

# France/Opinion on Humanitarian Exemptions in Sanctions Regimes and Counterterrorism Measures

*On June 20th 2024, CNCDH (French National Consultative Commission on Human Rights, also National Commission for the implementation of International Humanitarian Law) adopted an opinion on humanitarian exemptions in sanctions regime and counterterrorism measures and made recommendations to the French authorities.*

## Acknowledgments

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## A. OPINION ON HUMANITARIAN EXEMPTIONS IN SANCTIONS REGIMES AND COUNTERTERRORISM MEASURES, JUNE 2024

[Source: CNCDH, Opinion on humanitarian exemptions in sanctions regimes and counterterrorism measures, 20 June 2024, available at: <https://www.cncdh.fr/publications/avis-sur-les-exemptions-humanitaires-2024-6>]

[...]

## Introduction

1. One of the factors contributing to the shrinking of humanitarian space is the negative impact of sanctions on humanitarian activities and actors, as well as on civilians, which has long been criticized. Sanctions are one of the tools available to the United Nations Security Council as part of its responsibility to maintain or restore international peace and security. These can be targeted and consist, for example, of imposing asset freezes or travel bans on named individuals or entities. They can also take the form of arms embargoes or restrictions on certain resources or goods. In order to apply them, States must adopt implementing measures. As the Security Council points out, States must ensure that these measures comply with their other obligations under international law, in particular international humanitarian law (IHL), international human rights law and international refugee law. However, these measures can have direct and indirect

effects on the ability of humanitarian actors to carry out impartial humanitarian activities in accordance with IHL and humanitarian principles, on the ability of private sector companies and banks to collaborate with them, on the practices of donors and on the States in which sanctions are imposed. Aware of these counterproductive consequences, the Security Council adopted Resolution 2664 (2022) on 9 December 2022. It aims to “provide clarity to ensure the continuation of humanitarian activities” in situations where sanctions apply. For the first time, the Security Council is imposing a cross-cutting and standing “humanitarian exemption” for asset freezing measures, by excluding from their scope the activities necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs.

2. The CNCDH has recommended this on several occasions and welcomes this historic resolution, which was adopted after long and difficult negotiations and thanks to the commitment of many stakeholders (States, UN bodies, humanitarian organisations, academics, etc.). Not only does the CNCDH consider that humanitarian exemptions make it possible to facilitate humanitarian action based on the principles of humanity, impartiality, neutrality and independence, including in areas controlled by individuals or entities subject to sanctions or where they are present or exert influence, but also that they promote compliance with international law. Humanitarian action is rooted in law. Firstly, international humanitarian law contains rules relating in particular to humanitarian assistance, the protection of the wounded and sick, as well as humanitarian personnel. It is also based on international human rights law, which recognises the right of everyone to “a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services”. However, the measures taken to implement sanctions may have the effect of infringing upon these rules and rights. The application of sanctions can also contribute to a biased and non-neutral perception of the work of humanitarian actors and of the humanitarian actors themselves. This can have the effect of jeopardising their safety and acceptance of their actions, which then hampers their ability to access all the people who need their help. Providing for humanitarian exemptions in sanctions regimes is therefore essential to foster compliance with international humanitarian law and create an environment conducive to principled humanitarian action. Similarly, humanitarian exemptions make it possible to protect humanitarian personnel and their ability to respond to needs and to help ensure that people’s rights are respected, independently of any interaction that they may have with sanctioned individuals or entities, or any incidental benefits that they may derive from them. Humanitarian exemptions can thus help save lives and relieve suffering.

3. A significant proportion of people in need of humanitarian aid live in countries where sanctions are in force, sanctions which are increasing exponentially as is the number of listed individuals and entities, and they are often intertwined (UN, regional or national sanctions). This adds a further factor of complexity to already complex environments (political, security, regulatory, economic, governance, etc.) and to a global operational context marked by growing humanitarian needs. Imposing a humanitarian exemption through Resolution 2664 (2022), a legally binding decision, is thus of unprecedented operational value and has major symbolic significance while representing a genuine paradigm shift that is likely to set precedents. This development is

based on precedent, including, in particular, the first humanitarian exemption adopted for the situation in Somalia in 2010 and, more recently, those for the situations in Afghanistan in 2021 and Haiti in 2022. What makes Resolution 2664 (2022) particularly noteworthy, however, is the fact that, for the first time, the Security Council has imposed a humanitarian exemption which, firstly, is not linked to a particular sanctions regime – this is known as a cross-cutting humanitarian exemption – and, secondly, applies on a standing basis, subject to the notable exception – from a temporal point of view – of the sanctions regime relating to Da'esh and Al-Qaida.

4. From a terminology point of view, if the term 'exemption' seems to be the one that prevails today, it is important to note that it does not have a perfectly identifiable definition and that other terms are also used by the United Nations bodies themselves, by European Union institutions or by States. The CNCDH notes that, in French, reference is sometimes made to 'exemptions', sometimes to 'dérogations', and even more broadly to 'exceptions' or 'clauses humanitaires' (humanitarian clauses). These elements reveal a certain vagueness in the use of terms and a lack of precision that is detrimental to a proper understanding of the concept. The CNCDH also notes this in the English versions of the relevant texts which use the terms 'carve-out', 'exemption', 'derogation' or 'exception'. There are also translation issues, as the various terms are not always translated in the same way. However, it is essential to make a distinction between humanitarian 'exemptions' and 'derogations', which are intended to have distinct legal and operational effects. The term 'derogation' implies a request for prior authorisation on a case-by-case basis or notification to the competent authority. It also forces actors wishing to benefit from it to first identify the competent authority – an identification that is not always easy – and, if necessary, to wait for its response, which considerably delays operations. Derogations also contradict international humanitarian law, where it applies, since the latter stipulates that only parties to armed conflicts shall authorise and facilitate the free passage of relief operations for civilians and requires third States to facilitate such operations. As for an 'exemption', this refers to the absence of a request for prior authorisation on a case-by-case basis or a notification requirement, since the restrictions arising from a sanctions regime do not apply to the humanitarian activities in question. Its material scope is also generally broader and not limited solely to "basic and extraordinary expenses", as is commonly the case with derogations. Humanitarian exemption is therefore both the right term and the right solution, in that it guarantees compliance with international humanitarian law and humanitarian principles and is capable of promoting legal predictability and certainty.

5. Despite the significant advances it contains, however, the scope of the humanitarian exemption set out in Resolution 2664 (2022) is limited to the sanctions imposed by the UN and, of those, only to the freezing of assets. These sanctions represent only part of the total number of sanctions that have an impact on humanitarian action, since they apply alongside those adopted by other international or regional organisations or by States. However, the Security Council's clarification of the link between the adoption of sanctions and the need to "minimize unintended adverse humanitarian effects" of those sanctions represents a paradigm shift that is likely to be replicated in other contexts. While the Security Council recognises that sanctions are an important instrument designed to help maintain or restore international peace and security,

it formally emphasises that they need to comply with obligations under international law and deduces from the need to guarantee the continuity of humanitarian activities the imposition of a humanitarian exemption to the freezing of assets. Resolution 2664 (2022) therefore represents a decisive step towards preserving the humanitarian space, helping to establish it as a “common heritage”, which should be extended to include asset freezing measures other than those adopted by the Security Council, in particular the more numerous measures imposed by the European Union.

6. Resolution 2664 (2022) also provides an opportunity, over and above the measures that States must take or adapt to implement it, to adopt any other measures likely to extend the legal and symbolic impetus that it gives, in order to achieve its humanitarian ambitions. This is essential because other sanctions, such as arms embargoes or restrictions on the import or export of certain goods or resources, as well as other types of coercive measures, particularly those linked to counter-terrorism, have a negative impact on humanitarian action. Counter-terrorism measures include not only financial sanctions, to which the humanitarian exemption in Resolution 2664 (2022) applies, but also the criminalisation of terrorist financing and other forms of active or passive support for terrorism. The inclusion of humanitarian exemptions to ensure that terrorist offences do not apply to humanitarian action and other activities that support basic human needs, thereby granting immunity from prosecution to humanitarian personnel and organisations, is essential to ensure the effective implementation of Resolution 2664 (2022), compliance with international humanitarian law and protection of the humanitarian space. The absence of such exemptions can lead to the paradoxical situation where actions considered lawful under the provisions relating to sanctions can be criminalised under the provisions relating to terrorist offences, and thus be hindered.

7. This opinion therefore covers both humanitarian exemptions in sanctions regimes and humanitarian exemptions in (other) counterterrorism measures. These are both a necessary condition for compliance with international humanitarian law, an ethical requirement to avoid exacerbating the suffering of populations, and a practical necessity to ensure the operational capability of principled humanitarian action in difficult situations of armed conflict or other crises. They are therefore essential to reconcile the political, economic and security objectives pursued by sanctions and counter-terrorism measures with humanitarian imperatives. Resolution 2664 (2022) represents a decisive turning point in this respect. Its adoption has already led to a number of changes, whether at national level, as the United States was quick to do, or at regional level, notably within the European Union (EU), although, in the face of resistance from certain States, it has been slow to extend its scope beyond the sanctions imposed by the United Nations.

[...]

## **1. Consolidating the essential paradigm shift introduced by UN Security Council Resolution 2664 (2022) to preserve the humanitarian space**

[...]

## **1.1. The historic requirement of a cross-cutting humanitarian exemption for asset freezes decided by the Security Council**

11. The paradigm shift introduced by Security Council Resolution 2664 (2022) results from the requirement, for the first time, of a crosscutting and standing humanitarian exemption for the asset freezing measures that it imposes or will impose, without the need for prior authorisation or notification.

12. The CNCDH welcomes the broad scope adopted for the wording of the exemption. The type of conduct authorised (facilitative conduct) and the humanitarian activities covered by Resolution 2664 (2022) to support basic human needs make it possible to cover a wide range of situations. Authorised conduct, which the Security Council considers does not violate the asset freezes it imposes, covers both “the provision, processing or payment of funds, other financial assets or economic resources” and “the provision of goods and services”. Examples include the payment of funds (by an individual or entity), such as the payment of taxes imposed by individuals or entities targeted by asset freezes for operating in areas controlled, de jure or de facto, by the latter, the payment of suppliers, insurance premiums, etc. Also included are all activities relating to the supply of goods (tangible or intangible), such as food, medical supplies, fuel or IT equipment, as well as the supply of services, such as banking, transport, security, logistics, telecommunications, and legal services, or water, sanitation and hygiene (WASH) and waste management services, or training (e.g. (para) medical, first aid training for armed groups or training in international humanitarian law), etc

[...]

17. However, while the CNCDH welcomes the choice of such a cross cutting and standing humanitarian exemption, it regrets that the sanctions regime concerning ISIL (Da'esh), Al-Qaida and their associates is given specific treatment. The humanitarian exemption for this regime is limited to a period of two years. The Security Council expresses “its intent to make a decision on the extension of its application to that regime prior to the date on which its application to that regime would otherwise expire”, but only a new resolution will allow the humanitarian exemption in Resolution 2664 (2022) to continue to apply to sanctions regime 1267/1989/2553 from 9 December 2024. This difference in treatment is the result of a political compromise linked to the reluctance of certain Member States of the Security Council, including France, to extend the humanitarian exemption to this regime. It is all the more regrettable given that this is the Security Council sanctions regime that targets the largest number of individuals and entities, and that the latter are not operating in a single territory, but in numerous conflict zones where humanitarian needs are colossal, notably in Yemen, Syria, Afghanistan and the Sahel. Failure to renew the humanitarian exemption for this regime would therefore have an undeniably damaging impact on many humanitarian activities carried out in areas under the de facto control of these individuals or entities and, consequently, on the rights and needs of the populations concerned. It would also send a very negative signal, on the one hand, about the sustainability of the cross-cutting humanitarian exemption for asset freezes imposed by the Security Council and, on the other hand, about the willingness of its members to protect the humanitarian space by ensuring the continuity

of humanitarian activities, including in the context of counter-terrorism. It would also create legal uncertainty, particularly for states that have already implemented the humanitarian exemption for this regime, as well as for humanitarian actors and their partners which rely on the humanitarian exemption. With regard to Afghanistan, in particular, it would also be particularly incomprehensible and ineffective for a UN sanctions regime relating to the Taliban, and establishing a humanitarian exemption which, moreover, is not limited in time, to coexist with another UN sanctions regime, targeting Al-Qaida and Da'esh, which no longer includes a humanitarian exemption. This non-renewal would also risk compromising the progress made towards making humanitarian exemptions more widespread beyond what is strictly required by Resolution 2664 (2022).

[...]

19. In addition, the humanitarian exemption in Resolution 2664 (2022) only targets exclusion from the scope of the asset freezes and not from all the sanctions imposed by the Security Council (travel bans, arms embargoes, etc.). While this is the type of sanction that has been reported to have the most negative impact on humanitarian action, other sanctions can also have such an effect, particularly when they are interpreted broadly by the States required to apply them. This is the case, for example, with arms embargoes, which very often also include an obligation to prevent the supply of “technical advice, assistance or training related to military activities”. This is interpreted by some States to include the dissemination of international humanitarian law to weapon bearers, which hampers the ability of the International Committee of the Red Cross (ICRC), for example, to fulfil its mandate. Similarly, these embargoes can have an impact on activities related to combatting weapon contamination, in particular demining and the elimination of explosive remnants of war, due to the difficulty, or even impossibility, of transporting the necessary materials and equipment (explosives, detonators, metal detectors, protective vests, etc.). The travel ban, for example, could hinder the transfer of combatants injured in armed conflicts to the nearest medical facility, or delay it if a derogation is required. The CNCDH therefore recommends that France support the extension of the humanitarian exemption as set out in Resolution 2664 (2022) to all sanctions imposed by the Security Council or its subsidiary bodies, in addition to asset freezes, and that it encourage the other members of the Security Council to do the same (Recommendation 4). France should also work to ensure that the European Union delegation to the United Nations in New York defends this position.

[...]

## **DISCUSSION**

### **I. General questions**

#### *1. (Document A)*

a. In France, the CNCDH (National Consultative Committee on Human Rights) holds a mandate for implementing international humanitarian law (IHL) at the national level; is the establishment of such an institution an obligation for States? Where does the obligation for States to ensure the implementation of IHL

at the national level come from? (GC I-IV, art. 1)

b. What is the role of a National Committee on the Implementation of IHL?

c. The CNCDH is a National Human Rights Institution (NHRI - see The Paris principles)? What do you think of the fact that the CNCDH holds both the role of a NHRI and the role of a National Committee on the implementation of IHL at a national level?

d. Can you name national institutions from other countries with the same mandate? Is it common? (see the Table of National Committees and other national bodies on international humanitarian law)

2. (*Document A, par. 1*)

a. What factors contribute to the shrinking of humanitarian space?

b. What are the main types of sanctions imposed by the UN Security Council? How do these sanctions impact humanitarian activities? What consequences do they have for the capacity of humanitarian actors to deliver aid in conflict zones?

c. What obligations do States have under IHL to ensure that sanctions do not impede humanitarian aid? What obligations do parties to a conflict have under IHL to allow and facilitate humanitarian relief operations? (GC I-IV, art. 1; GC IV, art. 23, 59; P I, art. 69, 70, 71; P II, art. 18; CIHL, art. 55, 56)

3. (*Document A, paras 2, 3, 4, 6*)

a. What are humanitarian exemptions?

b. What are counterterrorism measures?

## **II. Humanitarian exemptions under IHL**

4. (*Document A, para 1, 3, 5, 11*)

a. What is the main objective of UN Security Council Resolution 2664 (2022) in relation to humanitarian exemptions and why is it considered a paradigm shift from the previous resolution on the subject?

b. While the CNCDH welcomes the progress made in UN Security Council Resolution 2664 (2022), it regrets one aspect of the resolution. Which one and why?

5. (*Document A, paras 2, 5, 6, 7, 9*)

a. According to the CNCDH, why are humanitarian exemptions crucial for upholding humanitarian principles



and international law? Why does CNCDH claim that humanitarian exemptions promote compliance with IHL?

b. According to the CNCDH, the application of sanctions can have the effect of “jeopardising” the work of humanitarian actors. In what way(s)? Does the absence of humanitarian exemptions in counterterrorism measures undermine the neutrality, impartiality and independence of humanitarian organisations?

c. What steps does the CNCDH recommend to ensure that humanitarian exemptions in sanctions regimes are effectively implemented at the national level in France? Are those steps replicable in other countries?

d. Do you think it is possible to reconcile counterterrorism measures with respect for IHL? How can States find the right balance in this regard?

6. (*Document A, paras 4, 11, 12*)

a. What is the difference between “humanitarian exemptions” and “humanitarian derogations”, and why does the CNCDH advocate for the term ‘exemption’ over ‘derogation’?

b. Are humanitarian exemptions provided for under IHL?

7. (*Document A, paras 5, 17, 19*)

a. What are the limitations to the humanitarian exemptions in Resolution 2664 and why is its scope still considered insufficient by the CNCDH?

b. Why is the non-renewal of the humanitarian exemption for ISIL (Da’esh), Al-Qaida, and associated entities’ sanctions regime a cause for concern according to the CNCDH? How does it pose challenges for humanitarian workers in certain conflict zones?

c. Why does the CNCDH emphasize the need to extend humanitarian exemptions beyond asset freezes to other types of sanctions?

d. How do arms embargoes and travel bans negatively affect humanitarian action, particularly in relation to obligations under IHL?

8.

a. What actions could be taken to strengthen humanitarian exemptions in international law?

b. For which actors is such an opinion useful? State authorities only?



c. What do you think could be the impact of such an opinion at the national level? Outside France?

9. Should IHL be interpreted as providing an implicit exemption for humanitarian activities, such as the delivery of aid, even in a context where counter-terrorism measures apply?

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