

NON-PAPER ON POLICY ISSUES AFFECTING UNICEF HUMANITARIAN ACTION IN COMPLEX THREAT ENVIRONMENTS

This non-paper is intended to inform discussions on UNICEF's humanitarian action and programming in insecure environments. Its aim is not to make any recommendations, but rather to describe recent policy and institutional developments of which participants ought to be aware. The paper has been developed by EMOPS in collaboration with other relevant divisions and benefited from comments of participants at the MENA-ROSA meeting on Operating in High Risk Environments. The paper does not constitute a UNICEF policy.

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. At the moment, EMOPS is working with Harvard University 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.¹ 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.² 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

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

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 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 fulfil 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.

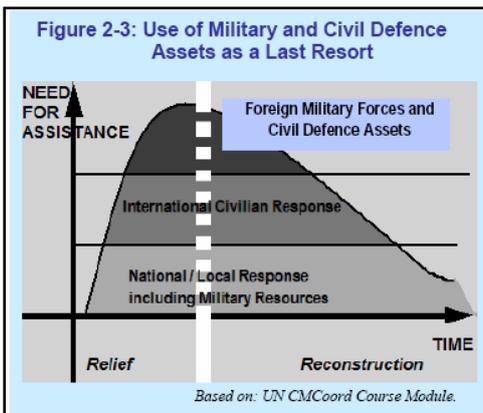
Use of humanitarian language and posture

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 abuses, 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 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.



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 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.

This non- paper has been developed by EMOPS in collaboration with other relevant divisions. A first draft version was circulated to participants at the MENA-ROSA meeting on operating in High Risk Environments (Dead Sea, 23-24 May 2010). It was subsequently enhanced through inputs from the participants. The non-paper does not constitute a UNICEF policy.

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 terrorists³. Countries and regional organizations who maintain lists of designated “terrorist organizations” (title varies) include: Australia, Austria, Belgium, EU, the Netherlands, UK, US, and Russia.

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 recent 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 held accountable for enforcing sanctions against individuals⁴.

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. Most of the organizations on the list are Islamist groups, Communist groups, and nationalist/separatist groups. 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. For these purposes “the term ‘training’ means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.” There is an exception for medicine and religious materials.

Specially Designated Global Terrorist (SDGT) List - Office of Foreign Assets Control - US Treasury Department. The Treasury Department’s Office of Foreign Assets Control (OFAC) also administers sanctions programs 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.

³ Definitions of this term vary, as will be pointed out in the text. Various legal systems and government agencies use different definitions of “terrorism”. Moreover, the International community has been slow to formulate a universally agreed, legally binding definition of this crime. Since 1994, the United Nations General Assembly has condemned terrorist acts using the following political description of terrorism: “Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.” (annex to UN GA 49/60).

⁴ 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.

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').

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. This economic embargo continued in force for thirteen years and was criticized as being blunt, unfair and punitive by many observers. The impact of Iraqi sanctions on the population, in particular on children, was widely documented and denounced⁵⁶. The extent to which sanctions achieved their original goal was also questioned, in the Iraqi case as well as in others. The growing controversy over Iraq sanctions led to relevant developments for humanitarian assistance. The first was research and advocacy around the humanitarian impact of sanctions. The second consisted of steps by the Security Council to mitigate the negative impact of the sanctions on the Iraq population (the so-called "Oil for Food Program"). The third was an evolution towards more "targeted sanctions" and more sanctions oversight, management and enforcement measures⁷.

Each sanctions regime within the Council has its own sanctions committee, traditionally chaired by an elected member (among members of the Security Council). The Council often creates Panels of Experts / Monitoring Groups (EMGs) to investigate sanctions enforcement and other aspects of the sanctions regimes. Working as independent experts, the members of these panels report on a regular basis and have time-bound appointments.

Major controversy has arisen over sanctions that directly name individuals and companies⁸. 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

⁵ Researcher Richard Garfield estimated that "a minimum of 100,000 and a more likely estimate of 227,000 excess deaths among young children from August 1991 through March 1998" from all causes including sanctions. UNICEF Executive Director Carol Bellamy said that if the substantial reduction in child mortality throughout Iraq during the 1980s had continued through the 1990s, there would have been half a million fewer deaths of children under-five in the country as a whole during the eight year period 1991 to 1998. As a partial explanation, she said in March 1999: "Even if not all suffering in Iraq can be imputed to external factors, especially sanctions, the Iraqi people would not be undergoing such deprivations in the absence of the prolonged measures imposed by the Security Council and the effects of war."

⁶ The Machel study of 1996 also raised the concern over the unfair impact of sanctions on children.

⁷ This paper will not discuss the humanitarian impact of sanctions. The main reference document in this area remains the 2004 IASC Handbook on Assessing the Humanitarian Impact of Sanctions. While it is acknowledged that sanctions have both direct and indirect negative impacts on children, it is also recognized that the evolution from general to targeted sanctions had made it even more methodologically challenging to measure the impact of sanctions on children.

⁸ 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.

reported that at least forty-two dead persons and sixty-nine defunct companies are among the 500 names on the UN's list of alleged al-Qaeda and Taliban supporters.

1. Al-Qaida 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 \(1999\)](#) on 15 October 1999 is also known as "the Al-Qaida 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 \(2004\)](#), [1617 \(2005\)](#), [1735 \(2006\)](#), [1822 \(2008\)](#) and [1904 \(2009\)](#) so that the sanctions measures now apply to designated individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban wherever located. Because of its broad scope, the regime established by 1267 is significantly different than other country specific regimes.

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-Qaida, Usama bin Laden 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 with respect to Al-Qaida; the Taliban; Usama bin Laden; and other individuals, groups, undertakings and entities associated with them. The List, often referred to as the "UN terrorist list," currently contains about 500 names⁹ 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-Qaida. The Consolidated List serves as the foundation for the implementation and enforcement of sanctions against Al-Qaida, Usama bin Laden, the Taliban and their associates. The Committee is continuously seeking to improve the information on the Consolidated List to ensure that the sanctions measures can be enforced.

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.

⁹ In terms of how the list is updated: In [resolution 1822 \(2008\)](#), the 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.

2. 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 resolution 1874 (2009).

By its resolutions 1718 (2006) and 1874 (2009), 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 or services), with the exception of the provision by States to the DPRK of small arms and light weapons and their related material, 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; and
- individual targeted sanctions – namely, a travel ban and/or an assets freeze on designated persons and entities.

By resolution 1874 (2009), 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).

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

Recent developments: On 7 June 2010, the Council adopted resolution 1928 (2010), extending the Panel's mandate until 12 June 2011. The Panel is to provide to the Council a midterm report on its work no later than 12 November 2010 and a final report no later than 30 days prior to the termination of its mandate with its findings and recommendations.

3. 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).

4. 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, are likely to have some effect on Iran's military and economy. The U.S. and European Union still insist 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.

5. 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 17 December 2010); a travel ban on individuals designated by the Committee on basis of criteria set out in resolution 1521 (2003) (effective until 17 December 2010); 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.

6. 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 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.

Recent developments: Until very recently, the Committee in seventeen years of its existence has not designated any individual, organization or state despite the evidence the Monitoring Groups presented would have been sufficient to allow it to do so. Nevertheless, 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.

Currently, the Sanctions Committee is considering the most recent EMG Report. This may result in additional individuals being listed. This Report, officially submitted to the Security Council on 10 March 2010, was previously leaked to the press and generated much controversy on humanitarian assistance in Somalia. The Report has 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.

It is important to note that on 13 April, OFAC promptly changed its list to reflect the same individuals in the SCC list. OFAC had already listed Al-Shabab, but amended its the list to reflect the full list of a.k.a.s, making it consistent with the SC list. It is also relevant to note that two of the individuals designated under the Somalia Arms Embargo on 12 April 2010 were already listed under the the Al-Qaida and Taliban Sanctions Committee.

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. The first report was submitted in July 2010, after 120 days, by the UN Emergency Relief Coordinator to the Chair of the Sanctions Committee. The second one is currently under preparations.

7. Sudan sanction regime

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 Committee¹⁰.

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.

¹⁰ 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.

8. Other countries

Other country specific UN sanctions regimes include Eriteria, 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 will be addressed further in section 3 (below).

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.¹¹ 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

¹¹ Terrorist Lists and Humanitarian Assistance, Kristina Thorne, Center for Humanitarian Dialogue, published in Humanitarian Practice Network, March 2007.

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.

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 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-Shabaab 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-Shabaab, 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 Hizballah 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.

Pakistan: This issue has not been explicitly discussed in the Policy Committee.

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.

Occupied Palestinian Territories: 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 oPt 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, SRSF 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 SRSF 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 Director¹² is responsible for our relationship with the ICC and all approaches from the ICC need to be referred to Peter’s Mason’s 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 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 agency.

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 Director¹³.

¹² Contact: pmason@unicef.org

¹³ Contact: pmason@unicef.org

6. THE IMPLICATIONS OF SECURITY COUNCIL RESOLUTIONS 1612/1882 FOR UNICEF IN THE CONTEXT OF IHL, COUNTER-TERRORISM AND HUMANITARIAN ACTION

What are the links between SC Resolutions 1612 and 1882, on the one hand, and IHL, IHRL, and international criminal law, on the other?

Established by SC Res. 1612, and affirmed and expanded by SC Res. 1882, the monitoring and reporting mechanism (MRM) monitors grave rights' violations against children in situations of armed conflict -- violations that are rooted in IHL, international human rights law (IHRL), and international criminal law. In this way, the definitions of rights' violations included in SC Res. 1612 and 1882 seek to provide the broadest possible protection to children. Nevertheless, given their roots in various bodies of law, the definitions utilized in the MRM only partially adhere to the principles applied by IHL and may not by themselves amount to violations under IHL. For example, with regards to the killing and maiming of children in armed conflict, the MRM does not differentiate between legal and illegal killing and maiming as defined by IHL (which utilizes the principles of proportionality and indiscriminate use of force to adjudicate the violation of unlawful killing of civilians). Therefore, while killing and maiming may not, in fact, violate IHL in all circumstances, it would still be considered a violation under SC Res. 1662 and 1882.

In relation to recruitment and use of children by armed forces or armed groups, the mechanism follows the standard of the Convention on the Rights of the Child, Operational Protocol 2 (CRC-OP2), rather than the Geneva Convention. It is important to be aware that the Geneva Conventions and the Rome Statute define recruiting children under the age of fifteen as war crimes, while the CRC-OP2 generally sets the limit at eighteen for deployment to combat. In relation to sexual violence, the Geneva Conventions and the MRM are aligned. Cases in the ICTY have refined the jurisprudence protecting against sexual assault and humiliation.

The definition of attacks on schools and hospitals is drawn from IHL, IHRL and the Rome Statute.¹⁴ IHL prohibits attacks directed against civilian objects, including schools and hospitals, offers special protection to medical facilities, and prohibits the use of indiscriminate attacks which fail to distinguish between military and civilian objects. The Rome Statute furthermore categorizes as a war crime the intentional attack against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.¹⁵ IHL and the Rome Statute, however, do allow for schools and hospitals to be attacked if they have become military objects, for example due to their occupation by parties to the conflict.

Abduction of children for any purpose is expressly prohibited under Article 35 of the CRC. Under IHL, abduction is contrary to the requirement to treat civilians humanely and in some instances can constitute hostage taking or recruitment.

Denial of humanitarian access depends equally on the CRC (application of Articles 6, 22, 24, 27 and 38) and IHL for legal frameworks. Several GA and SC resolutions use the term.

Are the provisions of SC Resolutions 1612/1882 and 1267 consistent, and is there a hierarchy?

This issue has never been formally considered, but indications of SC positions on it can be drawn from recent practice. The area of overlap between SC Res 1612/1882 and 1267 concerns engagement with armed

¹⁴ Current draft definition is "Attacks include the targeting of schools or medical facilities that cause the total or partial destruction of such facilities. Other interferences to the normal operation of the facility may also be reported, such as the occupation, shelling, targeting for propaganda of, or otherwise causing harm to schools or medical facilities or its personnel."

¹⁵ See Article 8 (2)b(ix) and 8(2)e(iv)

groups accused of committing grave child rights violations in Afghanistan and the Philippines. For the MRM, two avenues exist to issue recommendations from the highest levels of the UN system regarding these groups:

- Recommendations of the Secretary General: These are contained in the specific country reports Afghanistan (2008) and Philippines (2010) submitted to the Security Council.
- Conclusions of the Security Council Working Group on Children and Armed Conflict: The SCWG-CAAC is the body which reviews the country reports and subsequently issues conclusions and recommendations.

The last SCWG-CAAC conclusions on Afghanistan were adopted in July 2009. While the most recent country report from the Philippines was delivered in May 2010, conclusions have yet to be adopted. The last SCWG-CAAC conclusions for the country were issued in October 2008.

Both the SG reports and SCWG-CAAC conclusions make reference to and recommendations for the groups to "open channels of communication" or engage in dialogue with the UN in order to develop action plans to end the recruitment and use of children: in the Philippines SG report the recommendation is directed to Abu Sayyaf, while in the case of Afghanistan the recommendation does not name the Taliban, instead opting for a broader statement that "I encourage all parties to the conflict to enter into dialogue with the Task Force on Monitoring and Reporting with a view to halting grave violations of children's rights..." The call is reiterated in the SCWG-CAAC conclusions with specific recommendations to the Taliban and Abu Sayyaf.

Challenges of addressing SC Resolutions 1612/1882 within the context of humanitarian principles

It might be considered challenging to implement a monitoring and reporting mechanism (MRM) while maintaining a principled neutral and impartial position. While monitoring and reporting should cover all parties to the conflict, and only in that sense, is it a neutral activity, it concerns politically-and-militarily sensitive topics and, therefore, is often viewed as threatening to some members of the armed forces and armed groups due to its links to Security Council action, including potential sanctions. Also, where a MRM involves reporting on violations by non-state entities who often do not see themselves as part of the international community, the implementation of the MRM also risks the neutrality of humanitarian actors working in areas influenced or controlled by these non-state entities.

At the same time, monitoring and reporting strengthens UNICEF's evidence-base on which it can build a sound response and provides a strong platform for advocacy on child rights. Sometimes, there may be concerns about the fact that taking a strong stance on grave violations may impact other areas of work, for instance by limiting access to areas in need of humanitarian action. However, when grave violations are denounced within a context of providing programmatic response and support to parties to conflict to redress grave violations, there is generally space to maintain other programmes as well. UNICEF can also suffer considerable reputational risks if it does not implement the MRM as envisaged in SR Res. 1612/1882.

Following a Global UNICEF consultation on the MRM (June 2010), Programme Division and EMOPS are working on guidance to help Country Offices manage this potential tension between UNICEF's leading role in the MRMs as established by SR Res. 1612/1882 and UNICEF's operation as a neutral and impartial humanitarian agency.

7. 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 and to protect the rights of children and women in situations of armed conflict.

Which armed groups can UNICEF work with? Many NSEs will have poor human rights records, and possibly be in conflict with major donors or host governments. For UNICEF the question is: can we optimally fulfil our mandate if we limit ourselves in promoting access to civilians and respect for child rights? Depending on the answer, engagement with armed groups should usually take place over the long-term and be part of a strategic engagement. Until one has started to engage with an armed group, it may not be possible to answer some of these questions and/or to determine how to most constructively engage with them.

UNICEF has two major mandates to engage with NSEs:

GA Resolution 146/82 – “Actively facilitating, including through negotiation if needed, the access by the operational organizations to emergency areas for the rapid provision of emergency assistance by obtaining the consent of all parties concerned, through modalities such as the establishment of temporary relief corridors where needed, days and zones of tranquillity and other forms”

SC Resolution 1612 – “calls on the parties concerned to develop and implement action plans without further delay, in close collaboration with United Nations peacekeeping missions and United Nations country teams, consistent with their respective mandates and within their capabilities; and requests the Secretary-General to provide criteria to assist in the development of such action plans;”

Recent best practices and past experience

Afghanistan: Prior to 2007, the UNICEF CO avoided direct contact with NSEs. Efforts to engage with NSEs focused on developing a system of indirect negotiation using access negotiators, community elders, tribal networks. Indirect negotiation took place for at least two years prior to a training on negotiations with NSEs. During that period, UNICEF also created a social mobilization and communication network among health workers and teachers. In May 2007, the celebration of “Peace Day 2007” was leveraged to advocate for Day of Tranquility to access previously denied areas. UNICEF spoke openly to the government, media, NGOs, civil society to promote “Peace Day” actions. UNICEF and WHO met with ISAF, OEF and bilateral embassies to promote Peace Day. UNICEF and WHO worked with provincial and local health departments Red Crescent Society. Provincial Health Departments recruited “Access Negotiators” who established links to local traditional leaders using personal ties and “friends of- old-friends” to gain access. In 2007 the Taliban issued a directive asking their forces not to interfere with the inoculation campaign. The Days of tranquility enabled polio inoculation to proceed in areas that were otherwise inaccessible. In 2007 & 2008 and related inoculation campaigns during the year, children in six provinces were vaccinated.

Lord's Resistance Army: Peace talks in Juba, southern Sudan, between the Lord's Resistance Army (LRA) and the Government of Uganda (GoU) began in 2006. Mediated by the Government of Southern Sudan (GoSS) and supported by African states, international donors and the UN, talks on the northern Ugandan conflict had never seen such extensive international involvement. Until then UNICEF had never engaged directly with the LRA. UNICEF had generally supported reintegration of former abductees, de facto supporting the implementation of the Amnesty Act (2000), and engaged closely in dialogue with the Sudanese government and the Ugandan military, including extensive preparations to receive children in Juba at the initial phase of operation Iron Fist in 2002. The absence of direct contact with the LRA was not because of the US terrorist listing, but rather because reliable interlocutors were impossible to find.

October 2010

In late 2005, however, the Government of Southern Sudan (GoSS) as a new and semi-autonomous government was able to start credible peace talks. Tackling the LRA problem was a priority for the GoSS as the LRA had been fighting as a proxy force for the Khartoum government for years. There has been much debate over whether the ICC involvement motivated the LRA to engage in talks in order to try to negotiate away the arrest warrants, but the motivation behind the LRA's decision to engage may be its weakened numbers.

The UN was reluctant to engage due to internal debates over whether it could support the talks while also supporting the ICC, which maintained that the priority was extraditing wanted commanders. However, after Switzerland officially offered support, UNICEF joined the negotiation process in an advisory role. GoSS shouldered fast-growing costs and criticisms until an agreement on cessation of hostilities was signed in August 2006, after which the US, UK, Norway and the Netherlands joined the fundraising and support effort, while the UN Office for the Coordination of Humanitarian Affairs (OCHA) started providing administrative and logistical support.

Other parts of the UN got involved too, leading to some confusion over the division of responsibilities. However, the problem underlying UN engagement has been an inability to take a clear stance on how the organization would engage with the LRA, especially when the LRA failed to meet UNICEF and OCHA demands for the release of all women and children.

UN staff supporting a closer engagement and direct contact with the LRA came under much internal criticism. OCHA withdrew from its administrative and logistical tasks in 2007 and UN involvement has increasingly focused on the political level.

UNICEF's most important contribution was its long institutional history both in Sudan and in Uganda, and familiarity with the issues and personalities involved. Cross-bored coordination had existed on the issue for at least a decade. UNICEF was able to provide minimal but important support to the process at an early stage, and the clear objective of achieving the release of children allowed it to engage with less hesitance than OCHA and other parts of the UN. This support, including supplies for children held in captivity, may also have served as an important initial confidence measure. As other parts of the UN got more engaged, UNICEF took a lower-key posture. Ultimately, the talks failed, but the contact with the LRA rank-and-file probably contributed to further defections from the LRA at later stages, as individual members of the LRA, including children, gained confidence to escape to UPDF and become part of a long-standing mechanism for re-integration. It is very difficult to make causal attributions, but the high-profile hard demands made by senior UN officials may have prevented the successful release of children.

9. OTHER RELEVANT ISSUES AFFECTING HUMANITARIAN ACTION IN COMPLEX THREAT ENVIRONMENT

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

This non- paper has been developed by EMOPS in collaboration with other relevant divisions. A first draft version was circulated to participants at the MENA-ROSA meeting on operating in High Risk Environments (Dead Sea, 23-24 May 2010). It was subsequently enhanced through inputs from the participants. The non-paper does not constitute a UNICEF policy.