Non-Paper: HUMANITARIAN POLICY ISSUES RELEVANT TO OPERATING IN COMPLEX AND HIGH-THREAT ENVIRONMENTS

This non-paper is intended to inform discussions on UNICEF’s humanitarian action and programming in complex and high threat environments. Its aim is not to make any recommendations or set policy positions, but rather to provide basic information about the policy and institutional developments of which managers in UNICEF who work in such settings ought to be aware. The paper has been developed by EMOPS/HPS in collaboration with other relevant divisions and benefited from comments of participants at the MENA-ROSA meeting on Operating in High Risk Environments (2010). It has been updated in January 2014.

1. INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL HUMAN RIGHTS LAW, HUMANITARIAN PRINCIPLES AND HUMANITARIAN SPACE

A. INTERNATIONAL HUMANITARIAN LAW (IHL)

IHL consists of the Hague Conventions, the Geneva Conventions and their Additional Protocols, as well as subsequent treaties, case law, and customary international humanitarian law. A good way to think of IHL and its purpose is as a set of rules to organize the battle space and to help balance military necessity in armed conflict with the protection of civilians. It prescribes the conduct and responsibilities of belligerent parties, neutral parties, as well as individuals involved in armed conflict, in relation to each other and to protected persons (usually meaning civilians). IHL defines both the positive rights of high contracting powers (signatory states) as well as proscriptions of their conduct when dealing with irregular forces and non-signatories. EMOPS is working to strengthen UNICEF’s capacity to consistently use IHL as a basis and reference in our advocacy efforts.

B. APPLICATION OF IHL

IHL applies only in situations of “armed conflict,” occurring across national borders (“international armed conflict”) or within national borders (“non-international armed conflict”), or in situations involving both international and non-international armed conflicts.

An international armed conflict exists only when there is a resort to armed force between States. Thus, to trigger the application of IHL during an international armed conflict, there must be (1) organized armed forces of at least two States (2) engaging in violence across State borders.

A non-international armed conflict exists only when there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” Control of a portion of the territory by a non-state armed group is not required to trigger the application of IHL, but would certainly be strong evidence for its application. Territorial control is normally a required element for a non-international armed conflict in the application of the 1977 Additional Protocol II, but not for the application of Common Article 3 to the Geneva Conventions. Thus, territorial control by non-state armed groups will often distinguish a situation where only common Article 3 of the Geneva Conventions applies and one where both common Article 3 and the 1977 Additional Protocol II apply.

C. INTERNATIONAL HUMAN RIGHTS LAW (IHRL)

IHRL is the dominant body of international law in the absence of armed conflict and plays an important (and complimentary role to IHL) during emergencies (including armed conflict). IHRL consists of several international
treaties, including the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It also consists of substantial case law, specialized committee reports, observations, and (general and specific) recommendations regarding States’ obligations to respect, protect, and fulfil individual human rights.

Also relevant during emergencies is international refugee law, including the 1951 Convention on the Status of Refugees and subsequent treaties.

D. HUMANITARIAN PRINCIPLES

They guide and define humanitarian action. For the UN, principles of humanitarian assistance (humanity, impartiality, neutrality) are recognized in GA Res 46/182. These humanitarian principles are not derived directly from IHL, but there is an evolutionary as well as a functional link between the former and the latter. IHL assigns roles and provides special protections to, but does not define, humanitarian relief personnel during armed conflict. This means organisations that are mandated to deliver humanitarian assistance whenever necessary (including armed conflict) must adhere to humanitarian principles in practice. In turn, the adherence to normative principles affirms organizations’ “humanitarian” status and subsequent protections. Thus, UNICEF’s privileged position and, in turn, its duty to adhere to humanitarian principles in emergencies is partially based in IHL.

As a humanitarian assistance programme of the UN, UNICEF is also bound by GA Res. 46/182, which states humanitarian assistance principles but does not define them. UNICEF reaffirms and defines the humanitarian principles in the Core Commitments for Children in Humanitarian Action. For example, neutrality is defined as “a commitment not to take sides in hostilities and to refrain from engaging in controversies of a political, racial, religious or ideological nature”. While neutrality may not always be feasible and may sometimes create tension with UNICEF’s mandate to protect children’s rights, the principle must nevertheless be a key part of any UNICEF risk-management strategy in humanitarian action.

Neutrality is separate from impartiality which means ensuring that assistance is delivered to all those who are suffering, based only on their needs and rights, equally and without any form of discrimination. In terms of the CRC, impartiality relates most closely to non-discrimination.

In general, adhering to humanitarian principles has been vitally important for UNICEF to deliver on its mandate for humanitarian assistance. EMOPS is working to integrate humanitarian principles into risk management so that the principles can be used as a tool to achieve UNICEF’s mandate for humanitarian assistance.

Nevertheless, adhering to humanitarian principles, and specifically maintaining UNICEF’s neutrality in humanitarian action (i.e. a commitment not to take sides in hostilities and to refrain from engaging in controversies of a political, racial, religious or ideological nature), may be difficult. For example, children and adolescents have the right to access information to promote their physical and mental health. This right guarantees access to sexual and reproductive health-related information, including family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention of sexually transmitted diseases “regardless of their marital status and whether their parents or guardians consent.” The Committee on the Elimination of Discrimination Against Women (CEDAW) has specifically called on all states to ensure access to sexual and reproductive health education, to both female and male adolescents, by “properly trained personnel in specifically designed programmes that respect their right to privacy and confidentiality.” However, in country/cultural contexts where such universally-derived rights are not legally recognized or politically accepted, it may be difficult for UNICEF in some emergency situations to balance its

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1 Perhaps ICRC is the only organization that is defined inherently as a humanitarian organization
2 Definition in the CCCs is drawn from the IFCR Code of Conduct
advocacy in favour of global norms and human rights with its neutrality in country-specific contexts. This tension may result in UNICEF exercising self-restraint in some circumstances on programme approaches and advocacy in an effort to adhere to the principle of neutrality in humanitarian action.

UNICEF’s stance as a neutral and impartial actor can also be in tension with our commitment to work on capacity development in humanitarian action as well as our commitment to promote an early recovery approach during the response to crises. This is particularly true when working on conflict environments, where UNICEF is at times pressed to help build capacity of national actors who are still involved in the conflict. It is important to balance strategies in such situations through engagement with a broad set of national stakeholders in particular civil society and community-based organizations. To ensure a balanced approach that preserves neutrality and impartiality, a sound and recently updated conflict analysis is needed.

**E. OTHER PRINCIPLES GUIDING UNICEF’S HUMANITARIAN ACTION**

Humanitarian action is also generally guided by other principles which are not rooted in GA resolutions, but rather have evolved through practice and consensus within the humanitarian community. Many of these are based on other frameworks, such as the human-rights based approach to programming. These include:

**Operational Independence**: The General Assembly recognizes that “independence, meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented, is also an important guiding principle for the provision of humanitarian assistance” (GA Res 59/141 2005). Humanitarian agencies should not agree to any constraints/restrictions / conditionality imposed on the humanitarian basis of its operations, by any actor. Humanitarian agencies retain freedom of choice of implementing partner and of staffing/recruiting decisions, with the caveat that partners also need to be humanitarian. Thus this is unlikely to conflict with proscription by the UN Security Council, although it is possible (this issue will be discussed later).

**Participation**: Humanitarian agencies strive to engage directly, to the greatest extent possible, with those whom it seeks to assist to facilitate their participation in decision-making regarding provision of assistance and protection that affect them.

**Accountability**: UN humanitarian agencies are accountable for their actions first and foremost to those whom they seek to assist, to the United Nations General Assembly from which humanitarian agencies derive their mandate, and finally, to the donors who support their activities. Humanitarian agencies effectively monitor and report on their programme implementation and effectiveness using evidence-based approaches. UNICEF is also accountable to its Executive Board and donors in accordance with specific donor agreements.

**Transparency**: Humanitarian agencies undertake humanitarian negotiations in a transparent manner, with honesty, openness and clarity about the purposes and objectives of the negotiations.

**Do no harm**: Humanitarian agencies work to ensure that humanitarian action does not inadvertently cause harm, for example, by exposing beneficiaries to violence or discrimination, or by exposing intermediaries or humanitarian implementing partners to security risks, etc.

**Respect for culture and custom** - Humanitarian agencies strive to understand local customs and traditions to ensure that humanitarian work can be conducted with respect for local values to the extent that they do not conflict with internationally recognized human rights.
F. CIVIL-MILITARY COORDINATION

Engaging military support in humanitarian action is not a new endeavour. In today’s security environment, however, it seems that the military are ever more involved in the “direct” provision of aid, while humanitarian actors are often faced with situations where they have no alternatives but to rely on the military, as a last resort, for safety and access to populations in need. Of course, this may lead to the serious risk of compromising humanitarian actors’ neutrality, impartiality, independence, and thus their ability and/or credibility to operate.

Combined with the trends toward “integration” and “whole-of-government” approaches, as well as the greater propensity of some Governments to deploy mixed civilian-military teams to provide aid in counter-insurgency warfare, the situation calls for enhanced understandings between the military and humanitarian professionals at all levels.

In theory, the nature of civil-military coordination differs whether it occurs in the context of natural disasters or conflict. In reality, the lines are not so clear, especially given that the natural disasters to which UNICEF responds often occur in contexts of chronic fragility and/or conflict. Where a state exists with capabilities to fulfill its obligations as a duty bearer to affected populations, its military often plays a key role in delivering relief. In such contexts, humanitarian agencies will have to work closely with armed forces, and will often be highly dependent on the use of the military’s logistical resources. However, when responding to either a natural disaster taking place amidst a complex emergency and/or in contexts of armed conflict, humanitarian action must be delivered in a manner that clearly distinguishes it from armed forces. Central questions for policy makers and programmes alike are:

- How can a clear distinction between combatants and non-combatants be maintained and humanitarian-operating space be preserved?
- How can humanitarianism be shielded from being abused as a justification for military action?
- What information should/should not be shared between the military and the humanitarians?
- How do civil-military relations affect the perception, safety and security of humanitarian staff?
- How can we ensure that humanitarian action is not instrumentalized for political or security objectives?

For UNICEF, interaction with armed forces is more than coordination; UNICEF has a history of strong engagement with armed forces in order to strengthen protection of civilians in armed conflict. UNICEF engages with armed forces on several issues, including humanitarian access, child recruitment, child detention, explosive remnants of war education, sexual violence and exploitation, as well as safe schools and hospitals.

UNICEF works towards maintaining its real and perceived neutrality (in other words, one armed force is not a preferred partner as such) at the same time as it works with armed forces in order to advocate for protection. These objectives may be mutually supportive. For example, in the case of Operation Lifeline Sudan, the agreements with rebel movements regulating humanitarian assistance included provisions for demobilizing child soldiers.

Use of humanitarian language and posture

In all civil-military interaction at all levels, it is important to utilize humanitarian language only in civilian relief efforts delivered in accordance with humanitarian principles. In other words, we ought to clearly differentiate between counter-insurgency and/or “hearts-and-minds” motivated relief activities and humanitarian assistance which is being delivered in accordance with humanitarian principles (humanity, neutrality, and impartiality). Although armed forces are increasingly engaged in delivering relief, it is difficult to conceive of circumstances where they would qualify as humanitarian.
Upstream work

In those areas where the military might be responsible for human rights and child rights violations, and in order to strengthen the respect for humanitarian norms and protection of civilians, there is a need to use civil-military coordination and engagement as an entry point to influence armed forces’ policies and doctrines. This means that UNICEF and partners should work with armed forces not only in situations of armed conflict but also in those not suffering from it, to capitalize on opportunities to produce long-term changes through advocacy, training, and other capacity development support. At the global level as well, UNICEF contributes to the development of normative frameworks. One example is the so-called Paris Principles and Guidance on Children Associated with Armed Forces or Armed Groups. To make sense of this normative work, OCHA has developed the concept of de-confliction, meaning that despite the need to differentiate humanitarian action from military action, humanitarian agencies engage with armed forces and groups in conflict-prone areas to explain how humanitarian agencies operate and to share upstream planning assumptions so as to avoid the risk of entanglement between military and humanitarian actors in the field. At this normative and upstream level, UNICEF would also justify engagement with military forces around the protection-of-civilians agenda. Working through the UN-wide coordination framework on Security Sector Reform, UNICEF aims to shape UN and bilateral programmes that train or otherwise capacitate host countries security forces to ensure that curriculum includes knowledge about child and women rights and procedures that ensure their respect and enforcement. In a few countries, UN missions (peacekeeping or others) have strong mandates to support security forces and there is a growing recognition for the need to “condition” this support on respect for human rights and progress in the protection of civilians. UNICEF also advocated quite strongly in favor of the SG’s Human Rights Due Diligence Policy in 2011. This policy links UN support to non-UN security institutions to a review of their human rights records and promotes preventative and remedial action.1

Level of coordination and collaboration

There will always be questions about what the appropriate nature and extent of civil military coordination is for any given context. Failure to find this “right” level when operating both in natural disasters and in complex emergencies may create other risks. The IASC Guidelines on civil-military coordination use this figure to illustrate the appropriate use of military assistance and levels of coordination. In making this careful calculation, it is important to weigh the benefits of engaging with the military in terms of outcomes for children, against the risks posed to the principles of neutrality and impartiality.

G. HUMANITARIAN SPACE

There is also a continuing debate on the issue of humanitarian space. This is not a legal term, but is used to refer to the broad ability of humanitarian actors to implement their mandates in accordance with humanitarian principles, and the ability of beneficiaries to receive humanitarian assistance in safety and dignity. Note that humanitarian space relates to “how” aid is delivered and not simply the fact that it is delivered. On the other hand, humanitarian access is firmly rooted in IHL and should be provided by all parties in accordance with international law and custom. In other words, one thing is to be able to deliver relief; another is to have the required space to deliver aid in a principled manner.

1 See UNICEF Non Paper on Protection of Civilians
2. NATIONAL, REGIONAL AND UN LISTS OF “PROSCRIBED GROUPS, ENTITIES AND INDIVIDUALS”

The UN and Member States maintain various lists of entities and/or individuals seen as either associated with particular groups, in violation of specific embargo regimes, or designated as terrorists⁴. Countries and regional organizations who maintain lists of designated “terrorist organizations” (title varies) include: Australia, Austria, Belgium, Canada, Denmark, the EU, the Netherlands, Norway, Qatar, Saudi Arabia, UK, US, and Russia. Many countries have specifically declared one or more of their armed opposition groups as terrorist groups within their national legislation. These countries include China, Egypt, India, Iran, Myanmar, the Philippines, Tunisia and Turkey. This list is not exclusive.

These lists do not directly apply to (i.e. restrict the work of) UN organizations, although they may impact our work to some extent (see following section), especially in the wake of the US Supreme Court ruling Holder v. Humanitarian Law Project (more below), which broadly prohibits interaction with listed foreign terrorist organisations. Although humanitarian assistance is often explicitly “protected” by exceptions, in the case of the US, the Government has linked its list with parameters for making funding decisions, via the Office of Foreign Assets Control (OFAC).

In the case of the UN, the listing/designation of entities and/or individuals is linked to a specific sanction regime. There is no direct cross-feed from one regime to another. The responsibility for enforcing the specific measures encompassed in a given sanctions regime upon the entities/individuals concerned rests with Member States. International Organizations, including UN agencies, funds and programmes, are not directly held accountable for enforcing sanctions against individuals⁵.

This section will briefly describe the most relevant mechanisms whereby lists of “proscribed groups, entities and individuals” are established and monitored. The following section (section 3) will discuss implications of these listings and designations for humanitarian organizations and humanitarian assistance.

A. UNITED STATES OF AMERICA

Foreign Terrorist Organization (“FTO”) is a designation of non-United States-based organizations declared terrorist by the United States Department of State. According to this designation, it is unlawful for a person in the United States or subject to the jurisdiction of the United States to knowingly provide "material support or resources" to a designated FTO. Interestingly training is also considered a form of material support. For these purposes “the term ‘training’ means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.” In most of the cases

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⁴ Definitions of this term vary, as will be pointed out in the text. Various legal systems and government agencies use different definitions of “terrorism”. United Nations General Assembly

⁵ In a few cases, UN peacekeeping operations, through interactions between Expert Panels and Security Council members reviewing the mandate of a specific PKO, have been tasked with preventing some of the illicit activities targeted by parallel sanctions regimes.

In the DRC, for example, MONUC was tasked with patrolling more specifically areas where illicit trade and resource extracting activities were reported. Note however that MONUC was not tasked with enforcing the embargo itself.
there is an exception on these sanctions for medicine, provision of medical care and religious materials.

**Specially Designated Global Terrorist (SDGT) and Specially Designated Nationals (SDN) List**

Office of Foreign Assets Control - US Treasury Department. The Treasury Department’s Office of Foreign Assets Control (OFAC) also administers sanctions programs on certain entities and individuals involving terrorism, Libya, Iraq, certain targets in the Western Balkans, Cuba, North Korea, Iran, Syria, Sudan, Somalia, diamond trading, highly enriched uranium, designated international Narcotics Traffickers, proliferation of weapons of mass destruction, and Myanmar.

**B. EUROPEAN UNION**

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. The EU first adopted restrictive measures against persons and entities involved in terrorism in December 2001, in the wake of the terrorist attacks on 11 September that year. Those persons and entities which are on the list provided for in Regulation (EC) No 2580/2001 are subject to an asset freeze implemented by the European Community.

This EU autonomous regime is different from the EU regime implementing UN Security Council Resolutions 1267 (1999) and 1390 (2002) on the freezing of funds of persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (Council Regulation (EC No 881/2002: ‘EU/UN regime’).

Other than counter-terrorism, the EC has put in place restrictive measures on numerous entities and persons based on the Treaty on the Functioning of the European Union (TFEU) and revises the list frequently. Most updated list of EU sanctions can be found through this link: [http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf)

**C. UNITED NATIONS SANCTIONS**

The UN Security Council (UNSC) imposes sanctions to enforce international law. Much of the practice evolved from 1990-onwards, when the UNSC imposed sweeping sanctions against Iraq.

Each sanctions regime within the Council has its own sanctions committee.

Major controversy has arisen over sanctions that directly name individuals and companies\(^6\). While they are considered positively for being well-targeted, these sanctions have several major problems, including the lack of due process for listed persons. Individuals who have been listed often complain about the lack of mechanism to appeal a listing. Therefore, on 17 December 2009, the UN Security Council adopted Resolution 1904 in which it authorizes the establishment of an ombudsperson. Individuals and entities seeking a de-listing will therefore be able to present their cases to an independent and impartial officer. Another often cited problem with targeted sanctions is lack of regular updating. For example, in December 2009, the media reported that at least forty-two dead persons and sixty-

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\(^6\) Note that the consequences of being listed varies from one sanction regime to another depending on the measures associated with a given sanction. In most cases, listed individuals are subject to an asset freeze and travel ban.
nine defunct companies are among the 500 names on the UN's list of alleged al-Qaeda and Taliban supporters.

Given the importance of Al-Qaïda and Taliban sanctions regime we cover it in this part. For more information regarding sanctions on other countries please refer to Annex 1.

**Al-Qaïda and the Taliban and Associated Individuals and Entities**

The UN Security Council (UNSC) first imposed sanctions on Afghanistan in October 1999 with Resolution 1267, to force the Taliban *de facto* government to hand over Osama bin Laden to the "appropriate authorities." The Security Council Committee (SCC) established pursuant to resolution 1267 (1999) October 1999 is also known as "the Al-Qaïda and Taliban Sanctions Committee".

In December 2000, after strong pressure from the United States and Russia, the Council strengthened the sanctions. The new sanctions were imposed despite an August 2000 report from the UN Office for the Coordination of Humanitarian Affairs (OCHA), which highlighted the "tangible negative effect" of the existing sanctions on Afghanistan's populace. The sanctions regime has been modified and strengthened by subsequent resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1661 (2005), 1735 (2006) 1822 (2008), 1904 (2009), 1989 (2011) and resolution 2083 (2012).

The above-mentioned resolutions have all been adopted under Chapter VII of the United Nations Charter and require all States to take the following measures in connection with any individual or entity associated with Al-Qaïda and/or the Taliban as designated by the Committee:

- Freeze without delay the funds and other financial assets or economic resources, including funds derived from property owned or controlled directly or indirectly
- Prevent the entry into or the transit through their territories
- Prevent the direct or indirect supply, sale, or transfer of arms and related material, including military and paramilitary equipment, technical advice, assistance or training related to military activities, with regard to the individuals, groups, undertakings and entities placed on the Consolidated List.

The Committee, under its mandate, has established and maintains a list of names of individuals and entities associated with the Al-Qaïda organization. The List, often referred to as the “UN terrorist list,” currently contains about 500 names 7 and is split into four sections covering: (1) individuals or (2) entities associated with the Taliban; and (3) individuals or (4) entities associated with Al-Qaïda. The Consolidated List serves as the foundation for the implementation and enforcement of sanctions against Al-Qaïda and its associates. The Committee is continuously seeking to improve the information on the Consolidated List to ensure that the sanctions measures can be enforced.

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7 In terms of how the list is updated: In resolution 1822 (2008), Security Council encouraged Member States to submit names for inclusion on the Consolidated List as well as additional identifying and other information, along with supporting documentation, on the listed individuals and entities, including updates on assets frozen and the operating status of listed entities, groups and undertakings, the movement, incarceration or death of listed individuals and other significant events, as such information becomes available. The Committee also considers relevant information for updating the Consolidated List submitted by international or regional organizations either directly to the Committee or through the Monitoring Team

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UNICEF regularly checks its list of contractors and partners against this list of hundreds of individuals, many of whom have ties to countries in the MENA and ROSA regions, and to other countries, including Somalia.

3. THE IMPLICATIONS OF NATIONAL, REGIONAL AND UN LISTS OF “PROSCRIBED GROUPS, ENTITIES AND INDIVIDUALS” ON HUMANITARIAN ACTION

According to the UN World Conference on Anti-Terrorism (2005): “States must ensure that any measure taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.”

Thus, States are responsible to ensure that their commitments under international law are not contradicted by national legislation adopted in their counter-terrorism efforts.

Nonetheless, legislation in the United States stipulates that any entity or individual suspected of “supporting” designated terrorist entities are liable for prosecution for their activities. Other states’ laws also place similar burdens on individuals or groups who are suspected of supporting listed terrorist groups or individuals.

While these so-called “terrorist lists” are not well-understood for their implications on humanitarian work by humanitarian actors and others, the Center for Humanitarian Dialogue, based on numerous interviews, has listed common fears cited by humanitarian actors with regards to terrorist lists. These include: (1) prosecution of staff members for contact with listed individuals or groups; (2) inclusion of a humanitarian organization on a terrorist list due to contacts with those already listed; (3) adverse media coverage; (4) damaged reputation; (5) contraction of humanitarian space; (6) reduced scope for advocacy work; (7) constraints on funding. The brief sections below aim at providing facts on how the “lists” do or may impact humanitarian action.

**Provision of Humanitarian Assistance to areas under the influence of “proscribed” groups:** Given that humanitarian assistance is guided by the principles of neutrality, impartiality and humanity, and that under the principle of operational independence, humanitarian agencies should strive to remain free of constraints, restrictions, or (pre-)conditionality imposed by any actor on the humanitarian bases of their operations, there is principled grounds for UNICEF to advocate for the removal of restraints placed on it to deliver assistance to anyone who meets its criteria to receive assistance.

**Humanitarian negotiations:** Generally-speaking, anti-terrorism and sanctions regimes are silent on the issue of humanitarian dialogue with non-state entities, whether they are “listed” or not. The responsibility for enforcing the measures imposed on “listed” individuals/entities is incumbent upon member states themselves and not upon international organizations. Thus, there is no clear statement that the terrorist-designation of an individual, organization or state restricts UNICEF’s ability to engage with the latter for the purpose of securing humanitarian access. Since the dynamics of an armed conflict involving “listed” individuals or entities is likely to result in humanitarian access constraints, creating a tension with the principle of operational independence, UNICEF should not be precluded from being equipped with a reliable strategy to negotiate unimpeded access with all parties to a conflict to fulfil its mandate, including those listed as terrorist groups or individuals.

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Contracting (general): Anti-terrorism and sanctions regimes are mainly concerned with freezing assets of “listed” individuals and organizations in specific countries and banning their travel. In many cases, humanitarian assistance to areas/countries controlled by listed entities is explicitly exempted from sanctions (still, the absence of an explicit legal exemption does not mean humanitarian assistance is not exempted as a matter of policy; although the lack of explicit exemption creates additional risk of legal sanction of humanitarian action). The restrictions on contracting are thus more a result of the due diligence expectation rather than strictly legal obligations.

Resource mobilization: Every Member State and donor is at liberty to decide on the parameters for its funding decisions. Through measures such as the OFAC regulations, the US government has restricted funding to humanitarian organizations that do not comply with a set of conditions regarding monitoring, tracking of funds, etc. UNICEF does not negotiate with member states on terms of their allocation criteria, such as with OFAC, unless it is in the context of resource mobilization. Concretely with regards to OFAC, the Legal counsel and EMOPS are leading on negotiations around the terms of an agreement between USAID and UNICEF (as well as other humanitarian actors – WHO, WFP, UNHCR) which would allow for the assumption of funding that has been frozen due to OFAC regulations.

IHL and due diligence obligations: Through the right of States to control humanitarian access (and thus, the neutral and impartial character of this assistance), IHL clearly recognizes the risk of misuse, misappropriation, and misdirection of humanitarian assistance. Through this framework, a balance is struck between humanitarian concerns of the civilian population and the security imperative of controlling the proper delivery of this assistance. Thus, assistance is always carried out subject to the consent or permission of the state and by extension here, the UNSC. The UNSC can exercise a degree of regulation of this assistance, to ensure UN and other humanitarian operations are consistent with humanitarian principles (for instance, it could prescribe technical arrangements, searching of consignments, etc.).

Nevertheless, the monitoring and regulation of humanitarian access for security concerns rests with the state within the current IHL construction. This is a critical point in a non-international armed conflict where IHL recognizes there is a serious risk that armed groups will attempt to requisition and appropriate humanitarian goods essential to the survival of the civilian population. In such a situation it is not the food, water and medical supplies which are “humanitarian,” but rather it is the method by which they are managed and delivered and the guarantees offered by the humanitarian providers to the parties that such assistance will remain neutral and impartial. It is because they are delivered by an independent organization or agency, motivated by the principle of humanity and delivered in an impartial manner that they are considered to fall within the scope of humanitarian assistance under IHL. While IHL provides for the state’s authority to regulate and monitor humanitarian assistance to ensure that it is not being diverted to enemy forces, it does not provide for any clear system of monitoring by the humanitarian community itself of the kind suggested in UNSCR 1916.

While there is no clear-cut definition of due diligence by humanitarian actors in IHL, UNICEF and the humanitarian community can utilize language and concepts from general international law to frame their approach. Fundamentally, due diligence is based on a ‘reasonableness’ standard - one that asks what a given actor should know in order to act (to prevent or remedy problems) in particular circumstances.
At its core, the due diligence principle represents a context-based reasonableness standard. Due diligence asks that an actor adopt an appropriate “standard of care” based on his/her obligations or responsibilities in a given context. This standard may be linked to contractual obligations (with specific requirements), but in some cases may be more general, and rely on a broad understanding of the actor’s role.

UNICEF may take steps to demonstrate its adherence to the due diligence principle in its humanitarian activities. For instance, UNICEF may:

- Proactively examine the context within which its activities are taking place, with a view toward highlighting specific challenges, as those challenges relate to the arms embargo (arguably provided by section (a) above);
- Assess potential and actual impacts of a proposed activity (provided for in section (b) above);
- Determine whether its operational and logistical relationships contribute unreasonably to “misuse,” “misappropriation” and “ politicization” of humanitarian assistance.
- Put in place additional measures to monitor operations and the supply chain based on what is reasonable in the specific context, e.g., third party monitoring, remote programming, risk mitigation efforts, cooperation with implementing partners in the field.

It is important to note that under the due diligence, the humanitarian community need only demonstrate it is making reasonable efforts to avoid contributing to misuse, misappropriation and politicization, not that it has a perfect record of delivery.

**Holder v. Humanitarian Law Project**

The recent U.S. Supreme Court decision *Holder v. Humanitarian Law Project* may have future significance for UNICEF’s operations in its headquarters and various country offices. The decision affirms the prohibition of “material support” to any U.S.-listed “foreign terrorist organizations” (“FTO”).

First, the prohibition applies exclusively to support given to organizations that: 1) are foreign, 2) engage or desire to engage in terrorist activity; and 3) threaten the security of U.S. nationals or national security through their terrorist activity. Currently, 45 groups are listed as “Foreign Terrorist Organizations (FTO’s)”. Of those listed, Abu Sayyaf Group in the Philippines, Al-Shabab in Somalia, and al-Qaeda in Iraq also appear in Annex I or II of the Secretary General’s 2010 CAAC Report as non-state actors (NSAs) that “actively recruit and use children” (and in the case of Al-Shabab, also “kill and maim children”) in armed conflict. (In addition, Hizballah and Hamas – both listed FTOs – control sufficient territory which UNICEF may need to obtain access through significant interaction with representatives of these groups.)

Second, it should be noted that the prohibition, as clarified in Holder, does not apply to independent political advocacy by UNICEF. Rather, it only covers advocacy, which is controlled by, at the direction of, or in coordination with designated FTOs. Thus, if the prohibition applies to it, UNICEF on its own is still allowed to say anything it wishes on any topic, such as advocacy on behalf of children in armed conflict in any country. However, the organization, given fair notice of criminal liability, cannot provide “material support” to any NSA that it knows to be listed as an FTO. Material support to FTOs, as the term may be relevant to UNICEF’s Action Plans called for under SCR 1612 (2005), includes the following: (1) training, (2) expert advice or assistance, (3) service, (4) personnel, or (5)
communications equipment (although exceptions are made for “medicine or religious materials”). Accordingly, if UNICEF provides training to Al-Shabab to “use international law to resolve disputes peacefully,” or if UNICEF advocates on behalf of children in coordination with Hizbollah or Hamas, then UNICEF and its staff, if this prohibition extends to them, would be criminally liable in U.S. federal or state courts.

Third, it is not clear if this prohibition applies to UNICEF and all of its employees who hold UN privileges and immunities (UN P&I). Generally speaking, the UN enjoys absolute immunity from executive, administrative, judicial or legislative action unless the international organization has “expressly waived” such immunity (Art. II, Section 2-3). This means that officers and employees of the UN are immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as representatives, officers or employees. As a program of the UN, UNICEF and its staff during the course of their employment likewise enjoy protection from criminal prosecution under the material-support statute. However, UN P&I will probably not shield U.S. nationals working for UNICEF from criminal prosecution under their own national laws, as UN tax-exemption status does not suspend U.S. citizens’ obligations to pay their federal, state, or municipal taxes. Thus, even if UN P&I do immunize UNICEF employees from prosecution during their employment with the organization, UN P&I may not extend to U.S. nationals, who may conceivably be vulnerable to prosecution under the material-support law for prohibited activity even if performed in the course of their UNICEF employment.

- The ruling does not legally restrict UNICEF and certain other International Organizations. However, the U.S. government or U.S. charitable organisations (including UNICEF USA) will not likely fund UNICEF activities that are prohibited by U.S. law;
- The ruling is likely to restrict severely U.S. organizations, residents, and citizens through criminal sanction from working in environments controlled or influenced by designated FTOs;
- The ruling will also impact non-U.S. organizations working in environments controlled or influenced by FTOs, mainly due to the ruling’s “chilling effect” on the U.S. government or U.S. charitable organizations who normally fund these non-U.S. organizations;
- The ruling is likely to lead to a demand for a higher standard of due diligence by U.S. donors, including the U.S. government, to not engage in certain activities. This may lead to a “chilling effect” on the implementation of UNICEF activities prohibited under the material-support law but which are nevertheless an important part of the organization’s mandate (e.g. Action Plans).

4. THE SECRETARY-GENERAL’S POLICY COMMITTEE AND ENGAGEMENT WITH NSE’s and/or LISTED ENTITIES AND INDIVIDUALS

Given the confidential nature of Policy Committee recommendations and Secretary General’s decisions, it is hard to realize definite policy/positions regarding engagement with NSEs and/or listed entities and individuals. Within the UN, there tends to be a significant amount of speculation about these decisions. In some cases, limits imposed on humanitarian agencies’ engagement with NSEs and/or listed entities and individuals result from external factors such as donor government pressures or national/host governments. In other cases, the limits are a result of security and access constraints. In only a few cases, the UN SG’s Policy Committee has taken steps to frame the context for what is to be considered permissible engagement. All instances of limitations on
humanitarian assistance create additional difficulties for UNICEF to maintain an impartial and neutral position in a given humanitarian context.

**Afghanistan:** On 10 October 2006, the Policy Committee decided that UNAMA support for national reconciliation initiatives will focus on identification and outreach to disaffected tribal groups and commanders with a “soft” commitment to the Taliban. UNAMA and DPKO will approach key Member States regarding the need to have a functioning mechanism to add and delete individuals from the UNSCR 1267 list.

**Yemen:** The Policy Committee has decided the UN system should continue to request the Yemeni government to allow humanitarian access. The UN should also seek assurances from all parties to comply with their obligations under international humanitarian law. Presumably, this also includes assurances of humanitarian access, a clear obligation under IHL. While it does not explicitly say it, this decision can be interpreted to allow any communication and dialogue with non-state entities that is justified to guarantee humanitarian access.

**The State of Palestine:** Current UN policy according to PC decision in February 2009 states that “UN agencies should continue existing technical contacts with HAMAS across the sectors on the ground in Gaza, and senior UN leadership should utilize existing higher-level contacts in a coordinated manner, particularly to secure and ensure observance of undertakings not to interfere in humanitarian operations. In addition, the Secretary-General should keep under constant review the level of UNSCO contacts with HAMAS and progress yielded from existing contacts, and decide, in liaison with partners, whether to authorize discrete, high-level contacts in response to concrete positive steps such as adherence to a ceasefire or progress in Palestinian unity”. Within the framework of the Policy Committee decision, the UN system works with all relevant competent institutions and counterparts required for the accomplishment of its humanitarian and early recovery objectives. As such, a sustained focus on reversing socio-economic trends requires engagement, in particular with municipalities, on policies, programmes and procedures, without providing recognition or legitimacy to the *de facto* authority. The recently finalized ISF for Palestine calls for engagement at local level to accomplish humanitarian and early recovery interventions. It states that contacts with the *de facto* authority regarding matters other than implementation of humanitarian and early recovery interventions, or contacts at the highest levels, would remain at the discretion of the Secretary General and the Special Coordinator. The ISF also calls for allowing local procurement in Gaza for immediate humanitarian and early recovery imperatives “in the absence of viable alternatives under the current context and as a last resort”. The document has recently been endorsed at HQ level, and discussions are underway to prepare for a Policy Committee so that these policy shifts may be endorsed at the highest level (This would include a revision of the policy of contact with HAMAS.) Notably for UNICEF, we are seeking an authorization to engage with HAMAS at a senior decision-making level specifically for the purpose of raising and discussing specific human rights violations and concerns.

**Somalia:** In July 2006, the SG’s Policy Committee decided that “Based on OLA’s advice on how to deal with persons and/or entities included in the 1267 Committee’s list, SRSG Fall and the UNCT should refrain from contacts with the newly elected SCIC Chairman, Sheikh Hassan Dahir Aweys. They should continue contacts with other SCIC representatives in furtherance of the requirements of respective UN mandates. The Deputy Secretary-General will consult OLA and then provide a more elaborated note on this matter to the SRSG and UNCT.” The decision leaves some room for interpretation in regards to the “requirements of respective mandates”. Interpreting this exception
clause to mean that contact to facilitate safe passage for humanitarian assistance was not prohibited, humanitarian actors in Somalia, including the UN, did engage with SCIC in 2006 to negotiate safe humanitarian access to Mogadishu and other parts of Somalia. Engagement with NSEs was more restricted in 2007, but commenced again in 2008 when humanitarian needs increased in areas not under the control of the transitional authorities. The IASC in Somalia has adopted a number of frameworks that seek to frame and coordinate humanitarian engagement with NSEs.

5. IMPLICATIONS OF THE UN’s RELATION WITH THE INTERNATIONAL CRIMINAL COURT ON HUMANITARIAN ASSISTANCE

UNICEF’s relationship with the International Criminal Court (ICC) is governed by a UNICEF Executive Directive: CF/EXD/2005-006 (25 April 2005), “UNICEF and the International Criminal Court”. That EXD, which includes the general agreement developed between the ICC and the UN Secretariat, is available on the UNICEF intranet. The relationship reflected in that EXD has been recognized by the Office of the Prosecutor – one of the three pillars of the ICC – in various discussions between that Office and UNICEF.

As set out in CF/EXD/2005-006, UNICEF (a) supports the principles reflected in the Rome Statute and (b) will support the work of the ICC to the extent we do not, by doing so, compromise the safety and security of our staff and other personnel or our ability to pursue our humanitarian mandate by having full access to affected populations. In practical terms, as recognized by the Office of the Prosecutor, this means that UNICEF is not in a position to provide on-the-ground support to representatives of the ICC (including investigators and others) or, other than in exceptional circumstances, provide access to information, documentation or personnel. At the headquarters level, however, UNICEF is able to provide technical assistance to all pillars of the ICC on issues relating to children and international criminal law (as may be agreed with ICC officials from time to time). UNICEF, through New York Headquarters (OED), may also be in a position to provide specialized expert testimony or advice to the ICC in particular cases; this would be decided on a case-by-case basis.

As regards the UN as a whole, the reference document is the “Negotiated Relationship Agreement between the International Criminal Court and the United Nations”, which states that the United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.

Concerning UNICEF, as set out in the EXD, the Office of the Principal Adviser to the Executive Director9 is responsible for relationship with the ICC and all approaches from the ICC need to be referred to his office; approaches to the ICC need to be discussed with Mr. Mason’s office in advance.

Recent developments: The first Review Conference on the Rome Statute of the International Criminal Court (ICC) took place in Kampala, Uganda from 31 May to 11 June 2010. During the Review Conference, 112 pledges with the purpose of strengthening the Rome Statute system were made by 37 states parties, as well as the United States and the European Union. In addition, the Conference

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9 Email: pmason@unicef.org
adopted the Kampala Declaration, reaffirming states’ commitment to the Rome Statute and its full implementation, as well as its universality and independence. Notably, after much negotiation, States Parties adopted provisions governing the terms of the Court’s ability to investigate and prosecute individuals for the “crime of aggression.” The Review Conference determined that the activation of jurisdiction is still subject to a positive decision by the ASP which cannot be taken before 1 January 2017 and one year after the ratification or acceptance of the amendments by 30 states parties, whichever is later. UNICEF in coordination with the IASC Working Group and Harvard University is currently trying to understand the implications of the existing and potential expansion of the ICC’s jurisdiction on humanitarian agencies.

**UNICEF Operations as a Result of Particular ICC Actions**
The ICC has issued several arrest warrants. In line with the practice adopted by other UN organizations, UNICEF’s practice is that UNICEF personnel should minimize the opportunities for appearing in public with any person under indictment by the ICC, recognizing that private interactions are required periodically in order for UNICEF to pursue its mandate.

If UNICEF staff or personnel are likely to be in a situation where they will appear in public with a person under indictment by the ICC, the matter should be discussed in advance with the Resident Coordinator and with the Office of the Principal Adviser to the Executive Director10.

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6. UNICEF’S APPROACH TO ENGAGING WITH NON-STATE ENTITIES

UNICEFs approach to Non-State Entities (NSEs) is pragmatic. UNICEF may have to work with non-state entities to negotiate access to deliver assistance, to protect staff and assets from harm and to protect the rights of children and women in situations of armed conflict. Detailed guidance on NSE engagement can be found in Programme Guidance Note on Engaging with NSEs in Humanitarian Action (Nov 2011). To obtain further information please also refer to part 4 of this non-paper on Secretary General Policy Committee recommendations and the related experiences on NSE engagement.

7. OTHER RELEVANT ISSUES AFFECTING HUMANITARIAN ACTION IN COMPLEX AND HIGH THREAT ENVIRONMENT

This non-paper does not claim to cover all policy issues relevant to humanitarian action in complex and high threat environments.

In order to provide useful guidance on humanitarian policy areas, UNICEF has developed more specialized guidance notes (such as Guidance Note on Engagement with Non-State Entities) for further reference and use.

There are also draft guidance and policy documents that are circulated for feedback and finalization. These drafts include: Draft paper on components of a risk management approach, draft guidance note on remote programming, draft CAAC corporate positioning paper, draft non-paper on UN integration, humanitarian space and UNICEF.

Notably, UNICEF’s work in these contexts will take place in the context of the UN’s new Security and Risk Management System, it will also be guided by financial and procurement rules and procedures of the organization, and should be informed by policies on Enterprise Risk Management, the UN’s policy on ethics, UN system-wide policies on prevention of sexual abuse and exploitation, etc.

The CCCs constitute the framework thought which UNICEF defines its commitments in humanitarian action, and the approach it will take to achieve them.
Annex 1: Information on UN Security Council Sanctions on Individual Countries

1. Democratic People’s Republic of Korea (DPRK/North Korea)

The Security Council Committee established pursuant to resolution 1718 (2006) was established on 14 October 2006 to oversee the relevant sanctions measures and to undertake the tasks set out in paragraph 12 of that same resolution. Additional functions were entrusted by the Council to the Committee in resolutions 1874 (2009), 2087 (2013) and 2094 (2013).

By its resolutions 1718 (2006), 1874 (2009), 2087 (2013) and 2094 (2013), the Council imposed certain measures relating to the Democratic People’s Republic of Korea (DPRK). These measures include:

- an arms embargo (which also encompasses a ban on related financial transactions, technical training, services or assistance), with the exception of the provision by States to the DPRK of small arms and light weapons and their related materiel, on which States are required to notify the Committee in advance;
- a nuclear, ballistic missiles and other weapons of mass destruction programs-related embargo;
- a ban on the export of luxury goods to the DPRK (including those items listed in Annex IV of resolution 2094 (2013);
- individual targeted sanctions – namely, a travel ban and/or an assets freeze on designated persons and entities, as well as on any persons or entities acting on behalf of such designated persons or entities; and
- a ban on the provision of financial services or the transfer of financial or other assets, including bulk cash, that could contribute to prohibited programs or activities, or to the evasion of sanctions.

By resolutions 1874 (2009) and 2094 (2013), the Council affirmed that it shall keep the DPRK’s actions under continuous review and that it shall be prepared to review the appropriateness of the measures contained in paragraph 8 of resolution 1718 (2006) and relevant paragraphs of resolution 1874 (2009), including the strengthening, modification, suspension or lifting of the measures, as might be needed at that time in light of the DPRK’s compliance with relevant provisions of resolution 1718 (2006) and resolution 1874 (2009).

All resolutions 1718 (2006), 1874 (2009) and 2094 (2013) call upon all Member States to submit reports on their implementation of the relevant provisions of the resolutions.

Recent developments: By adoption of resolution 2094 (2013) the Security Council extended the panel’s mandate until 7 April 2014. The Panel is to provide to the Committee a final report with its findings and recommendations by 7 February 2014 and, after a discussion with the Committee, submit this final report to the Council by 7 March 2014.

2. Democratic Republic of Congo (DRC)

With the adoption of resolution 1493 (2003), the Security Council first imposed an arms embargo on all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu
and Ituri, and on groups not party to the Global and All-inclusive agreement in the Democratic Republic of the Congo (DRC) on 28 July 2003. The sanctions regime was subsequently modified and strengthened with the adoption of resolutions 1533 (2004), 1596 (2005), 1649 (2005) 1698 (2006), 1768 (2007), 1771 (2007), and 1799 (2008) by which, inter alia, the Council extended the scope of the arms embargo to the entire DRC territory (paragraph 1 of resolution 1896 (2009), imposed targeted sanctions measures (travel ban and an assets freeze (paragraphs 9, 11, and 13 of resolution 1807 (2008))), and broadened the criteria under which individuals and entities could be designated as subject to those measures. The Security Council Committee (SCC) pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo was established on 12 March 2004 to oversee the relevant sanctions measures and to undertake the tasks set out by the Security Council in paragraph 15 of resolution 1807 (2008), paragraph 6 of resolution 1857 (2008) and paragraph 4 of resolution 1896 (2009).

Since March 2008, with the adoption of resolution 1807 (2008), the arms embargo has been further modified and only applies to all non-governmental entities and individuals operating in eastern DRC, however, pursuant to paragraph 5 of resolution 1807 all States are under an obligation to notify the Committee in advance regarding any shipment of arms and related material for the DRC, or any provision of assistance, advice or training related to military activities in the DRC, except those referred to in subparagraphs (a) and (b) of paragraph 3 of the resolution, and are encouraged to include in such notifications all relevant information, including, where appropriate, the end-user, the proposed date of delivery and the itinerary of shipments.

Recent developments: By resolution 1906 (2009), adopted on 23 December 2009, the Security Council requested the United Nations Mission in the DRC (MONUC) to monitor the implementation of the measures imposed by paragraph 1 of resolution 1896 (2009), in cooperation with the Group of Experts, and exchange information with the Group of Experts on arms shipments, illegal trafficking of natural resources, support to armed groups as well as in particular on child recruitment and human rights abuses targeting women and children. By paragraph 27 of resolution 1906 (2009), the Council urged all States to take appropriate legal action against FDLR leaders residing in their countries, including through effective implementation of the sanctions regime established by resolution 1533 (2004) and renewed by its resolution 1896 (2009). By resolution 1952 (2010), adopted on 29 November 2010, the Security Council further extended the arms embargo and targeted travel and financial sanctions until 30 November 2011, and extended the mandate of the Group of Experts for the same period, with the addition of a sixth expert on natural resources issues.

3. Iran

The UN Security Council (UNSC) first imposed sanctions against Iran on 27 December 2006 pursuant to resolution 1737 (2006), further extended by UNSC resolutions 1747 (2007), 1803 (2008), and most recently, resolution 1929 (2010). The sanctions were placed in response to Iran’s failure to comply with provisions of Security Council resolution 1696 (2006) related to non-proliferation risks presented by the Iranian nuclear program. The sanctions applying to Iran generally include prohibitions relating to goods and technology, prohibitions relating to services, prohibitions relating to investment and business dealings, targeted financial sanctions, and travel bans.

Recent developments: On 9 June 2010, the UNSC adopted resolution 1929 imposing an additional series of sanctions measures against Iran’s nuclear and missile programs. The resolution introduces prohibitions on the transfer of technology or technical assistance to Iran related to ballistic missiles, as well as a prohibition on bunkering services, such as the proscription of fuel or supplies, or other
servicing of vessels, to Iranian-owned-or-contracted vessels if such vessels are suspected of carrying prohibited items. Resolution 1929 also updates and strengthens previous sanctions placed on Iran. It updates the lists of items, materials, equipment, goods and technology already prohibited for supply to Iran, and it also expands the range of items prohibited for supply to include non-listed items a State determines could contribute to Iran’s enrichment-related process and weapon delivery systems.

Much debate has surrounded the purpose and application of these more stringent UNSC-imposed sanctions on Iran. While the U.S., France, and the UK negotiated with Council members to impose these harsher sanctions on Iran, Russia and China while agreeing to place sanctions made clear that the sanctions should not affect Iran’s day-to-day economy. Nevertheless, the sanctions, experts say, have had negative impacts on Iran’s military and economy. The U.S. and European Union have insisted on UN sanctions as means to stop Iranian nuclear capacity and plan to use the UN sanction provisions as “hooks” to substantiate stronger national sanctions on Iran.

With the election of new head of state in Iran (2013), the nuclear talks were revitalized and initial agreements were reached on the steps towards a final deal. If all stages of negotiations move according to the plans the existing sanctions may be lifted or suspended gradually.

4. Liberia

The Security Council Committee (SCC) established on 22 December 2003 pursuant to UN Security Council resolution 1521 (2003) concerning Liberia oversees the relevant sanctions measures and undertakes the tasks set out by the Security Council in paragraph 21 of the same resolution. These sanctions measures include the following: an arms embargo (effective until December 2014); a travel ban on individuals designated by the Committee on basis of criteria set out in resolution 1521 (2003) (effective until December 2014); and finally an assets freeze which remains in effect until the Security Council decides otherwise. The Council is nevertheless obliged to review the measures once every year.

States implement the travel ban and assets freeze measures in connection with individuals and entities included in the Travel Ban List and Assets Freeze List, which are maintained and regularly updated by the Committee.

While resolution 1903 (2009) terminated the arms embargo with regard to the Government of Liberia, by paragraph 6 of that resolution the Security Council decided that all States shall notify in advance to the Committee any shipment of arms and related materiel to the Government of Liberia, or any provision of assistance, advice or training related to military activities for the Government of Liberia.

5. Somalia Arms Embargo

Background: The Security Council Committee (SCC) concerning Somalia was established pursuant to resolution 751 (1992) on 24 April 1992 to oversee the general and complete arms embargo imposed by resolution 733 (1992). Subsequent resolutions resolution 1907 (2009), resolution 2023 (2011) and resolution 2036 (2012) further shaped the Committee’s mandate.

Notably, in SC Res 1844 (2008), the Security Council expanded the Committee’s mandate by broadening its designation criteria. The amended criteria include: (a) engaging in or providing support for acts that threaten the peace, security or stability of Somalia, including acts that threaten
the Djibouti Agreement of 18 August 2008 or the political process, or threaten the TFIs or AMISOM by force; (b) having acted in violation of the general and complete arms embargo; or (c) obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia.

The practice of the Committee has been to establish an annual Monitoring Group to investigate violations of the embargo and to report its findings to the Sanctions Committee. The Committee may then designate individuals, organizations or states named in the report. The designation would be done on the basis of a proposal by a member of the sanctions committee and requires consensus of all members. The individuals, organizations or states designated by the Committee are subject to a travel ban and asset freeze.

On 12 April 2010 the Sanctions Committee issued its conclusions in consideration of the previous Report of the Arms Embargo Monitoring Group. These conclusions resulted in the designation of Al-Shabab, a number of its alleged ideological and military leaders, as well as individuals designated for having violated the arms embargo and provided weapons and financing to Al-Shabab. These were not the only individuals or entities named in the Report. Two of the individuals who became listed under the Somalia Embargo regime in April 2010 were already on the list of associates of Al-Qaida, Usama bin Laden and/or the Taliban established as per SCR 1267.

Paragraph 1 of resolution 2002 (2011) expanded the criteria for designation to include individuals and entities found to be recruiting or using children in armed conflicts in Somalia or found to be responsible for the targeting of civilians including children and women in situations of armed conflict. In paragraph 15 (e) of resolution 1907 (2009), the Security Council decided that obstructing the investigations or work of the Monitoring Group is a criterion for listing.

In paragraph 22 of resolution 2036 (2012), the Security Council imposed a ban on the direct or indirect import of charcoal from Somalia, whether or not such charcoal originated in Somalia. Furthermore, the Council decided that Somali authorities shall take the necessary measures to prevent the export of charcoal from Somalia.

In recent years media coverage of the sanctions monitoring group on humanitarian organizations engagement with listed groups and entities (e.g. Al-Shabab) has generated a lot of controversy. For example the 2010 Report made several allegations of concern for UNICEF and the UN more broadly. Those include allegations about large-scale diversion of food aid, irregular business procedures by WFP, and conflicts of interest involving some NGOs partners of the UN. In one text box labelled “Case Study”, the report alleges that UNICEF unknowingly used a Somali contractor who has links to Al-Shabab and kidnappers. This is the only explicit mention of UNICEF in the Report.

In the context of considering the 2010 Report of the Arms Embargo Monitoring Group which linked humanitarian agencies to individuals claimed to have violated the embargo, the Security Council passed SCR 1916, which may be considered a precedent-setting resolution. UNSCR 1916 is not concerned principally with the provision of humanitarian assistance or the nature of humanitarian action in conflict, but rather the maintenance of the overall arms embargo established by the UNSC under Chapter VII in 1992. However, Operative Paragraphs 4 and 5 of UNSC 1916 provide for a 12-month exemption regime for humanitarian aid carved out from an otherwise broad-based sanctions framework. One possible interpretation of these OPs is that they release member states from their obligations to enforce the measures related to the embargo upon those designated. The same SCR 1916
calls upon the United Nations Humanitarian Coordinator to report every 120 days on the assistance provided to this population under the exemption regime, and the measures to ensure the proper delivery of this assistance to the beneficiaries.

While the intention to create an exception regime for humanitarian assistance is welcome, the increased involvement of the Security Council in monitoring the delivery of humanitarian assistance poses certain risks, and care should be taken to avoid any standard or precedent-setting action.

Recent developments: In resolution 2111 (2013), adopted on 24 July 2013, the Security Council consolidated the exemptions to the arms embargo on Somalia and Eritrea in one single resolution. In this resolution, the Council decided to partially lift the arms embargo on Somalia for deliveries of weapons or military equipment or the provision of advice, assistance or training, intended solely for the development of the Security Forces of the Federal Government. This modification of the arms embargo on Somalia does not apply to the items listed in the annex of the resolutions for which an exemption is required (paragraph 7 of resolution 2111 (2013)).

6. Sudan

The UN Security Council first imposed an arms embargo on all non-governmental entities and individuals, including the Janjaweed, operating the states of North Darfur, South Darfur, and West Darfur on 30 July 2004 with the adoption of resolution 1556. The sanctions regime was modified and strengthened with the adoption of resolution 1591 (2005), which expanded the scope of the scope of the arms embargo and imposed additional measures including a travel ban and an assets freeze on individuals designated by the Committee. In 2006, the Security Council designated four individuals as subject to the travel ban and assets freeze. It appears that these individuals are not listed under the Al-Qaida and Taliban Sanctions Committee11. The enforcement of the arms embargo was further strengthened by resolution 1945 (2010).

The US Government also has a Sudan specific sanctions regime. Under E.O. 13067, all property and interests in property of the Government of Sudan located in the US or within the control of a US person are blocked. In October 2006, the regional government of Southern Sudan was excluded. Regulations have been amended to generally authorize activities of contractors or grantees of the United States Government or the United Nations and its specialized agencies, programmes, and funds, provided the activities are for the conduct of official business of the US Government or UN agency, programme or fund.

7. Other Countries

Other country specific UN sanctions regimes include Central African Republic, Eritrea (now combined with Somalia), Côte d'Ivoire, Guinea-Bissau, Lebanon (no individuals or entities listed thus far), Iraq, and Sierra Leone.

Operationally, how UNICEF should interpret ‘due diligence’ when working in high risk environments remains to be a salient question. It is addressed further in section 3 of this non-paper.

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11 Names were verified against the list, but since some individuals go by various variations of a same name, it is hard to affirm this to full confidence without a more detailed research effort.