organizations*, 1 September 2017, available at: http://international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/guidelines-lignes_directrices.aspx?lang=eng#s32. Until 2014, the template included the section "3.4 Assumptions and Risk Mitigation Strategy", which comprised both the assumptions and the risk mitigation strategy. Between 2014 and 2017, the template included three sections with specific reference to terrorism: "Risk and Risk Management", with questions regarding terrorism; "Safety and Security Considerations"; and a dedicated section "(M) Anti-terrorism". From 2018 to date, the two last sections were removed, and only the section "Risk & Risk Management" remained. Templates from different years are on file with the authors.

32 See section 83.05 of the Canadian Criminal Code, available at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-14.html#docCont>.

33 See section 83.01 of the Canadian Criminal Code, available at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-13.html#docCont>.

34 Some examples can be found, for example, at Fiona Terry, *Condemned to Repeat. The Paradox of Humanitarian Action*, Cornell University Press, Ithaca, NY, 2002.

(OFDA), an organizational unit within USAID, reminded applicants of the prohibition on “transactions with, and provision of resources and support to, individuals and organizations associated with terrorism”, and added that “it is your legal responsibility to ensure compliance with these executive orders and laws”.³⁵ These provisions apply to any contract or memorandum of understanding between implementing organizations (in particular NGOs) and UN agencies funded by USAID, and in practice, there are no exceptions; the same goes for registration as a recipient of funds. There are references to exceptions in “food, medical care, micro-enterprise loans, shelter, etc. unless the Recipient has reason to believe that one or more of these beneficiaries commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts”.³⁶ But the degree of “association”, “facilitation” or “advocacy” depends on the subjective assessment of the observer.

The restrictions imposed by UNICEF were not new, but the enforcement, interpretation and impact of this clause could be. UNICEF’s “General Terms and Conditions for Programme Cooperation Agreements” stipulate in section 21 that cash, supplies and equipment “are not used to provide support to individuals or entities associated with terrorism”, among other requirements.³⁷ Interestingly enough, the text of this section almost verbatim coincides with paragraph 30 of the UNICEF Programme Cooperation Agreement used over a decade ago.³⁸ Humanitarian actors are likely not to have paid much attention to this clause in the past, but in the current context of pre-eminence of the counterterrorism agenda, the very existence of such a commitment is of concern.

Evidence that this clause could be more stringently applied than in the past is UNICEF’s decision to turn down USAID funding in Northern Nigeria.³⁹ An

35 USAID/OFDA, *Proposal Guidelines*, V.2, May 2018, available at: https://www.usaid.gov/sites/default/files/documents/1866/USAID-OFDA_Proposal_Guidelines_May_2018_1.pdf, p. 63.

36 USDA, *Certifications, Assurances, Representations, and Other Statements of the Recipient. A Mandatory Reference for ADS Chapter 303*, available at: <https://www.usaid.gov/sites/default/files/documents/1868/303mav.pdf>, p. 6.

37 The full section 21 (support to terrorism) is as follows: “IP agrees to apply the highest reasonable standard of diligence to ensure that cash, supplies and equipment under its control, including but not limited to cash, supplies and equipment transferred by UNICEF to IP: (a) are not used to provide support to individuals or entities associated with terrorism; (b) are not transferred by the IP to any individual or entity on the UN Security Council Committee Consolidated List available at http://www.un.org/sc/committees/consolidated_list.shtml; and (c) are not used, in the case of money, for the purpose of any payment to persons or entities, or for any import of goods, if such payment or import is prohibited by a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations.” UNICEF, *Programme Cooperation Agreement*, available at: https://www.unicef.org/about/partnerships/files/PCA_Final-English.docx.

38 See, for instance, UNICEF’s Programme cooperation agreement of 3 December 2009, on file with the authors.

39 Obi Anyadike, “Aid Workers Question USAID Counter-Terror Clause in Nigeria”, *The New Humanitarian*, 5 November 2019, <https://www.thenewhumanitarian.org/news-feature/2019/11/05/USAID-counter-terror-Nigeria-Boko-Haram>. According to USAID, UNICEF “did sign an agreement with the clause in September 2019. The new funding will support water, sanitation, and hygiene, nutrition, and protection efforts by UNICEF in Nigeria”. U.S. Department of Defense, U.S. Department of State and USAID, *East Africa and North and West Africa Counterterrorism Operations*,

alleged explanation for such a decision was a concern for the USAID's request to certify in writing that aid is not used to support terrorism, as the UN agency feared legal consequences after the experience of Oxfam in the Gaza Strip.⁴⁰ However, this prudence did not prevent friction between Nigerian officials and UNICEF, and Nigeria's military suspended the activities of the UN agency under the official accusation of harming Nigeria's counterterrorism efforts via "spurious and unconfirmed allegations" of human rights abuses by the military.⁴¹

Grant agreements can even go further than legislation by governments and donor agencies in the limits they impose on humanitarian action. For example, according to the USAID's "Lake Chad Basin" clause, prior to providing any assistance to certain people, the USAID's implementing partner must obtain written approval by the USAID Agreement Officer when it "affirmatively knows" that these include people formerly "affiliated" with JAS or ISWA such as "fighters, non-fighting members, individuals who may have been kidnapped by Boko Haram or ISIS-West Africa but held for periods greater than six months, and those under the control or acting on behalf of the same".⁴² According to USAID, "if an implementer has affirmative information in regarding a beneficiary's affiliation, the implementer is required to provide that information to USAID, which will decide if providing assistance to those in question would be consistent with U.S. law".⁴³ This provision places the implementing partners in a position of responsibility to subjectively designate people to be screened and to

Lead Inspector General Report to the United States Congress, available at: https://www.stateoig.gov/system/files/q1fy2020_leadig_ea_nw_africa_cto.pdf, p. 49.

- 40 Confidential interview with a source close to the case, 20 December 2019, on file with the authors. In February 2018, David Abrams of The Zionist Advocacy Center filed a lawsuit against Oxfam (*United States of America ex rel. TZAC, Inc. v. Oxfam a/k/a Oxfam GB*). In order to be eligible for funding, Oxfam had to execute certifications indicating that it had not provided material support or resources to designated terrorist persons or entities in the last 10 years. According to Abrams, Oxfam had received over \$53 million in USAID grant funds in recent years, but from 2013 to 2017, Oxfam sponsored a project in the Gaza Strip to promote agriculture in urban and suburban areas. He claimed that this project provided support and assistance to the Ministry of Agriculture and the Ministry of National Economy in Gaza. In those years Hamas governed the Gaza Strip, and Hamas was a designated Foreign Terrorist Organization as defined by the U.S. State Department. The lawsuit is available at: <https://www.docketbird.com/court-documents/ABC-v-DEF/COMPLAINT-against-OXFAM-a-k-a-OXFAM-GB-Document-filed-by-UNITED-STATE-OF-AMERICA-ex-rel-TZAC-Inc-Document-previously-filed-under-seal-in-envelope-1-and-unsealed-by-document-3/nysd-1:2018-cv-01500-00006>.
- 41 Sam Olukoya, "Nigeria Suspends UNICEF Work, Alleges 'Clandestine' Activity", *AP*, 14 December 2018, <https://apnews.com/c7b5ccc3e14b4f80a90bf10877b2c189>.
- 42 Abby Stoddard, Monica Czwarno and Lindsay Hamsik, *NGOS & Risk: Managing Uncertainty in Local-International Partnerships (Global Report)*, USAID, Interaction and Humanitarian Outcomes, March 2019, available at: <https://www.humanitarianoutcomes.org/publications/ngos-risk2-partnerships>, p. 10. In May 2020, USAID reviewed some of those restrictions as a response of pressure by some international non-governmental organizations, and amended two documents related to USAID's contract and certification process, the Anti-Terrorism Certification and the Standard Provision on Preventing Transactions with, or the Provision of Resources or Support to Sanctioned Groups and Individuals (Standard Provision). While problems associated with the clause persisted, "these changes will provide improved clarity and reasonable standards regarding grantees' obligations in all grant agreements going forward". Charity & Security Network, *USAID Revises Grantee Documents Relating to Anti-Terrorism Requirements*, 21 May 2020, available at: <https://charityandsecurity.org/false-claims-act-lawsuits/usa-id-revises-grantee-documents-relating-to-anti-terrorism-requirements/>.
- 43 U.S. Department of Defense, U.S. Department of State and USAID, above note 39, p. 49.

contribute to counterterrorism agendas.⁴⁴ Moreover, discriminating between these different categories established by USAID is not an easy task. Former fighters and members of armed groups cannot be expected to declare their previous affiliation or wear a uniform and other individuals' testimonies will inevitably be biased in a context of violence.⁴⁵ Furthermore, civilians are often coerced to obey armed groups and behave according to the norms imposed. Many people fleeing the territories where JAS or ISWA are active have suffered the consequences of war for years with no access to basic humanitarian assistance, and many have an extremely poor medical situation. However, these new arrivals may be identified firstly as potential supporters of the insurgency and not as people in desperate need. In the case of unaccompanied women from rural areas, for instance, rather than being screened for humanitarian needs as a consequence of sexual violence, abduction or forced marriage and offered health and protection assistance accordingly, they are "often questioned and in some cases detained if they could not prove that they were not affiliated by marriage with members of JAS".⁴⁶

These examples demonstrate that, in certain contexts, humanitarians have been somehow asked to subjectively identify (and avoid assisting) people who others determine are "associated" with an "enemy" armed group. However, state authorities have also resorted to other, subtler ways to instrumentalize humanitarian action in the general strategy of fighting the enemy, as we shall see in the next section.

Detention, political screening and dispossession of the right of assistance

In certain locations, humanitarian actors do not need to identify people associated with designated terrorist groups because the government and military officials have previously done a screening process and separated those who are permitted to reach the humanitarians. This entails discrimination in humanitarian assistance contrary to the IHL aspiration for the provision of assistance to be based solely on needs,⁴⁷ as notably exemplified in Northern Nigeria and Mosul (Iraq).

In Northern Nigeria, as witnessed by MSF, no humanitarian organization can have prior contact with internally displaced people in certain zones until they are searched and screened by the Civilian Joint Task Force (a loose vigilante

44 According to USAID, in the two years (presumably 2018 and 2019) that the clause has been included in agreements, "implementers have not reported to USAID any significant impact from the clause. Over this period, USAID has received only two requests to provide humanitarian assistance to groups or individuals known to be formerly affiliated with Boko Haram or ISIS-West Africa, and both have been approved." U.S. Department of Defense, U.S. Department of State and USAID, above note 39, p. 49.

45 The Civilian Joint Task Force or the military can even look for someone from the same villages of the new arrivals to testify that they are not JAS members. MSF internal report, August 2017, pp. 14–15.

46 Joe Read, "Sexual Violence and the Boko Haram Crisis in North-East Nigeria", in Humanitarian Practice Network at the Overseas Development Institute (HPN-ODI), "Special Feature. The Lake Chad Basin: An Overlooked Crisis?", *Humanitarian Exchange*, No. 70, October 2017, available at: <https://www.alnap.org/system/files/content/resource/files/main/he-70-web.pdf>, p. 26.

47 AP I, Arts 10, 11 and 70; AP II, Arts 7.2, 9.2 and 18.2; rule 55 of customary IHL.

group formed by militants to fight JAS) or the military at checkpoints or in the barracks. This has included women and children as young as 9 years old. Some new arrivals never reach humanitarian organizations' services, in particular people with war wounds, frequent in this type of war setting. In fact, in certain places, MSF has never received any wounded member of armed groups in its medical structures, while the organization has received wounded soldiers on several occasions. This is very uncommon in armed conflict-affected areas that MSF is used to. This is probably because men, including wounded men, as well as women and children in certain places, are systematically taken for interrogation and held in conditions of detention and interrogation, that in both Nigeria and Cameroon have been described as "harsh" by Amnesty International.⁴⁸ Researcher Chitra Nagarajan has found that harm to civilians produced by the counterterrorism operations and practices of the Nigerian army stems, at least, from five main sources:⁴⁹ the lack of proper distinction between fighters and civilians who are perceived by some as part of the "enemy", the use of schools and hospitals by the military, "restrictions on the movement of food and goods, designed to deprive the enemy of essential supplies", "widespread sexual exploitation and abuse" by the military and "mistrust and suspicion between the military and civilians". However, the crisis had been labelled as "nutritional", diverting attention away from the consequences of counterterrorism measures.⁵⁰ Even for people who can receive humanitarian assistance, the conditions that these measures allow for significantly differ from what they need.⁵¹

In Iraq, civilians fleeing Mosul because of the United States-supported Iraqi military offensive to retake the city from ISIS in 2016–2017 had to pass through screening and mustering processes by pro-government forces before accessing humanitarian assistance, in particular, "all males above 12 years of age".⁵² This, along with the fact that the UN's World Health Organization (WHO)-led humanitarian response was closely coordinated with the Iraqi government (a party to the armed conflict), reduced operational independence and impartiality for some humanitarian actors in the context. Humanitarian principles and medical ethics were also affected by the widespread presence of

48 Amnesty International, *Amnesty International Report 2017/18: The State of the World's Human Rights*, available at: https://www.amnesty.ie/wp-content/uploads/2018/02/AIR201718_English_2018_EMBARGOED-22-FEB.pdf, p. 282.

49 Chitra Nagarajan, "Integrating Civilian Protection into Nigerian Military Policy and Practice", in HPN-ODI, above note 46, p. 23.

50 Virginie Roiron, "A Square Peg in a Round Hole: The Politics of Disaster Management in North-Eastern Nigeria", in HPN-ODI, above note 46, p. 14.

51 People from rural areas are gathered and deposited "in military-controlled enclaves, where movement restrictions make them entirely dependent on aid". There are restrictions on movement in camps with limited access to basic services, forcing displaced civilians living in extreme poverty to adopt demeaning coping strategies. Natalie Roberts, "Raising the Alert in Borno State, North-Eastern Nigeria", in HPN-ODI, above note 46, p. 20. The standards of humanitarian assistance within the camps for displaced people must be urgently enhanced – it is not a problem of funding. See L. Eguiluz, above note 15.

52 UNHCR, *Iraq: Bi-weekly Protection Update (22 January - 4 February 2018)*, 4 February 2018, available at: <https://reliefweb.int/report/iraq/iraq-bi-weekly-protection-update-22-january-4-february-2018>.

various forms of military and private security at medical facilities. The WHO subcontracted its emergency health programme to these militarized hospitals, including screening.⁵³ Humanitarian workers interviewed by the organization Humanitarian Outcomes talked about patients who were afraid to be referred to an NGO-run hospital associated with the United States; or caretakers unable to enter because of the presence of military personnel and the security screening procedures; and patient information being handed over to military actors.⁵⁴ The battle for Mosul had a terrible impact on civilians.⁵⁵ By embedding humanitarian organizations with the Iraqi military, it has been argued that the principle of humanity (the imperative to save lives) “was consciously given precedence” over the principles of impartiality, neutrality and independence.⁵⁶ However, reputed journalist Robert Fisk challenged this logic with a hypothetical parallel that unveiled politics rather than a humanitarian imperative behind these practices: “Would, for example, the WHO have funded Russian medical posts to be embedded with Syrian army units on the front lines of east Aleppo? They did not do so. But no one questioned the decision to make the same political compromise in Iraq.”⁵⁷

As already stated, discrimination in humanitarian assistance must be based solely on needs, and IHL is clear when recalling the obligation of the parties to the conflict to collect and care for the wounded and sick.⁵⁸ However, research by the Johns Hopkins Center for Humanitarian Health stated that: “the U.S. and its coalition partners have never accepted direct responsibility for the medical care of all civilians during wars in Afghanistan or Iraq”, and in fact conditioned this care to eligibility criteria that “are not triage rules; they are pre-triage rules based not on medical need, but on patient identity”.⁵⁹ This identity-based screening has affected both medical ethics and humanitarian aid, dispossessing people in need of their right to assistance.

53 See MSF’s Jonathan Whittall’s testimony at: Robert Fisk, “Why are Doctors in the Middle East Cosying up to Foreign Armies?”, *The Independent*, 15 January 2018, available at: <https://www.independent.co.uk/voices/iraq-mosul-doctors-medicins-sans-frontieres-usa-army-humanitarian-a8160306.html>.

54 Hosanna Fox, Abby Stoddard, Adele Harmer and J. Davidoff, *Emergency Trauma Response to the Mosul Offensive, 2016–2017: A Review of Issues and Challenges*, March 2018, available at: https://www.humanitarianoutcomes.org/Emergency_Trauma_Response, p. 27.

55 See testimonies of MSF staff and patients at: “Rebuilding Lives Shattered by War: Testimonies from MSF’s Hamdaniya Hospital in Iraq”, 4 May 2017, *MSF*, available at: <https://www.doctorswithoutborders.ca/article/rebuilding-lives-shattered-war-testimonies-msfs-hamdaniya-hospital-iraq>.

56 Paul B. Spiegel, *et al.*, *The Mosul Trauma Response. A Case Study*, Johns Hopkins Center for Humanitarian Health, February 2018, available at: http://www.hopkinshumanitarianhealth.org/assets/documents/Mosul_Report_FINAL_Feb_14_2018.pdf, pp. 24–25.

57 R. Fisk, above note 53.

58 Numerous references include Arts 12 and 15 of GC I, Arts 12 and 18 of GC II, Art. 16 of GC IV, common Article 3 and rule 110 of customary IHL.

59 This research has also stated that “this posture is based on a claim of scarce resources, resources that would be overwhelmed by the numbers of civilians needing care, resources that first and foremost must attend to wounded soldiers”. P. B. Spiegel *et al.*, above note 56, p. 27.

Conclusion

While the main access limitation for MSF teams in contexts associated with counterterrorism is the insecurity posed by armed groups, in many regions governments and military actors have blocked, restricted, made conditional or undermined humanitarian action. The official arguments used have often highlighted military reasons and security risks, and humanitarians certainly perceive certain areas as unreachable due to insecurity. However, other areas have been designated as off-limits despite the MSF's readiness to respond to dire situations driven by the humanitarian imperative and medical ethics. The perception exists among people consulted that the reasons for such limitations may also include preventing a foreign actor from observing what is happening and denying any potential benefit to not only armed groups but also any person or community associated with them. In either case, in contexts where armed groups are tagged as terrorists and the general population is perceived as part of the enemy, the imposition of armed escorts by the military represents an added constraint for the acceptance of principled humanitarian action.

In certain contexts associated with counterterrorism, some governments and military forces have stigmatized civilians, not because of the acts that they perform but rather from loose associations with groups perceived as "terrorists", based on geographical proximity or common social, ethnic and religious backgrounds. Humanitarian assistance has been affected by this stigmatization, and certain donors require not only that humanitarian actors identify and avoid assisting fighters, but also people "associated" with them. While they insist that their requirements are compatible with principled humanitarian assistance and that no negative operational impact has been demonstrated, for many in the humanitarian sector it looks obvious that counterterrorism measures limit the organizations' ability to implement programmes according to needs alone and risk undermining the very basis of humanitarian action. There is a clear inherent conflict in trying to reconcile humanitarian action that does not discriminate against people with counterterrorism action that consists, precisely, in singling them out.

Humanitarian actors risk being engulfed in securitization and counterterrorism strategies. In certain contexts, the identity of people is routinely screened and humanitarian assistance is restricted to them for no ostensible reason other than where they are or who they are perceived to be associated with. Humanitarians have also been somehow asked to subjectively identify (and avoid assisting) people who others determine are "associated" with the enemy. This is an antipode of principled humanitarian action.

The association of civilians with designated terrorists has been part of the political and military rhetoric for a long time, yet more sinisterly this discourse has also been incorporated into both the theory and practice that govern counterterrorism operations and humanitarian assistance during armed conflicts. Armed groups perceived as "terrorists" are not political subjects anymore; they

are now devoid of any rights including access to humanitarian assistance. Likewise, civilians coexisting in areas where these groups operate are not considered as people in need but rather as potential bases of support of these groups, and thus deemed by default as suspicious and guilty until proven innocent and with little interest by the parties of proving it. It is simply guilt by association. Just being born and living on the land of the enemy is deemed a sign of potential support to terrorism. In practice, the vast majority of international actors, including the humanitarian sector, have decided not to confront this logic of counterterrorism that potentially stigmatizes and demonizes people and jeopardizes their access to humanitarian assistance. The plight of people trapped in distress and their needs and rights should not be subordinated to counterterrorism laws, policies, practices and narratives. Nothing justifies terrorism. Nothing justifies hurting humanity in the name of counterterrorism.