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International Review

of the Red Cross

Humanitarian debate: Law, policy, action

A photograph showing a large, conical stack of cash, likely US dollars, in a conflict zone. In the foreground, a man in a blue jacket and a patterned headscarf holds a clear plastic bottle. To the left, a black assault rifle is pointed towards the stack. In the background, the skeletal remains of a destroyed building are visible against a clear sky. Other people are seen in the background, some looking towards the camera.

**Counterterrorism,
sanctions and war**



ICRC

International Review

of the Red Cross

Aim and scope

Established in 1869, the *International Review of the Red Cross* is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the *Review* informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the International Red Cross and Red Crescent Movement in armed conflict and other situations of violence. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Movement.

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Cover Photo: Members of an armed group stand by a pile of currency during a ceremony to collect supplies for their fighters. Credit: REUTERS/Image ID: RC2Z4J9NUG5P/Khaled Abdullah.

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EDITORIAL

COUNTERTERRORISM, SANCTIONS AND WAR

Helen Durham, Director of International Law and Policy, ICRC

As in the past, terrorism is a live threat in today's world – and one that causes immeasurable human suffering. The International Committee of the Red Cross (ICRC) unequivocally condemns terrorism of all forms, no matter the perpetrator and no matter whether it occurs during or outside of armed conflict. Without exception, terrorism runs counter to the principle of humanity and fundamentally undermines efforts to make the world a safer place for its citizens. States likewise condemn terrorism and have made countering terrorism a high priority individually and as an international community.

Despite the broad consensus that tackling terrorism should be a high priority, the question of how that threat should be tackled remains an area of real controversy. In part because of this divisiveness, the international community has addressed the threat of terrorism in a piecemeal fashion, with a constellation of nineteen partially overlapping international treaties, dozens of United Nations (UN) Security Council resolutions, and countless national-level laws aiming to address the phenomenon. The result is a complex patchwork of law and policy that collectively fails both to establish a clear, universally accepted definition of terrorism and to set clear and common standards for how to counter terrorism. Meanwhile, the law and policy framework has yet to earnestly and comprehensively address the risks that countering terrorism can bring.

Common to much of this law and policy patchwork is an effort to stymie all possible avenues of direct and indirect support for individuals, groups and organizations labelled as terrorist. These counterterrorism measures have taken many forms, including, most notably, sanctions and efforts to criminalize terrorists and their actions. Generally, this project has led to increased controls over and constraints on activities seen as providing support to groups or individuals designated as terrorist.

To be sure, this effort is not without a fair foundation. In attempting to cut off lines of support to terrorists and terrorist organizations, States aim to confront a real and pressing threat to themselves and their people.

When countering terrorism causes harm

Despite their fundamental legitimacy in theory, efforts to cut off all sources of direct and indirect support to terrorists and terrorist organizations have quickly – and

predictably – generated a new set of humanitarian challenges. In working to control and constrain activities seen as providing support to terrorists, States and the international community have often been overly broad, at times sweeping humanitarian activities under the same umbrella – and the harm caused by this is real. As the ICRC has long highlighted, areas with severe terrorist threats are frequently the very same areas in which civilians are most urgently in need of humanitarian support. That support is often slowed or even impeded entirely by counterterrorism measures that aim to keep funds, supplies and other forms of aid out of the hands of terrorists – and this is particularly true where the relevant sanctions or criminal law provisions have failed to include a well-crafted exemption for humanitarian activities. The result: preventable civilian suffering.

Since 2011, the ICRC has worked to alert States and the international community to this problem.¹ The ICRC was the first humanitarian organization to publicize its stance that counterterrorism measures can negatively affect the provision of humanitarian aid, harming both intended beneficiaries and humanitarian workers. In the intervening decade, the ICRC has repeatedly noted its concern that sanctions and criminalization, when not designed and implemented carefully, have the potential to meaningfully impede humanitarian aid, often in violation of international humanitarian law (IHL).

In tandem, the ICRC has advocated for clear steps that would help to tackle this challenge and bring counterterrorism efforts back into balance with States' other international commitments. First, States should protect the space for neutral and impartial humanitarian action, ensuring that humanitarian organizations like the ICRC can maintain their physical proximity to populations in need of assistance – and to parties to armed conflict. Second, States should ensure that IHL is respected and fully implemented in all armed conflicts, including the elements of treaties and customary international law that ensure and regulate speedy humanitarian access. And third, States and the international community should put in place standing, well-crafted exemptions that protect humanitarian activities of all forms from otherwise restrictive counterterrorism measures.

The past year brought with it an important step in this direction. In December 2021, the UN Security Council unanimously adopted Resolution 2615, with a view to ensuring the provision of humanitarian assistance and other activities to support basic human needs in Afghanistan in the wake of the changes in governmental authorities in 2021, including listed Taliban members, and the spiralling economic and humanitarian crisis on the ground. In response to important humanitarian needs, the Security Council decided that such activities would not constitute violations of earlier resolutions that aimed to limit

¹ See, for example, ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, pp. 51–53, available at: www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf (accessed in December 2021).

contact with and support to certain members of the Taliban and the Haqqani Network, among others, in the 1988 Afghanistan sanctions regime.² As a whole, Resolution 2615 and the unanimous support for it marked an important step in ensuring that counterterrorism and sanctions measures do not harm or undermine vital humanitarian work.

Tackling the overlap

The ICRC is not the only actor that has been working to bring attention to the overlap and interaction between counterterrorism measures and humanitarian action for the past decade. Others have been central to these conversations, too.

Two UN Special Rapporteurs work on related topics: Fionnuala D. Ní Aoláin is the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, and Alena Douhan is the UN Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights. Each has participated in this issue of the *Review* by engaging in substantive conversations on their mandates and their perspectives on how counterterrorism measures of various kinds affect human rights and humanitarian action.³

State officials, including diplomats, are of course central to these conversations as well. The past several years have seen numerous States make efforts to address the effects of counterterrorism measures on humanitarian action. There is no better demonstration of this than the increasing mention of the importance of protecting humanitarian access in law and policy developed in recent years—perhaps most notable are UN Security Council Resolutions 2462 and 2482, both from 2019. With that in mind, the *Review* has also engaged in conversations with diplomats and high-level officials from the European Union,⁴ Canada⁵ and the Russian Federation⁶ in order to include their important perspectives on these issues and this work.

Topics in counterterrorism, sanctions and war

When designing and curating this double issue on “Counterterrorism, Sanctions and War”, it became clear that this was a broad topic with many sub-themes.

2 UNSC Res. 2615, 22 December 2021, op. para. 1.

3 See the interviews with Fionnuala D. Ní Aoláin and Alena Douhan in this issue of the *Review*.

4 See the interviews with Janez Lenarčič, EU Commissioner for Crisis Management, and Gilles de Kerchove, EU Counter-Terrorism Coordinator, in this issue.

5 See the interview with Elissa Golberg, Assistant Deputy Minister for Strategic Policy at Global Affairs Canada, in this issue.

6 See the interview with H. E. Ambassador Vladimir Tarabrin, Special Representative of the Minister of Foreign Affairs of the Russian Federation, in this issue.

Counterterrorism law and international humanitarian law

A long source of confusion and debate has been the relationship between international law on counterterrorism, on the one hand, and international humanitarian law, on the other. How do – and how should – international counterterrorism law and IHL interact? The co-application of these distinct areas of law raises both advantages and disadvantages that require careful assessment and understanding. To be sure, both fields of law pursue legitimate interests – but at the same time, each field of law may, at times, negatively impact the other.⁷

A particular area of interaction between these two fields of law is that of classification of situations of armed violence where terrorism and terrorist groups may play a role. Without a universally accepted standard for classifying individuals or groups as terrorist, States are left largely to their own devices and to rely on their own discretion in applying the terrorist label. This, at times, leads to a domino effect whereby States then view violence carried out by those classified as terrorists as meeting the threshold for armed conflict under IHL – even when that threshold has arguably not been met. Given the derogation of various human rights and the additional powers that States may exercise during armed conflict, the risks associated with over-classification are grave.⁸

Because both counterterrorism measures and IHL can result in criminal charges, yet another area of overlap involves how prosecutors pursue individuals or groups who may have run afoul of both fields of law. Prioritizing the prosecution of individuals either for war crimes or for offences that constitute terrorism, when each is done to the exclusion of the other, may reflect relevant trends, interests or prejudices in justice systems – or may simply reflect how the laws themselves are written.⁹

The criminal law aspects of counterterrorism measures also raise additional concerns when those measures are written so broadly as to criminalize as terrorist activities those that are otherwise lawful under IHL. This broad criminalization is often responsive to both the nineteen counterterrorism treaties and the wide array of UN Security Council resolutions that have proliferated over the past twenty years, many of which do not explicitly mention compliance with IHL or humanitarian exemptions.¹⁰ This overlap causes friction which could be dissipated with the help of creative solutions such as the inclusion of clauses in

7 See Ben Saul, “From Conflict to Complementarity: Reconciling International Counterterrorism Law and International Humanitarian Law”, in this issue, for a discussion on the actual and optimal interactions between these two fields of law.

8 See Gloria Gaggioli and Pavle Kilibarda, “Counterterrorism and the Risk of Over-Classification of Situations of Violence”, in this issue, for a comprehensive overview of these risks and how they grow out of counterterrorism law and policy.

9 See Kelisiana Thynne, “Better a War Criminal or a Terrorist? A Comparative Study of War Crimes and Counterterrorism Legislation”, in this issue, for an exploration of prosecutorial decision-making in this area.

10 See Agathe Sarfati, “International Humanitarian Law and the Criminal Justice Response to Terrorism: From the UN Security Council to the National Courts”, in this issue, which delves into the implications of the non-inclusion of humanitarian exemptions in these sources of international law and policy.

laws criminalizing terrorist activity that explicitly exclude activities governed by IHL.¹¹

Another challenge arises when considering “dual-nature groups” – groups that can simultaneously be understood as non-State armed groups engaged in non-international armed conflict, on one hand, and as terrorist organizations, on the other hand. It is clear, of course, that both IHL and counter-terrorism law share applicability to these groups and their activities – though it seems that counter-terrorism law has, at times, edged out IHL as the predominant framework when addressing these groups and prosecuting members for wrongdoing.¹²

Evolving concepts of terrorism

Though processes exist at the international level, including at the UN, for identifying and designating individuals or groups as terrorist, those designation processes rely heavily on information from States. At the same time, the practical effects of designation at the UN level play out only once States choose what to transpose into their own domestic legislation. In both international and domestic processes for designating individuals or groups as terrorist, then, State discretion reigns supreme. This raises numerous challenges.

One area of concern relates to the “foreign terrorist fighters” phenomenon. States and the international community have struggled to tackle this particular issue. One area of contention arises around the return of foreign terrorist fighters: should States focus on punishment, exclusion or reintegration?¹³ These problems are also complicated when foreign terrorist fighters’ States of origin move to strip the fighters of their citizenship. This citizenship stripping has largely been discussed in the context of international human rights law and its protections, but may carry serious implications in the IHL context as well – despite the safety net of humane treatment that IHL guarantees to all people, regardless of their nationality.¹⁴

On a related note, there may be particular risks associated with highly militarized responses when confronting a terrorist opponent¹⁵ – in other words,

11 See Thomas Van Poecke, Frank Verbruggen and Ward Yperman, “Terrorist Offences and International Humanitarian Law: The Armed Conflict Exclusion Clause”, in this issue, for a discussion of the potential of excluding IHL-governed activities from counterterrorism criminal law.

12 See Hanne Cuyckens, “Foreign Fighters and the Tension between Counterterrorism and International Humanitarian Law: A Case for Cumulative Prosecution Where Possible”, in this issue, for a discussion of the overlap of counterterrorism law and IHL as applied to dual-nature groups.

13 See Carlota Rigotti and Júlia Zomignani Barboza, “Unfolding the Case of Returnees: How the European Union and Its Member States Are Addressing the Return of Foreign Fighters and Their Families”, in this issue, for an exploration of which methods of handling returnees lead to the best and most desirable outcomes.

14 See Christophe Paulussen, “Stripping Foreign Fighters of their Citizenship: International Human Rights and Humanitarian Law Considerations”, in this issue, for a discussion of citizenship stripping of foreign terrorist fighters and how it may be incompatible with IHL.

15 See Dina Mansour-Ille, “Counterterrorism Policies in the Middle East and North Africa: A Regional Perspective”, in this issue, for a discussion of securitized responses to terrorism in the Middle East and an evaluation of their success.

risks that may be realized when a State's escalation of violence converts a terrorist group into a dual-nature group. These risks may include tit-for-tat violent escalation that could result in undermining (rather than supporting) a State's security objectives.

Yet another challenge relates to States' detention and data collection practices in relation to terrorism and armed conflict. So-called "administrative detention" of (suspected) terrorists remains a highly controversial practice, but one defended by several States. Meanwhile, other administrative measures short of detention may be worth exploring moving forward.¹⁶ On the data collection front, States are increasingly turning to the collection and use of biometric data – despite the risks that such data may entail.¹⁷

Effects of counterterrorism on the humanitarian space

As noted above, one of the central issues in the intersection between counterterrorism law and IHL relates to the effects of counterterrorism measures on humanitarian action and the humanitarian space, and by extension on the people who need protection and assistance. In a general sense, the past two decades have seen counterterrorism measures elevated over and above the humanitarian imperative in much of the law- and policy-making in this area, meaningfully undermining humanitarian activities.¹⁸

In particular, counterterrorism measures have at times proven detrimental to the provision of impartial medical care to the sick and wounded during non-international armed conflicts, particularly when non-State armed groups are labelled as criminal or terrorist, whether through the criminalization of the provision of that care, through legitimizing attacks on medical facilities, or through overlooking the protections that IHL affords to the sick and wounded and those who care for them.¹⁹

Meanwhile, the extent and punitive nature of counterterrorism measures has generated growing, understandable risk aversion among donors, humanitarian organizations and other actors (banks/financial institutions, suppliers etc.) in this

16 See Lawrence Hill-Cawthorne, "Detention in the Context of Counterterrorism and Armed Conflict: Continuities and New Challenges", in this issue, for a discussion of administrative detention practices and forward-looking alternatives.

17 See Katja Lindskov Jacobsen, "Biometric Data Flows and Unintended Consequences of Counterterrorism", in this issue, for a discussion of the collection and use of biometric data and the risks that this entails.

18 See Naz K. Modirzadeh and Dustin A. Lewis, "Humanitarian Values in a Counterterrorism Era", in this issue, for reflections on this phenomenon and how the international community might explore avenues to better respect impartial humanitarian values. See also Sherine El Taraboulsi-McCarthy, "Whose Risk? Bank De-Risking and the Politics of Interpretation and Vulnerability in the Middle East and North Africa", in this issue, for a discussion on the use of counterterrorism measures to foreclose the space for civil society organizations, especially where the communities they assist are particularly vulnerable.

19 See Françoise Bouchet-Saulnier, "How Counterterrorism Throws Back Wartime Medical Assistance and Care to Pre-Solferino Times", in this issue, for a discussion of how counterterrorism measures have harmed the medical mission and how clear exemptions in counterterrorism measures to protect humanitarian and medical assistance would limit the impact of counterterrorism on IHL in general – and on the medical mission in particular.

area, for fear of running afoul of the law.²⁰ But the risk that humanitarian action will intersect with counterterrorism measures simply cannot be eliminated – in part because of the reality that people living where threats of terrorism are real and prevalent are often those most in need of humanitarian aid. Instead, as noted elsewhere, policy change may be needed to protect humanitarian action and exempt it from counterterrorism measures.²¹

One phenomenon that has fuelled the foreclosure of the humanitarian space (and that connects to shifting understandings of terrorism) is the reality that some actors have used geographical proximity or common social, ethnic and religious backgrounds to justify associating civilians with terrorist groups – and stigmatizing them accordingly. This has, in turn, undermined the impartial delivery of aid to all affected populations.²²

In a forward-looking sense, there are numerous proposals and approaches for beginning to reverse the foreclosure of the humanitarian space that results from de-risking measures. One such approach already being implemented in certain contexts is the promotion of multi-stakeholder dialogues at the national level. This proposal aims to address the remarkable diversity of relevant actors when dealing with counterterrorism measures and their effects on humanitarian activities, including regulatory officials, diplomats, civil society, banks and private citizens.²³

Law and policy debates regarding counterterrorism measures

The ICRC has long been engaged in the difficult law and policy debates around IHL, principled humanitarian action and counterterrorism measures. How does IHL apply to counterterrorism measures and operations? Where IHL and counterterrorism law are co-applicable, how can we best preserve the integrity and purposes of IHL without compromising the objectives of counterterrorism work? How can we best protect humanitarian action, as mandated by IHL, in the context of counterterrorism measures?²⁴

20 See Justine Walker, “The Public Policy of Sanctions Compliance: A Need for Collective and Coordinated International Action”, in this issue, for a discussion of the financial impediments that sanctions pose to actors carrying out humanitarian work. See also Emanuela-Chiara Gillard, Sangeeta Goswami and Fulco van Deventer, “Screening of Final Beneficiaries – a Red Line in Humanitarian Operations. An Emerging Concern in Development Work”, in this issue, for a discussion on one particular expression of donors’ risk aversion – screening of final beneficiaries – and how it has harmed humanitarian work.

21 See Emma O’Leary, “Politics and Principles: The Impact of Counterterrorism Measures and Sanctions on Principled Humanitarian Action”, in this issue, for a broad discussion of the need for policy change to protect principled humanitarian action given this growing risk aversion.

22 See Alejandro Pozo Marín and Rabia Ben Ali, “Guilt by Association: Restricting Humanitarian Assistance in the Name of Counterterrorism”, in this issue, for a discussion of this phenomenon and real-world examples thereof.

23 See Lia van Broekhoven and Sangeeta Goswami, “Can Stakeholder Dialogues Help Solve Financial Access Restrictions Faced by Nonprofit Organizations that Stem from Countering Terrorism Financing Standards and International Sanctions?”, in this issue, for a discussion of the power and potential of multi-stakeholder dialogues in bridging these gaps.

24 See Tristan Ferraro, “International Humanitarian Law, Principled Humanitarian Action, Counterterrorism and Sanctions: Some Perspectives on Selected Issues”, in this issue, for a comprehensive discussion of these and other questions.

As States, organizations and the international community have worked to tackle these difficult issues, law and policy debates have begun to shift. One of those shifts has been through language added to recent UN Security Council resolutions in recognition of IHL and humanitarian action. In particular, Resolutions 2462 and 2482 of 2019 may serve as a starting point as States and the international community work to establish standing and comprehensive exemptions that exclude humanitarian activities from the scope of application of counterterrorism measures.²⁵

Still, those shifts may not be enough, in and of themselves. Even if law and policy language moving forward better accounts for the protection of the humanitarian space, restrictive measures that are already in place at the international and national levels foreclose much of that space. With that in mind, considering meaningful reform to the existing counterterrorism infrastructure in order to better protect humanitarian action may prove crucial moving forward.²⁶ Likewise, because sanctions are enacted in many armed conflict scenarios that do not directly involve terrorism or implicate counterterrorism law, the importance of assessing the compatibility of sanctions regimes with IHL extends beyond the counterterrorism space.²⁷

Looking ahead

Given the timeliness of this topic and the richness of ongoing debates, the ICRC is proud to present this double issue of the *Review* on “Counterterrorism, Sanctions and War”. In soliciting submissions and selecting articles for this issue, the *Review* asked authors to take a forward-looking perspective wherever possible, first diagnosing the problems we currently face and then developing recommendations for how the international community can and should move forward. It is our distinct hope that the proposals and recommendations put forth in this issue will resonate with scholars, policy-makers, diplomats and humanitarians, and will help foster the very conversations that can help remedy the challenges we face, as a global community, in countering terrorism and recognizing States’ security needs while protecting and encouraging humanitarian action.

25 See Nathalie Weizmann, “Respecting International Humanitarian Law and Safeguarding Humanitarian Action in Counterterrorism Measures: United Nations Security Council Resolutions 2462 and 2482 Point the Way”, in this issue, for a discussion of how recent UN Security Council resolutions may help the shift toward humanitarian exemptions in counterterrorism measures.

26 See Sue E. Eckert, “Financial Access Challenges for Humanitarian Actors: Impacts of Counterterrorism Measures and Sanctions and Ways to Address Them”, in this issue, for a comprehensive set of recommendations for improving existing and future counterterrorism measures.

27 See Kosuke Onishi, “The Relationship between International Humanitarian Law and Asset Freeze Obligations under United Nations Sanctions”, in this issue, for a discussion of the importance of clarifying the relationship between sanctions provisions and IHL. See also Rebecca Brubaker and Sophie Huvé, “Conflict-Related UN Sanctions Regimes and Humanitarian Action: A Policy Research Overview”, in this issue, for a broad discussion of conflict-related sanctions and their effects on the humanitarian space and IHL.

The reality is that counterterrorism measures, including sanctions, are unlikely to disappear from the international policy- and law-making toolkits in the near future. But as the authors who have contributed to this issue have demonstrated so deftly, the current tension between those measures and the urgent need to deliver critical humanitarian aid around the world is too great to be ignored. We must find and maintain a balance between these priorities, and we hope this issue has a real impact in helping us move closer to that balance.



Interview with Fionnuala D. Ní Aoláin

Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*

Fionnuala D. Ní Aoláin is the United Nations (UN) Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. She was initially appointed to this position by the UN Human Rights Council in 2017 and was re-elected by member States for a further three-year term in 2020. In this capacity she works closely with States and UN entities to advance human rights protections in some of the most difficult contexts globally. She is also a University Regents Professor at the University of Minnesota Law School, and a Professor of Law at the Queen's University of Belfast, Northern Ireland.

In this interview, Ms Ní Aoláin discusses her duties as Special Rapporteur and illustrates the current challenges to the humanitarian space in the context of counterterrorism (CT) regulation.

Keywords: counterterrorism, sanctions, human rights, humanitarian exemptions, United Nations.

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By way of introduction, could you briefly explain your role and responsibilities as the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism? Why was the mandate established, and how have you approached its implementation?

* This interview was conducted by Bruno Demeyere, Editor-in-Chief of the Review.

Thank you for the question. The mandate I hold was established in 2005/06.¹ It was essentially created to address the excesses in the years following the 9/11 terror attack, during which particularly securitized and extreme violations of human rights were recorded, such as torture, extraordinary rendition, arbitrary detention and extrajudicial executions. The gap in the existent human rights system in terms of addressing these issues was made quite evident in the years immediately following 9/11. This was the principal reason behind the creation of the mandate. The mandate, as such, has three capacities: (1) the capacity to conduct country visits; (2) the capacity to engage with individual communications wherein individuals or groups send information to the mandate suggesting human rights violations that arise out of particular CT contexts; and (3) the capacity to issue annual reports to the UN General Assembly. Perhaps uniquely, however, the mandate has an additional set of responsibilities arising out of the fact that it is an entity for the purposes of the Global Counter-Terrorism Coordination Compact,² which is a New York-based institutional structure that coordinates all UN CT practice arising from the work of UN entities on CT-related issues as mandated by the General Assembly and the Security Council. Within the Global Compact, the mandate is the only entity charged with oversight on the interface between human rights and CT.

During my first term of appointment commencing in 2017, I identified four priorities for the mandate: (1) to examine the architecture of CT, including the various organizations and entities that are involved in CT work, both within and outside the UN; (2) to address the negative impact of CT on civil society; (3) to focus on states of emergency and use of exceptional powers in the CT arena; and (4) gender mainstreaming in the CT context. Having been re-appointed in the summer of 2020, I've added two additional priorities, namely (1) CT and technology, and (2) the examination of national CT legislation.

As part of your mandate, you are expected to conduct fact-finding country visit missions. What are some of the particular challenges faced in negotiating and securing these State visits, and how might they potentially hinder the discharge of your duty?

I do believe that being present in a country, and spending time with the government and civil society actors in the field, is one of the most effective ways to engage in a dialogue about CT and its impact on human rights. Without a doubt, many States face ferocious challenges of violence in their respective territories, and often there are difficult choices for governments to make, but expanding the conversation

1 For more information on the mandate of the Special Rapporteur, see Human Rights Council Res. 15/15, "Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism", UN Doc. A/HRC/RES/15/15, 7 October 2010, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/167/28/PDF/G1016728.pdf?OpenElement>.

2 For more information on the UN Global Counter-Terrorism Coordination Compact, see: www.un.org/counterterrorism/global-ct-compact.

with them and creating a dialogue is best advanced when you can physically be present in a country and engage with the relevant actors in the field. From the mandate's point of view, the visits are a means to an end, which is to start and establish a continued dialogue with States over an extended period of time. The biggest challenge, however, is getting those visits authorized. Many States claim that they have open access for Special Procedures, but in reality that is a misnomer, and when trying to get a visit, many mandate holders unfortunately fail to secure one. Also, many countries that use CT measures extensively, including P5 members, have never allowed the Special Rapporteur to visit. There are some exceptions to this, however; for example, I would positively highlight France, which invited me to visit in the early months of my first term. This is the kind of leadership you hope to see from a P5 country, wherein they are open to debate and dialogue with the mandate holder on CT measures that are being used in their territory. We also do follow-ups to country visits, which is very important. A good example would be Kazakhstan; I first visited this country in 2019, and we still continue to have a sustained public dialogue on CT issues, which in a sense illustrates to other States what good cooperation looks like. I think the biggest challenge remains that of access to countries which simply refuse to allow Special Procedures to visit. Positively, however, the mandate has never had an experience of being blocked from performing its duty on the ground. In fact, I have been pleasantly surprised by the scale and openness of State engagement, especially since the States that allow access open themselves up to criticism in real and politically risky ways because of the CT measures that are being implemented and scrutinized. In a way, when you criticize States for their conduct it is always under the caveat that they have opened up, which creates a model of best practice for other States to uphold, in ensuring that their CT measures are compliant with human rights and other international legal standards.

In contrast, can you elaborate with examples of good practices followed by States in creating a framework for the domestic adjudication of acts of CT without encroaching upon human rights standards?

I would say good practice is really hard to find in this space. I think it correlates to a broader challenge post-9/11, as we have seen a massive growth in the expanses of the CT realm. We have seen the scale of the definition of “terrorism” being broadened in many countries, for example to include offences like glorification of terrorism, or a whole range of preparatory acts which were not accorded special criminalization status in previous years. Not only are the core acts expanding, but so is the broader space – for instance, the increased criminalization of the pre-criminal space, such as acts of thought or acts of support, which are things that would traditionally fall outside the criminal justice framework but now come under the veil of CT adjudication. There has also been an expansion on the other side of justice after persons have completed criminal sentences for conducts attributed to terrorism, like the expansive criminal justice and administrative law models for maintaining the deprivation of liberty of these individuals, or maintaining continued

oversight, even after a sentence has been finished. Criminal responses to CT have been on a massive growth spurt over the past twenty years, without restraint. Additionally, we have seen enormous growth in the “preventing/countering violent extremism” narrative—a new nomenclature being used by States alongside, and sometimes indistinguishably from, that of CT—and an overall expansion of security measures. As such, it is really difficult to identify good practice. There are some small bright lights, such as in countries that have instituted independent oversight mechanisms for CT—like the UK, which has had a long history of appointing independent reviewers for terrorism, going back to the conflict in Northern Ireland. Their role is to give advice to the government on implemented measures and their legality in the broader scheme of things. Australia has also adopted a similar model. But it is true that there are only very few States which engage in this sort of practice. As such, one of our consistent pleas to States is to appoint independent, well-resourced oversight bodies at the national level.

In your recent report³ submitted to the UN General Assembly, you emphasize the interface between international human rights law and international humanitarian law [IHL] in CT regulation. In furtherance of this, it is pertinent to note that the fragmentation of the international legal order in tackling CT has grown substantially in recent years, for example with the increased involvement of the UN Security Council and its Counter-Terrorism Executive Directorate [CTED], the Financial Action Task Force [FATF], and so on. With so many legal instruments in play, do you think it is possible to ensure that the different mechanisms can maintain a harmonious relationship?

This thread of my work was first expounded upon in my UN General Assembly report A/73/361⁴ in 2018, which focuses really on new institutions and the effects of soft law in the CT space. We should note that since 9/11 the expansion of new entities has been extraordinary, such as the FATF (whose legal status under international law is somewhat indeterminate), the Global Counterterrorism Forum and the Shanghai Forum. In my view, these entities are significant in view of the extent to which they are weakening and undermining the value of multilateral frameworks, as they are composed of selective memberships or “clubs” of certain States only, rather than being more general and inclusive. Moreover, the creation of these entities has had an enormous (negative) effect on treaty-making as the primary mode of regulation in this area. We see an abandonment of treaty-making, and a move to more soft-law norms being produced. Interestingly, soft law in this context is an oxymoron of sorts, as many

3 Fionnuala D. Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/75/337, 3 September 2020, available at: <https://undocs.org/pdf?symbol=en/A/75/337>.

4 Fionnuala D. Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/73/361, 3 September 2018, available at: <http://undocs.org/en/A/73/361>.

States hold these instruments in higher regard than hard treaty norms. I have warned against this dangerous trend in the past as well. The mandate encounters this problem in country visits and in other contexts, as often States mention that they are comports with their soft-law obligations but overlook the hard, treaty-law norms in the human rights and humanitarian law arena, which are far more important.

Therefore, I think harmony is quite absent and that the current situation is convenient for States that are purporting the creation of international law in these fora, with norms produced that suit them and their underlying political agendas. As a result we also get a massive fragmentation of norms, resulting in an “à la carte” menu of sorts, from which States can pick and choose the institutions and treaties that work best for them. This affects the *Grundnorm* nature of human rights and humanitarian law obligations. I find this highly problematic.

You have collaborated extensively with other Special Rapporteurs during your tenure. Can you give us more insight into some of these joint collaborative efforts and tell us why they are important in furthering your mandate?

As States operate more collectively, it’s increasingly important for human rights and humanitarian actors to also accept that operating alone often doesn’t drive the necessary agenda. In some places, speaking with one, concerted voice makes us more powerful and reduces interpretive differences between Rapporteurs to protect norms that we would like to advance. I have been pleased to be part of a number of high-profile collaborative efforts, which have been furthered with great effect and response. One example of this is the collective position of fifty Special Procedure mandate holders on China last year⁵ – almost every single mandate holder and working group addressed a whole range of human rights practice issues in China. Another example was on the issue of annexation, when the Israeli government appeared to be moving towards the annexation of the Occupied Palestinian Territory.⁶ In this case we saw an extraordinary statement by Special Procedures, speaking in one unified voice, on the absolute illegality of the acts of the Israeli State. In conclusion, I think you can see a growing trend of maturity in Special Procedures, in the operationalization of moving together on key issues and key countries, which strengthens us.

Given that your mandate requires you to work with, develop a regular dialogue with, and discuss possible areas of cooperation with relevant actors in the CT space, what are your thoughts on the role played by the UN Security Council and its subsidiary organs, such as the Counter-Terrorism Committee [CTC] and

5 UN Office of the High Commissioner for Human Rights (UN Human Rights), “UN Experts Call for Decisive Measures to Protect Fundamental Freedoms in China”, 26 June 2020, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26006.

6 UN Human Rights, “Israeli Annexation of Parts of the Palestinian West Bank Would Break International Law – UN Experts Call on the International Community to Ensure Accountability”, 16 June 2020, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25960.

the CTED? What are your thoughts on the Security Council's adoption of resolutions in the field of CT which have far-reaching legislative implications for States, and the role of the CTED when it comes to the interpretation of the rules regulating the interplay between IHL and CT? What challenges, if any, does this raise for international law-making and the various other stakeholders that are working in such contexts?

As a member of the Global Compact, the mandate sits on all of the working groups of the Compact as the only entity charged with overseeing the intersection of CT and human rights. I have expressed my reservations in a number of my General Assembly reports⁷ towards the gargantuan growth in the CT architecture. I have warned against it and have said that it needs to be pruned substantially. It is pertinent to note that the funding for these entities comes primarily from two States, comprising approximately 95% of the total funds. This is against the best interests of the UN in managing extra-budgetary funds, and of the operations and projects that are to be undertaken by these entities.

In relation to the CTC, the Special Rapporteur has expressed concern over the closed nature of the body, even in contrast to the access available for human rights experts to the Security Council. For instance, the CTC has largely been closed to independent civil society actors, with some very limited exceptions over recent years. None of this makes for good policy. The whole point of evidence-based policy formulation, whether in the Security Council or in national settings, is to have open debate and discussion, by bringing in people who may disagree to check if the measures/policies are in fact working or not. The lack of public discourse on the findings and availability of information has resulted in non-transparency. We have also, for instance, raised concerns regarding the secrecy and lack of transparency in the reporting process that the CTED leads on behalf of the CTC. Bear in mind that none of the reports that are issued on compatibility compliance by States in furtherance of Security Council Resolution 1373 (2001) and other resolutions have been made public since 2006. This is a travesty. However, I should commend in this regard the government of Finland, which is essentially the first country in twenty years to make its report and its assessment by the CTED public.⁸ The general trend, however, is that it seems to be a closed, non-transparent and highly problematic space, precisely because of the nature of its operation and its lack of accessibility.

On the increased legislative role of the Security Council in the CT arena, it is *sui generis* and completely unique in the legislative realm. It does not apply to other aspects of the Security Council's work. The mandate is of the view that this is an encroachment on the sovereignty of States. We are profoundly aware of how many States are concerned by the impingement of their sovereignty by

7 Particularly UN Docs A/73/361 and A/74/335. See also Fionnuala D. Ní Aoláin, "The Massive Perils of the Latest U.N. Resolution on Terrorism", *Just Security*, 8 July 2019, available at: www.justsecurity.org/64840/the-massive-perils-of-the-latest-u-n-resolution-on-terrorism/.

8 Finland has made its CTC assessment report public on its Ministry of the Interior's website, available at: <https://tinyurl.com/52r7uhbw>.

criminal law regulations induced by the Security Council, which often fails to take into account key issues like human rights and rule of law obligations, including under their own domestic constitutions. I think there is increasing disquiet amongst States, and I hope that, for example, the decision in the summer of 2020 will become an emerging trend, wherein there was a failure to pass a Security Council resolution on terrorism promoted by Indonesia; this was the first time we had a veto on a Security Council resolution in this context.⁹ This may be indicative of States' behaviour leaning towards a need to pause on the Security Council becoming a "global legislator" on CT-related issues.

Regarding the role of the CTED and its substantive interpretations of the interplay between IHL and CT, I have addressed this at length in my most recent report to the General Assembly.¹⁰ The mandate accepts that there is a role for the CTED in acknowledging and affirming fundamental human rights and IHL norms that are not controversial, but it seems to me that it is unacceptable and inappropriate for the CTED to appoint itself as "*primus inter pares*" on the interpretation of IHL. That seems to undermine the vision and structure of the Geneva Conventions and also undermines the key role that the International Committee of the Red Cross [ICRC] plays in this regard, as well as the important role of States in the Diplomatic Conference that were instrumental in the creation of the Geneva Conventions. The CTED is a special political entity and it has an important role to play, but it should ensure that its work does not expand the interpretation of IHL beyond the established, accepted norms agreed upon by States. And it deeply concerns me that there is an increased move to include IHL assessments in those CT reviews carried out by the CTED which – I remind us all – are secret, and as such, there is no way by which we can know what advice States are given. But what we do know is that States have consistently disavowed the application of IHL. It is highly comfortable for States, especially in the context of non-international armed conflicts, to address actors and their acts as terrorist in nature rather than to make the harder and more complicated questions of assessment on what the applicability of Common Article 3 to the Geneva Conventions, and Additional Protocol II, might mean.

It seems to me that in the highly political context of assessment within which the CTED operates, the idea that the CTED will apply IHL faithfully – given the kinds of political pressures that are brought to bear upon it in these assessment processes – seems a worrisome development and even a potential subversion of the Geneva Conventions themselves. The mandate has been very clear that we do not believe this to be appropriate.

From a humanitarian angle, one of the most debated topics in the realm of CT and sanctions is the need for humanitarian exemptions. You identify this in your

9 For the interviewee's assessment of that resolution, which did not pass, see Fionnuala D. Ní Aoláin, "The Challenges of a New UN Security Council Resolution on Foreign Fighters", *Just Security*, 17 August 2020, available at: www.justsecurity.org/72052/the-challenges-of-a-new-un-security-council-resolution-on-foreign-fighters/.

10 See F. D. Ní Aoláin, above note 3, paras 27–29.

recent report as well.¹¹ How have States responded, and what are there general reactions? Even though there are only a handful of States that have incorporated humanitarian exemption clauses within their domestic CT legislations, they are all different from each other. Is there a need to create a uniformly recognized language to ensure that there is no impediment to the provision of impartial humanitarian aid?

In its most recent report,¹² the mandate affirmed the integrity of principled humanitarian action. I have addressed in this report the very serious impact of what I call “a complex web of interwoven counter-terrorism measures, legislation, regulations, donor requirements and terrorism sanctions” on principled humanitarian action. I have been concerned about the ways in which sanctions regimes have led to impediments and delays to humanitarian operations, having impinged upon the core mandates of several humanitarian actors, including the ICRC. We see a proliferation of these measures and an increased interplay between national and international sanctions regimes, and these developments are particularly worrisome.

My view is that the Security Council has a particular responsibility in this regard to prevent the negative consequences of these measures on humanitarian action. But as you may know, we face a number of political challenges in this space. The mandate’s view is that there must be consistent exemption language in all of these CT resolutions, and that there is a need to revisit those resolutions where it has been arguably demonstrated empirically that the resolution has impeded and prevented principled and exclusively humanitarian action. Doing this, in practice, means ensuring that these provisions are included in Security Council resolutions, including affirming humanitarian access, like in Resolutions 2139 (2014)¹³ and 2175 (2014).¹⁴

My view is that at the moment, our best way forward is to focus on particular country resolutions by augmenting the language in a favourable manner where possible, and to focus our efforts on documentation of the negative effects of these measures. One striking feature, not just for CT sanctions, is that while the Security Council continues to effectively legislate, it has spent little effort in documenting the negative effects of these measures, or really any effects at all. Without needing to assess effects, the Security Council can legislate freely and in a more reckless fashion. To resolve this systemic structural problem and to undo some of the harms that have been done over the past twenty years, we must focus on documenting, articulating and ensuring that the costs of sanctions regimes are visible, so that it is no longer viable for the Security

11 *Ibid.*, paras 34, 35.

12 *Ibid.*

13 UNSC Res. 2139, UN Doc. S/RES/2139 (2014), 22 February 2014, para. 7, available at: <https://tinyurl.com/cb6n28zw>.

14 UNSC Res. 2175 (on protection of humanitarian personnel and UN and associated personnel in armed conflict), UN Doc. S/RES/2175 (2014), 29 August 2014, para 3, available at: <https://digitallibrary.un.org/record/778588?ln=en>.

Council to argue that these measures are neutral or cost-free to those in need of protection.

In your annual report submitted to the Human Rights Council as Special Rapporteur in 2019,¹⁵ you focused on the impact of measures to address terrorism and violent extremism on the civic space and the rights of civil society actors and human rights defenders. Can you elaborate further on this and highlight the operational challenges faced in this regard by members of civil society, humanitarian actors etc.?

In this report, my focus was to highlight the negative impacts on CT, the “preventing/countering violent extremism” debate, and the effects of security measures on civil society at large. It goes without saying that the civil society space has been shrinking around the globe. This shrinkage is inherently linked to the increased securitization since 9/11. Human rights defenders are increasingly the target of CT measures and actions by States. The report found that of all communications sent by the mandate to States in almost twenty years, nearly 66% showcased that CT measures directly affected civil society actors rather than furthering actual CT efforts. To state the obvious, this is indicative of lousy CT action by States, especially if you are targeting civil society rather than the violent actors carrying out so-called terrorist acts. Moreover, it speaks to the hardwiring of the misuse of CT frameworks. What we have to understand is that over the past twenty years, CT has become the favoured tool of many repressive States to target those who disagree with them, such as those advocating for women’s rights, the right to protest etc. As such, CT is largely being used as a tool to repress dissenting views to that of the government in power.

The challenge here is on how we can roll back the permissive global environment that has been created for States, from the Security Council outwards, because that is where it all starts. We cannot look at national practice in isolation from the cover and permissibility that is given to States by the invocation of the word “terrorism” without a definition, leaving national systems to define the terminology as they see fit. This is the perfect gentleman’s agreement, as it allows every State to define whoever they want as a terrorist and no one ever calls them out for it. I think we have a clear and evidenced pattern of abuse in this regard.

As such, the lack of a definition of terrorism results in the creation of an overarching veil that allows absolute discretion to States. The only way to address this nationally is by looking at the way each State interprets the use of CT frameworks in its domestic system. We need deep and profound change to CT laws at the national level. These laws currently provide cover and capacity for systemically undermining rule of law and fundamental human rights under the

15 Fionnuala D. Ní Aoláin, *Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders*, UN Doc. A/HRC/40/52, 1 March 2019, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/057/59/PDF/G1905759.pdf>.

guise of responding to terrorism, violent extremism and radicalization. From there, if the UN is involved in CT assistance and support, not only human rights entities but all CT entities have to clearly identify State abuse of CT and have an effective means to address it. From a human rights perspective, this work requires as much support as possible from States, and from other human rights entities in the CT system, especially bearing in mind that the Special Rapporteur is a part-time, unfunded position.

From a humanitarian and victim standpoint, one of the biggest challenges is to represent and measure the actual impact of CT measures and sanctions on affected populations. In your experience, can States be held accountable for the impact of their actions on vulnerable communities through their having imposed stringent CT and sanctions regimes?

This is a complicated question because it raises issues of State responsibility under international law. Often, vulnerable communities are the least able and the least well-placed to articulate the harms they have experienced. They are viewed with suspicion and distrust, and are often seen by their societies as tainted or deemed suspect by virtue of security and political classifications around supporting, enabling or being a site/hub for terrorism. The legal issues for accountability are really challenging in terms of holding States accountable under the classic rhetoric of State responsibility doctrine. This is where the UN and other humanitarian actors have a really important role to play in terms of being the voice for those communities, as well as – and I think this goes to the broader impact of CT – reimagining the mission and brand of the UN: when we have a situation where UN entities enable and support CT measures and in-country action with harmful outcomes on vulnerable communities, we run directly into UN due diligence territory and an enormous branding problem for the organization. The Secretary-General and other key actors within the UN system should take this seriously into account. The very “brand” of the UN is at stake in this regard.

On past occasions, you have mentioned the need for States to “talk the talk and walk the walk” when it comes to the treatment of foreign “terrorist” fighters. This topic is highly debated and relevant in today’s world. What are some specific human rights challenges you see in relation to these fighters, such as their treatment in areas of conflict, their repatriation, and the domestic criminalization and adjudication mechanisms that deal with them?

The mandate has addressed this issue in a number of reports, and I also address it in my most recent report¹⁶ to the Human Rights Council, which looks at the negative impact of CT on women, girls and families. I have been very clear that return and

16 Fionnuala D. Ní Aoláin, *Human Rights Impact of Counter-Terrorism and Countering (Violent) Extremism Policies and Practices on the Rights of Women, Girls and the Family*, UN Doc. A/HRC/46/36, 22 January 2021, available at: www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx.

repatriation of people from Syria and Iraq is the only international law-compliant response to the humanitarian catastrophe that has unfolded over the last several years in northeast Syria and Iraq. The failure of some States to enforce their international obligations, including under IHL, international human rights law and particularly the UN Convention on the Rights of the Child, is extraordinarily demoralizing not least because many of these States claim their foreign policy and approach to international law are driven by a gender- and human rights-sensitive approach, but their actual approach, particularly to foreign terrorist fighters and associated women and children, belies that. There is an obvious contradiction between the rhetorical sentimentality concerning victims of terrorism and the need to support them, on the one hand, and on the other, the failure on the part of many States to bring back and prosecute persons who commit serious violations of IHL and international law from Iraq and Syria, especially since those States are often the only ones that are well-placed to engage in such prosecutions. We do have good State practice as well, from countries including the Russian Federation, Kazakhstan, Kyrgyzstan, Tajikistan, Tunisia and Indonesia. As such, it is not that we have an absence of State practice here, but one of the failures has been a failure to acknowledge the return of nationals to their home States, including during this COVID-19 health pandemic. Enormous failings by Western States appear to be hardwired and speak to an enormous moral failure on their part, which is evidently glaring for the whole world to see.

In the wake of the COVID-19 global pandemic, the entire world has faced challenges in coping with this new disease. Has the impact of the pandemic exacerbated or amplified the effect of CT measures on affected populations? Moving forward, what are the steps that need to be taken to ensure that CT measures and sanctions do not have an adverse impact on the ability of local communities to fight COVID-19?

It truly seems like a very long year as we now look back and reflect on the twelve months plus since the advent of the global health pandemic. The mandate has identified a number of CT- and human rights-related challenges during this time. Firstly, we have seen a resort to the use of exceptional powers in multiple countries around the world. These powers have included an expansion of traditional emergency powers, the consistent use of *de facto* emergency powers (mostly found in health and sanitation law), expansions of executive purpose, and the repurposing of CT and security powers to manage the pandemic. The mandate, together with two NGOs – the International Center for Not-for-Profit Law and the European Center for Not-for-Profit Law – has created a global tracker¹⁷ on the use of emergency powers. Built into that exceptional power use has been the repurposing of CT and security powers to manage the pandemic, and that raises profound questions about the appropriateness, proportionality and necessity of using such measures, which were designed primarily to address

17 Available at: www.icnl.org/covid19tracker/.

extreme violence, for the purpose of addressing a global pandemic. This is further exacerbated when we recall that the communities that have been most negatively affected by the pandemic are communities of minorities and persons of colour – communities that have historically been marginalized or racialized within their own national settings. So, the idea that we would use the extraordinary powers of the State against these vulnerable communities, which often have tenuous and fragile relationships with their States, seems to me to be most regrettable.

Secondly, I would stress that we are particularly concerned that the negative impact of sanctions continues to apply through the COVID-19 period, without any relief in sight. And thirdly, many of the tools that have been used by the security State to address terrorism, especially surveillance and technology tools, raise questions of privacy. The mandate's observations have been that we see many of these tools being repurposed for the health pandemic, and this raises all kinds of questions on privacy and on privacy being a gateway right to the infringement of other rights like economic and social rights, including the right to health and the right to work, as well as classic civil and political rights such as freedom of movement, expression, religion and belief, which will all be monumentally compromised in the post-COVID world. As most of us who have spent time working in the field of exceptionality and exceptional powers know, the hardest thing about exceptional measures is getting rid of them, whereas implementing them in the first place is far easier.

To conclude, I think the challenge we will face – if there is a time after this pandemic – will be to address the fundamental distortions, excessive securitization and wholesale abandonment of rights protection in data and surveillance that will have been hardwired into many of our systems, including the health sectors of all States.

Is there anything else you would like to share with our readers?

My final comment would be that this is a big year. It is the 20th anniversary of 9/11 and of Security Council Resolution 1373, and we have sanctions committees celebrating twenty years as well. Today [11 January 2021] was also the 19th anniversary of the first formal statement by the US government that persons were being transferred and held at Guantanamo Bay, Cuba. If we were to pause and look at the last twenty years, we would need to ask the one fundamental question of whether any of this CT stuff is actually working. We see very little in terms of the monitoring and evaluation of effects of CT measures, especially of their negative effects in terms of fuelling and feeding the underlying drivers of violence as opposed to reducing them. We have also seen the displacement in the UN system of other important blocks of work by CT – indeed, CT might be described as a rising fourth pillar of the organization, displacing the UN Charter's core pillars of human rights, peace and security, and development, and thereby competing with other core values which, whether development or conflict resolution, are far more likely to bring an end to the causalities of violence in many areas of fragility and conflict than the CT measures currently being

deployed. Lastly, this is the year in which we will renegotiate the global CT strategy, and this being twenty years after 9/11, it is a great time for a fundamental rethink and a chance to significantly prune the global CT apparatus; to ensure that CT budgets are redirected to foundational development and conflict prevention work in order to prevent violence in the first place; and most importantly, to implement an independent, overarching and fully funded global CT oversight mechanism. A part-time Special Rapporteur cannot even conceive of being the oversight body for the scale and scope of work being done, and States can and should do better to ensure that CT work is IHL- and human rights-compliant.



Unilateral coercive measures, IHL and impartial humanitarian action: An interview with Alena Douhan*

Alena Douhan is the United Nations (UN) Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights. She was appointed to this position by the UN Human Rights Council in March 2020. As the mandate holder, she works with both States and UN organs and seeks to prevent, minimize and redress the adverse impacts of unilateral coercive measures on human rights. Ms Douhan is also a Professor of International Law at the Belarusian State University, Director of the Peace Research Center, and President of the Belarusian branch of the International Law Association.

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By way of introduction, could you explain your role and responsibilities as the UN Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights? What is the purpose of your mandate, and how have you approached its implementation? Could you explain what distinguishes a unilateral coercive measure [UCM] from other sanctions regimes, including those instituted by the UN Security Council?

The mandate of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights is one of the Special Procedures

* This interview was conducted by Bruno Demeyere, Editor-in-Chief of the Review.

established by the Human Rights Council.¹ As a relatively new mandate, it was first established in 2015 as soon as the number of sanctions applied by States and regional organizations without or beyond authorizations of the UN Security Council, as well as the types, means, forms and targets of sanctions, began to expand a lot. One can mention here in particular the expansion of targeted sanctions, affecting thousands of individuals and companies already in that period; the introduction and tightening of economic and trade embargoes; and the introduction of so-called sectoral sanctions against sectors of the economy. These developments have been accompanied by an expansion of grounds for the introduction of sanctions – protection of human rights, suppression of terrorism and terrorist financing, cyber threats, corruption and many others – and by the implementation of provisions on civil and criminal penalties in the legislation of sanctioning States for violations of “sanctions” regulations.

UN Security Council authorization versus UCMs

When we speak about the mandate itself, its focus is not on all types of sanctions, but rather on the sanctions that are applied by States or regional organizations unilaterally without the authorization of the UN Security Council. That is the main difference between the focus of this mandate and the other major sanctions regimes. The UN Charter provides for the possibility of the UN Security Council to adopt necessary measures for the maintenance of peace in situations where there is a threat to peace, a breach of the peace or an act of aggression.² As such, States and regional organizations cannot take enforcement action without authorization by the UN Security Council. However, recent practice shows that a number of such measures are taken by States and regional organizations both in situations of armed conflict and outside of armed conflict. By 2015, it became clear that the number of unilateral sanctions applied against States, individuals and companies was rapidly expanding. Their legality is not entirely clear and, at the same time, the impact of these sanctions on the population is enormous. These unilateral sanctions do not have a military component. They include other forms of pressure – trade, economic and arms embargoes, freezing of bank accounts, entry bans etc. – which may be imposed by a State, or group of States, or regional organizations against another State or against specific individuals.

Main purposes of the mandate

The main purpose of the mandate is first to collect information about any application of unilateral sanctions by States or regional organizations and to

1 Office of the UN High Commissioner for Human Rights (UN Human Rights), “Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights”, available at: www.ohchr.org/en/issues/ucm/pages/srcoercivemeasures.aspx (all internet references were accessed in July 2021); UN Human Rights, “Special Procedures of the Human Rights Council”, available at: <https://tinyurl.com/vxa9ydsz>; Human Rights Council, *Manual of Operations of the Special Procedures of the Human Rights Council*, August 2008, available at: www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/Manualofspecialprocedures.aspx

2 Charter of the United Nations, 1 UNTS XVI, 24 October 1945, Chap. VII.

analyze what processes are in place in regulating these measures, for what purpose they are applied, what means are used, and what are their consequences. Another purpose of the mandate is to qualify these measures from the point of view of international law, because it is necessary to admit that today there are diverse views on the legality of these measures. Moreover, there is a discrepancy about the definition of UCMs itself. It is important to note that there is no recognized definition, and therefore there are disputes about which measures are legal and which measures are illegal. In numerous resolutions, the Human Rights Council³ as well as the UN General Assembly⁴ have announced that all UCMs are illegal. That is why States and regional organizations insist that they are not imposing UCMs but are rather imposing measures which they perceive as legitimate sanctions/restrictive measures, and as such, they should not be prohibited and do not fall under this mandate. Therefore, an assessment of the legality of measures to qualify them as UCMs or not is also important for the purpose of the mandate.

Thematic reports

Another aspect of the mandate is to identify spheres of interest and to prepare thematic reports to be delivered to the Human Rights Council and to the UN General Assembly. In the absence of definitions and in view of the discrepancy between States and regional organizations on the assessment of unilateral measures, my reports to the Human Rights Council and General Assembly in 2021 are focusing on the problem of the notion, elements, types and characteristics of unilateral sanctions as well as the identification of targets of unilateral sanctions.⁵ The call for contributions has been sent to all States, expert academics, non-governmental organizations [NGOs] etc.

Country visits

The next sphere of the mandate is to carry out country visits. Unfortunately, today many countries are under severe sanctions regimes, and it is therefore necessary to visit these countries in order to analyze the situation in the field and to assess, as a result, what the impact of unilateral sanctions imposed on these countries is. For instance, last year, I had visits to Qatar and Venezuela.

3 HRC Res. 15/24, 6 October 2010, paras 1–3, available at: <https://undocs.org/en/A/HRC/RES/15/24>; HRC Res. 19/32, 18 April 2012, paras 1–3, available at: <https://undocs.org/en/A/HRC/RES/19/32>; HRC Res. 24/14, 8 October 2013, paras 1–3, available at: <https://undocs.org/en/A/HRC/RES/24/14>; HRC Res. 30/2, 12 October 2015, paras 1–2, 4, available at: <https://undocs.org/en/A/HRC/RES/30/2>; HRC Res. 34/13, 24 March 2017, paras 1–2, 4, available at: <https://undocs.org/en/A/HRC/RES/34/13>; HRC Res. 45/5, 6 October 2020, Preamble, available at: <https://undocs.org/en/A/HRC/RES/45/5>.

4 UNGA Res. 69/180, 18 December 2014, paras 5–6, available at: www.ohchr.org/Documents/Issues/UCM/Res/A-RES-69-180.pdf; UNGA Res. 70/151, 17 December 2015, paras 5–6, available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/151; UNGA Res. 71/193, 19 December 2016, paras 5–6, available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/193.

5 The report to the Human Rights Council is to be presented in September 2021, and the report to the General Assembly in October 2021.

Impact on human rights

When we speak about the impact of unilateral sanctions on the enjoyment of human rights within the scope of the mandate, the aim is to qualify unilateral measures under international law and to identify affected individuals, or groups of individuals, as well as the humanitarian impact of measures taken. The last important aspect of the mandate is to identify whether the mechanisms of humanitarian exceptions and delivery of humanitarian aid are neither effective nor efficient due to the impediments which take place because of sanctions, or due to the non-cooperation of governments or any other reasons.

Methodology

When it comes to the methodology of work of the mandate, it is necessary that I try to use all possible mechanisms available. I described this in my first report to the Human Rights Council in September 2020, which elucidated the roadmap for the development of the mandate.⁶ Besides the thematic reports and country visits, I pay lots of attention to cooperation with NGOs because of their field presence, and also because they are facing both negative consequences (in particular, their assets or assets of their staff are frozen) as well as impediments (problems with getting humanitarian licenses, rejections of requests to do bank transfers, etc.) when performing their work. I also place a huge emphasis on cooperation with the academic community because I believe that this sphere and their contributions are underestimated.

There are a lot of factors to be taken into account. For example, there are specifics when unilateral sanctions are applied in the course of an armed conflict, outside of an armed conflict, or when it is disputed whether the situation can be classified as an armed conflict or not. I cooperate with States and with international organizations because this mandate comes very close to a number of different aspects: maintenance of international peace and security, international responsibility, international criminal law, the struggle against international terrorism, and many others. For example, in November 2020 I was invited as a speaker at an Arria-Formula meeting of the UN Security Council, where the aspect of cooperation regarding the interaction/impact of unilateral sanctions on the maintenance of international peace and security was discussed.⁷ I also try to work actively with other international organizations such as the Office of the UN High Commissioner for Refugees and the International Organization for Migration because the application of unilateral sanctions—together with the

6 Alena Douhan, *Negative Impact of Unilateral Coercive Measures: Priorities and Road Map*, UN Doc. A/HRC/45/7, 1 July 2020, available at: <https://undocs.org/en/A/HRC/45/7>.

7 Alena Douhan, “Statement of the Special Rapporteur on the NEGATIVE impact of the Unilateral Coercive Measures on the Enjoyment of Human Rights”, 25 November 2020, available at: www.ohchr.org/Documents/Issues/UCM/UCM-Arria-Formula-meeting.pdf; Virtual Arria-Formula Meeting on “End Unilateral Coercive Measures Now”, available at: <https://media.un.org/en/asset/k1l/k1l5rfnox1> (part 1), <https://media.un.org/en/asset/k1f/k1fnor8vmq> (part 2).

existence of armed conflict – quite often initiates or influences flows of refugees and migrants to neighbouring countries, as has happened or is still happening with Syrian and Venezuelan migrants/refugees and undocumented Afghan refugees in Iran.

You have mentioned several times, including in your guidance note on COVID-19⁸ and your first report to the Human Rights Council,⁹ the relevance of international humanitarian law [IHL] to UCMs. Would you be able to expand on this? What do you see as the interplay between UCMs and IHL? Would you go as far as to say that UCMs must comply with IHL?

UCMs and armed conflict

In my opinion, this question deals with several perspectives concerning the application of unilateral sanctions/UCMs. All of those perspectives are very important in my opinion. First of all, quite often, UCMs/unilateral sanctions are applied in situations where there is an armed conflict in the country, or there is some sort of civil disorder which – depending on the circumstances – can or cannot be qualified as a conflict of non-international character. The government or the opposition or opposition groups do not recognize the fact of the existence of the armed conflict, but sanctions are imposed. In other situations, unilateral sanctions are imposed outside of any armed conflict, but the consequences of their application have sometimes been claimed to constitute a crime of aggression or a crime against humanity, as has been done, for example, by Venezuela in its referral to the International Criminal Court [ICC].¹⁰

UCMs and UN Security Council sanctions

It is important to take into account that when we speak about the application of unilateral sanctions, we may or may not have the authorization of the UN Security Council. Even in a situation where there are relevant Security Council resolutions and the Security Council tries to handle the conflict, quite often unilateral sanctions go much further, listing more people or companies than was authorized by the Security Council, imposing new types of sanctions, or implementing penalty mechanisms (US and EU restrictive measures imposed in the course of the struggle against international terrorism; EU sanctions against Afghanistan, Eritrea, Haiti, Iraq, North Korea, Somalia and Sudan). From an international law standpoint the above excessive unilateral measures are not authorized, have no other legal grounds, and thus exacerbate the calamities of

8 Alena Douhan, “COVID-19 Human Rights Guidance Note: Negative Impact of Unilateral Sanctions during the State of Emergency”, 1 May 2020, available at: www.ohchr.org/Documents/Issues/UCM/UCMCOVID19GuidanceNote.pdf.

9 A. Douhan, above note 6, paras 103, 110.

10 ICC, “Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the Referral by Venezuela regarding the Situation in Its Own Territory”, 17 February 2020, available at: www.icc-cpi.int/Pages/item.aspx?name=200217-otp-statement-venezuela.

armed conflicts or other situations of violence, without any guarantee of human rights protection.

International humanitarian law, human rights law and refugee law

In the case of unilateral sanctions, during the course of my interactions with States I refer to their obligations to observe human rights law, IHL and international refugee law. However, my main approach and message that I try to put forward to States is that human rights should be protected in all situations and that this should be their primary concern regardless of their political approaches to specific situations, conflicts, and parties to the same. In my opinion, in certain situations it may be complicated to differentiate exactly what legal framework should be applied, but they should all be taken into account by States in order to guarantee protection of the people who are affected by the conflict or who are affected by the application of these unilateral sanctions.

Delivery of humanitarian aid

An important element of interaction with IHL standards is the problem of delivery of humanitarian aid. If we look at, for example, the Additional Protocols to the Geneva Conventions,¹¹ both of them provide, in my opinion, for the right of a population to get access to humanitarian aid and not be deprived of the essential means of their subsistence. However, when we look at the situation in the absence of international or non-international armed conflict we do not have this explicit prescription and we do not speak about these rights. That is why from a legalistic point of view, IHL enables the right to get humanitarian aid and also sets forth the principle of non-discrimination and impartiality as it concerns the availability and distribution of humanitarian aid.

There are some provisions in the Human Rights Council resolutions which regulate the functioning of my mandate in this regard.¹² I believe that it is very important, keeping in mind the need to protect human rights and to guarantee the basic humanitarian needs of people, to apply the prohibition on discrimination when distributing humanitarian aid, even in situations where no armed conflict exists or the qualification is doubtful. Unfortunately, several humanitarian NGOs have reported to me that they quite openly face some sort of pressure preventing them from delivering humanitarian aid to certain territories or to the territory under the control of certain opposition or governmental

11 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Arts 54, 69, 70; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 14. See also Anna Segall, "Economic Sanctions: Legal and Policy Constraints", *International Review of the Red Cross*, Vol. 81, No. 836, 1999, available at: www.icrc.org/en/doc/resources/documents/article/other/57jq73.htm.

12 HRC Res. 15/24, above note 3, para. 8; HRC Res. 19/32, above note 3, para. 11; HRC Res. 34/13, above note 3, Preamble, para. 11.

groups by countries which impose sanctions. That clearly violates, in my opinion, the right to access to humanitarian aid as well as the principle of non-discrimination, and that is why the application by analogy of these rules of IHL in the face of human suffering is very important.

Unilateral sanctions or UCMs a crime against humanity?

Recently there has been a new trend in the interaction between IHL and the application of unilateral sanctions or UCMs. Quite openly, countries targeted by severe sanctions are referring to the application of UCMs as a crime against humanity or a crime of aggression. In the responses I received from the call for contributions when I was preparing a report on the negative impact of UCMs during the pandemic, a number of sanctioned States referred to such unilateral measures as a crime against humanity.¹³ A very recent development includes the Venezuelan referral submitted to the ICC to consider the case of application of sanctions against Venezuela as an international crime.¹⁴ The referral was submitted a year ago. We do not have any decision yet, but that is one of the contemporary developments which we can identify.

Looking ahead, how can States best ensure, across the breadth of different legal traditions in the world, that their approach to UCMs is consistent and fully compliant with all applicable rules of international law? Are there examples of good drafting practice which States could lean on?

Legal rather than political perspective

It is necessary to acknowledge that in accordance with resolutions of the Human Rights Council and the UN General Assembly, UCMs are illegal¹⁵ – and it is very complicated to speak about good practice in the application of illegal measures. The main idea, as well as the main recommendation that I have, is to stop looking at the application of unilateral sanctions in political terms only. Unfortunately, today there is a fierce discussion about sanctions in absolutely black-and-white terminology. They are viewed as either something good applied against someone bad, or vice versa: any unilateral measures are viewed as something totally illegal regardless of the form or type. That is why I believe we need to stop looking at them from a political perspective and start acting in accordance with international law to guarantee human rights protection. In accordance with international law, States are free to try to influence the policy

13 Alena Douhan, *Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights in the Coronavirus Disease Pandemic*, UN Doc. A/75/209, 21 July 2020, available at: www.undocs.org/en/A/75/209.

14 ICC, above note 10.

15 HRC Res. 15/24, above note 3, paras 1–3; HRC Res. 19/32, above note 3, paras 1–3; HRC Res. 24/14, above note 3, paras 1–3; HRC Res. 30/2, above note 3, paras 1–2, 4; HRC Res. 34/13, above note 3, paras 1–2, 4; HRC Res. 45/5, above note 3, Preamble; UNGA Res. 69/180, above note 4, paras 5–6; UNGA Res. 70/151, above note 4, paras 5–6; UNGA Res. 71/193, above note 4, paras 5–6.

and behaviour of other States, but by legal means only. In particular, in a situation which can be qualified as a threat to peace, a breach of the peace or an act of aggression, the mechanisms of the UN Security Council may be used – that is, Chapter VII of the UN Charter.

Trade, investment agreements and diplomatic relations

Where the severity of the threat does not amount to a breach of the peace or an act of aggression, States are free to impose measures in accordance with international law – for example, denouncing economic or trade agreements in accordance with the rules of the agreement, stopping diplomatic relations, or deciding not to engage in cooperation.

“Countermeasures”

A mechanism that is very important, in my opinion, is the law of international responsibility. Some States in their practice insist that measures taken by them do not constitute UCMs but are rather countermeasures. The mechanism of countermeasures is well known under international law. At the same time, any measures taken as countermeasures should correspond to the law of international responsibility. In particular, under the Draft Articles on Responsibility of States for Internationally Wrongful Acts, they can only be taken by the directly affected States in response to violations of international obligations in order to restore fulfilment of those obligations; they shall be proportionate to the violation and temporary; and they shall not violate human rights, peremptory norms of international law or humanitarian law.¹⁶ Naturally, countermeasures can also be taken by States other than directly affected States in response to violations of *erga omnes* obligations like aggression, genocide, apartheid or mass gross violations of fundamental human rights shocking the conscience of mankind.¹⁷ Countermeasures could thus help to restore violated international obligations but in a legal way and without a negative humanitarian effect.

The International Criminal Court

Another instrument is the possibility of submitting a referral to the ICC within its jurisdiction when international crimes are committed. I remind all States about the existence of universal jurisdiction in situations when international crimes are committed. Unfortunately, these mechanisms are quite often forgotten. If we look at the practice of the ICC, one can cite, for example, cases submitted by a group of countries against Venezuela and by Venezuela against the United States. The use of the judicial mechanism guarantees that those who commit international

¹⁶ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 50.

¹⁷ *Ibid.*, Art. 48(1)(b).

crimes do not enjoy impunity, but at the same time it provides due process guarantees and prevents any violation of human rights. Unfortunately, today States often prefer to impose sanctions instead of starting a criminal case in an international or national court as it is easier and faster, and the standards of proof are nearly non-existent.

Counterterrorism measures as an example

Here, the struggle against international terrorism both in the course of armed conflict and outside of conflict may serve as an illustrative example. Resolutions of the UN Security Council in the period of 1999 to 2001¹⁸ referred to the obligation of all States to suppress international terrorism by all means, but it started to become clear that this “all means” might affect human rights and international humanitarian law. So, within a couple of months, by October 2001 (Resolution 1370), we see that the terminology of Security Council resolutions had begun to refer to the obligation of States to suppress international terrorism by all means and with due account to the UN Charter and later to international law, human rights law, humanitarian law and refugee law.¹⁹ The global counterterrorism strategy of the UN refers to the obligation to protect human rights and to protect humanitarian law as one of the important preventive mechanisms in the suppression of international terrorism.²⁰ One should not violate human rights in order to protect human rights.

Good practice: Detailed guidance

When we come to good practice, I am carefully optimistic in mentioning the attempts of States to develop more detailed guidelines in the sphere of humanitarian exemptions and delivery of humanitarian aid.²¹ They are far from ideal, but I believe that these are the essential first steps which need to be taken. The same role is to be played by the recently established EU-level contact point for humanitarian aid in environments subject to EU sanctions.²² There are numerous problems with this mechanism, but it is still a good step forward to understand and acknowledge that these problems exist.

18 UNSC Res. 1267, 15 October 1999, para. 3; UNSC Res. 1333, 19 December 2000, para. 3; UNSC Res. 1373, 28 September 2001, para. 2.

19 UNSC Res. 2199, 12 February 2015; UNSC Res. 2249, 20 November 2015; UNSC Res. 2354, 24 May 2017, and many others.

20 UNGA Res. 60/288, 20 September 2006, available at: <https://undocs.org/A/RES/60/288>.

21 European Commission, “Commission Guidance Note on the Provision of Humanitarian Aid to Fight the Covid-19 Pandemic in Certain Environments Subject To EU Restrictive Measures”, 16 November 2020, available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/201116-humanitarian-aid-guidance-note_en.pdf.

22 European Commission, “EU-Level Contact Point for Humanitarian Aid in Environments Subject to EU Sanctions”, available at: <https://tinyurl.com/59acr5fs>.

European Court of Justice sanctions cases

The second good tendency that should be taken into account is the developments that exist in the practice of the European Court of Justice [ECJ] in its so-called sanctions cases. Article 275 of the Treaty on the Functioning of the European Union provides for the possibility of bringing a case to the attention of the ECJ, if sanctions are imposed against individuals.²³ For a long period of time there were just a few cases, but the activity of the ECJ in sanctions cases has enormously increased over the last five years and we see now that more than 360 decisions have already been taken. This mechanism provides the possibility of accessing justice.²⁴

Recommendations

To conclude, I believe the first recommendation is to observe international law standards; second, to carry out a humanitarian assessment of any unilateral measures taken; and third, to apply some sort of precautionary humanitarian principles to any unilateral activity that is taken by States.

The title of your mandate refers to the negative impact of UCMs. Is it all negative, or do you see any potential usefulness of UCMs?

The lawyer in me says that if we believe that UCMs are illegal, we cannot speak about the potential positives or potential usefulness of these measures, and that is why I will speak again on unilateral sanctions more generally. When we speak about the impact of the measures, the main point is that States should act in accordance with the rule of law. This means that they cannot perform illegal activities and therefore they cannot apply UCMs. However, as I mentioned in response to the previous questions, they can take unilateral activity which is in conformity with international law. The unilateral activity being in conformity with international law is an important means of international intercourse. It is a means which may help States to settle their disputes and their differences in a peaceful way, and will positively impact, in my opinion, the situation in their societies.

Negative impacts

Regarding the negative impact of UCMs that falls within the mandate, I believe that first of all it is necessary to understand what is meant by a “negative impact”. That is one of the purposes of the mandate. I have observed total unawareness about this negative impact. There is a constant discussion about the evidence-based

23 Treaty on the Functioning of the European Union, 26 October 2012, Art. 275, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

24 “Sanctions Judgments”, *Sanctions: Law, Practice and Guidance*, available at: www.europeansanctions.com/judgment/.

approach to this: is there any negative impact or none at all? How can the specific negative impact of specific unilateral measures be identified? I have been asked these questions repeatedly. We need to take into account that unilateral sanctions are never the only reason for problems in a country because quite often such sanctions are applied in situations where, for example, there is an ongoing armed conflict in the country and the infrastructure of the country itself is already affected by the conflict, or there are internal disturbances or some other problems in the country.

I have been repeatedly asked how I assess the impact of sanctions. When we speak about the application of unilateral sanctions, especially the sectoral or economic ones, or the situation of freezing assets of countries in banks abroad, we speak about the comprehensive negative impact on the economies of such countries. Targeted sanctions imposed on individuals and companies have less direct effect but, in their multiplicity, and in view of the existing over-compliance, may have a similar effect. All these measures exacerbate already existing economic problems in the country. Indeed, we can never exactly identify the exact impact of unilateral sanctions applied to States because of the pre-existing economic, military, social or humanitarian problems in those States. Therefore, my aim is to identify the trends in different areas of the economy, social guarantees, education and development in order to see how all these spheres have been affected by sanctions.

I will cite here the example of my recent country visit to Venezuela. Statistics, verified from different sources, clearly show that starting from the moment when sanctions were first imposed in 2015, levels of child mortality, maternal mortality, and mortality of people with diseases like HIV and diabetes, or infections like malaria and yellow fever, have increased. That is a clear demonstration of a negative impact. The situation was not ideal beforehand, but the sudden increases of all these rates is a clear sign. The same can be said for cases of malnutrition, and the increase in poverty levels. It may have well been the case that the medical insufficiency and malnutrition persisted even before these sanctions were imposed, but it is undeniable that they have been exacerbated since the implementation of such measures, which is a clear sign of a negative humanitarian impact.

Therefore, when we speak about the application of sectoral sanctions or the freezing of assets, quite often the whole population is affected. We speak not only about the absence of luxury goods, but rather about the unavailability of food, medicine, access to medical treatment, water, electricity, gas, fuel and other basic means of subsistence. This is especially important for countries which have already been affected by armed conflicts because the infrastructure there is already depleted. The above measures affect all categories of human rights, from the rights to education, access to information and freedom of expression – because of lack of access or interruptions to electricity or internet coverage – to the right to fulfilment of basic needs such as access to drinking water, sanitation, food and medical assistance. As a result, even freedom from suffering and the right to life are affected. When people cannot guarantee their basic needs, death

rates – maternal, children, people suffering from chronic diseases, etc. – usually increase. The effects of unilateral sanctions in the course of the pandemic are very illustrative in this regard.²⁵ This is why there were repeated calls from the UN Secretary-General²⁶ and from the High Commissioner for Human Rights²⁷ to lift sanctions in the course of the pandemic because the impact of sanctions in the targeted societies was enormous. Insufficiency of medicine and vaccines, and unavailability of medical aid, was especially complicated for people in the targeted societies, who appeared to be even more vulnerable and appeared to be discriminated against in comparison to other States.

Another important negative impact is that as soon as a State starts to receive limited resources as a result of the sanctions, it naturally stops all development programmes. The resources are used to guarantee the survival and basic needs of the population. Educational, development and reconstruction projects are usually stopped, and the right to housing is also affected. All economic projects are stopped. It affects a lot of economic and social rights, including the right to work, to decent labour, to housing and to education, and it results in child labour and increasing rates of involvement in the grey economy or criminal activity, human trafficking and prostitution.

Targeted sanctions

When we speak about the negative impact of targeted sanctions, we need to take into account the variety of targets and the grounds for their listing as well as a number of other aspects. A number of individual sanctions have been imposed on individuals and companies for alleged involvement in committing international crimes. However, no attempt has ever been taken to bring such cases for consideration before the ICC or to start a case domestically on the basis of universal jurisdiction. As a result, if the international crimes really took place, their perpetrators do not face any criminal charges, but a huge group of people suffer from economic and travel limitations and are publicly announced to be international criminals without any court verdict, in violation of the presumption of innocence and with very limited opportunities to access court institutions.

A larger group of individuals and companies are directly designated for alleged wrongful activity which cannot be qualified as international crimes and

²⁵ See A. Douhan, above note 13.

²⁶ António Guterres, “Remarks at G-20 Virtual Summit on the COVID-19 Pandemic”, 26 March 2020, available at: www.un.org/sg/en/content/sg/speeches/2020-03-26/remarks-g-20-virtual-summit-covid-19-pandemic; António Guterres, “We Are All in This Together: Human Rights and COVID-19 Response and Recovery”, 23 April 2020, available at: www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and; “COVID-19 Shows ‘Urgent Need’ for Solidarity, UN Chief Tells Nobel Forum”, *UN News*, 11 December 2020, available at: <https://news.un.org/en/story/2020/12/1079802>. See also UNGA Res. 74/270, “Global Solidarity to Fight the Coronavirus Disease 2019 (COVID-19)”, 3 April 2020, available at: <https://undocs.org/en/A/RES/74/270>.

²⁷ UN Human Rights, “Bachelet Calls for Easing of Sanctions to Enable Medical Systems to Fight COVID-19 and Limit Global Contagion”, 24 March 2020, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25744&LangID=E.

therefore no grounds for the exercise of universal jurisdiction exist. This clearly demonstrates an attempt to expand national or regional jurisdiction beyond national borders. At the same time, practice demonstrates no attempt to start criminal processes, even when grounds for national jurisdiction exist. I would cite here a case of six Nigerian individuals who have been sanctioned by the United States for committing cyber fraud schemes against US citizens.²⁸ Committing information technology fraud against the United States is a crime against that country and I would recommend for this situation a criminal prosecution.

When we speak about those who have been targeted by sanctions, some of them are designated for something that does not constitute a crime at all and therefore I see here serious problems as concerns the limitation of their rights in the absence of a legal ground. Moreover, they are designated without any court hearing and therefore without any fair trial guarantees, which is why, as I said, I welcome the access to justice in cases at the ECJ.

Another example of the negative impact of targeted sanctions against individuals can be seen in those sanctions imposed against judges and officials of the ICC.²⁹ In these cases, the situation becomes even more expanded because we speak about the problems of the privileges and immunities of those judges, and moreover the impediment of their access to justice. There is a communication which has been forwarded to the United States by the group of Special Procedures;³⁰ I was one of the signatories. In my opinion, the sanctions against the ICC judges and officials not only negatively affect these people in particular, but also undermine the Court's ability to bring to justice perpetrators of war crimes and crimes against humanity which have been committed in the territory of Afghanistan. Although no response has been received, I note with pleasure that the sanctions have been reversed.³¹

The final negative impact I need to mention when I speak about targeted sanctions is that they have indirect effects. Not only the designated people are affected, but also their business partners, the employees of the companies of designated people, the employees of their partner companies, the beneficiaries of humanitarian aid that has not been received because of the designation of donors, and a number of other groups who have been somehow negatively affected because of over-compliance with stringent sanctions.

One consistent criticism with regard to UCMs – as with other forms of restrictive measures – is that they may contribute to overly cautious behaviour by

28 US Department of the Treasury, “Treasury Sanctions Nigerian Cyber Actors for Targeting U.S. Businesses and Individuals”, press release, 16 June 2020, available at: <https://home.treasury.gov/news/press-releases/sm1034>.

29 Executive Order 13928, “Blocking Property of Certain Persons Associated with the International Criminal Court”, 11 June 2020, available at: www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court.

30 AL USA 15/2020, 23 June 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25379>.

31 US Department of State, “Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court”, press release, 2 April 2021, available at: www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/.

commercial actors, including financial institutions, in terms of which clients they accept, to whom they agree to transfer funds, etc. This practice is known as “de-risking”. In your experience, what are the risks associated with, and the consequences of, “de-risking” by the private sector, overall as well as particularly when it comes to their impact on the work of impartial humanitarian organizations? Are those risks any different, or any greater, for UCMs as opposed to UN Security Council sanctions?

Over-compliance and humanitarian organizations

The question of de-risking is often discussed in terms of over-compliance with sanctions, and indeed over-compliance is cited today as one of the major problems of the application of unilateral sanctions. I have been told that the fear of imposing sanctions is affecting human rights more than the actual unilateral sanctions themselves, and that is something I have heard equally from NGOs, private companies and individuals. As mentioned earlier, I pay a lot of attention to cooperation with NGOs because they work on the ground and are aware of the impediments in the field. I have held several meetings with them to discuss problems they have faced while working within sanctions regimes. They all unanimously referred to problems with over-compliance, and I will now mention some aspects about which they complained.

Problems of over-compliance: De-risking

The first issue is that the concept of de-risking is used by everyone today. On the one hand, it is used by the banking system, especially taking into account that the banking system is all interrelated and the majority of banks in whatever country they are placed have corresponding banks in the countries that impose one or more types of sanctions. Therefore, these banks prefer either to refrain from any bank transfers or to make it a long, cumbersome process. It has been reported to me, for example, concerning bank transfers to severely targeted societies like Syria or Venezuela, that the duration of bank transfers has moved from two days to up to 45–60 days. The costs for bank transfers have increased from 0.25–0.5% to 5–10% for one bank transfer. The same rules are applied to humanitarian organizations when they try to make these bank transfers; some of them refer to losing a tenth of the aid money they try to use for humanitarian activity within the banking sector purely because of a bank raising its transfer fees or refusing to make a transfer. Delivery companies feel that they are at risk of facing civil or criminal charges from the side of sanctioning States, and that is why they charge more. Sometimes humanitarian organizations have to work through several agents, and it is necessary to pay these agents. As a result, some humanitarian actors report that the amount of money which was initially allocated for humanitarian purposes can sometimes be twice what it could have been without all these extra charges and delays. The timely delivery of humanitarian aid, especially in societies which face serious crises or which are in conflict or

immediate post-conflict situations, is very important as it pertains to the lives of affected populations.³²

Problems of over-compliance: Donors

Another problem which has been repeatedly complained about by humanitarian organizations is the fear that donors have. Humanitarian organizations have said that donors from various countries are quite openly reluctant to provide humanitarian aid or to provide money to deliver humanitarian aid to countries which have been targeted by sanctions of the State of nationality of the donor, because these donors are very scared to be listed for providing such aid. The unwillingness of donors to be involved in the provision of humanitarian aid means that humanitarian organizations have less money for humanitarian operations. Secondly, humanitarian organizations have to do extensive reporting about the purposes and the final targets/beneficiaries of the humanitarian aid that has been delivered. Moreover, a number of humanitarian organizations have complained that the bank accounts of the organizations and of their employees have been frozen because of making these financial transfers or trying to be involved in some operations to deliver humanitarian aid. Due to over-compliance, they even refer to problems in transferring the salaries of people working in the field in the targeted societies, although these people are employees of those humanitarian organizations.

Private businesses

I should say that the same problems are faced by private businesses as well. Private businesses are usually not directly listed, but because of de-risking or over-compliance, they face problems very similar to those dealt with by humanitarian organizations. Producers often refrain from cooperating with them directly because they are from targeted societies. They have to act via several agents, including several delivery or transportation companies. They have to find ways to do several bank transfers via several banks, and they say that this is very lengthy and costly, and results in a two-, three- or four-fold price rise from the point of view of the end consumer. It is necessary to note that the people in the targeted societies are also already suffering and are usually at some level of poverty, and they need humanitarian aid and other goods to be brought over for their survival.

Practice of the UN Security Council

When I compare this situation with the practice of the UN Security Council, there is quite a bit of difference. First of all, I have not heard about cases of over-compliance with resolutions of the UN Security Council. The number of UN Security Council resolutions is not that huge, the resolutions are rather clear, and the

32 A. Douhan, above note 13.

decision-making process is not fast. It is also possible to find all of them online easily, so any actor around the world is clearly aware of the number and scope of UN Security Council sanctions. Secondly, there is no huge risk that the UN Security Council will impose secondary sanctions over those who are violating its resolutions today or tomorrow, so the process is transparent and the process is usually not that fast. When we speak about unilateral sanctions, however, the secondary sanctions – or sanctions for trading with designated companies – may be imposed within one or two days, or within the week. This is why companies feel this risk of being under sanctions constantly. The third point is that the practice of the UN Security Council since the late 1990s and early 2000s reveals that there have been repeated efforts to assess the humanitarian impact of its sanctions.³³ There are reports which have been done by UN institutions, including under the supervision of the UN Economic and Social Council, in that regard.³⁴ Unfortunately, so far there have been no reports and no assessment of the humanitarian impact of unilateral sanctions. That is why I would say that the aspect of de-risking and over-compliance exists to a certain extent when we speak about sanctions of the UN Security Council, but there is a continuous policy to minimize this negative impact and to assess the humanitarian impact of those sanctions. This is absolutely not the case for the application of unilateral sanctions today, and that is why the over-compliance problem is grave and continues to grow.

Recently, there has been a strong focus on the indirect effect that sanctions and other restrictive measures may have on civilians in conflict zones. What risks do you see arising from the use of UCMs without due regard for their wider social implications?

33 W. Michael Reisman and Douglas L. Stevick, “The Applicability of International Law Standards to United Nations Economic Sanctions Programmes”, *European Journal of International Law*, Vol. 9, No. 1, 1998, pp. 100, 103–104, 110–111, 114–116, 120–121. A similar position is expressed in Ioana M. Petrescu, “The Humanitarian Impact of Economic Sanctions”, *Europolity*, Vol. 10, No. 2, 2016, pp. 207–210; Marc Bossuyt, “The Adverse Consequences of Economic Sanctions”, 2000. On the assessment of the humanitarian effect of UN Security Council sanctions, see also Katie King, Naz K. Modirzadeh and Dustin A. Lewis, “Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action”, Working Group Meeting Memorandum, Harvard Law School Program on International Law and Armed Conflict, Counterterrorism and Humanitarian Engagement Project, 2016, available at: <https://tinyurl.com/spb9hkbe>; Alice Debarre, “Safeguarding Humanitarian Action in Sanctions Regimes”, International Peace Institute, June 2019, available at: www.ipinst.org/wp-content/uploads/2019/06/1906_Sanctions-and-Humanitarian-Action.pdf; High-Level Review of UN Sanctions Working Group 3, *UN Sanctions: Humanitarian Aspects and Emerging Challenges*, Chairperson’s Report, 19 January 2015; Claude Bruderlein, “Coping with the Humanitarian Impact of Sanctions: An OCHA Perspective”, 2 December 1998; Marco Alberto Velásquez Ruiz, “International Law and Economic Sanctions Imposed by the United Nations’ Security Council: Legal Implications in the Ground of Economic, Social and Cultural Rights”, *Revista Colombiana de Derecho Internacional*, No. 21, 2012.

34 Marc Bossuyt, “The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights”, 5 April 2012, available at: www.ohchr.org/Documents/Events/WCM/MarcBossuyt_WorkshopUnilateralCoerciveSeminar.pdf; M. Bossuyt, above note 33.

Non-selectivity

Again, I will begin by citing the experiences of a humanitarian organization. This organization has stated that when military force is applied, it is usually applied against certain regions, and people there are affected. However, when unilateral sanctions are applied, they are not selective – they are applied against the entire population of the country, and that is one of the risks. I have heard some statements from NGOs that the application of economic and sectoral unilateral sanctions affects a population not less but sometimes even more than the armed conflict as such. Therefore, I believe that the first risk is the non-selectivity of unilateral sanctions, when the whole population of the country is affected by the application of these measures.

Discrimination in the delivery of humanitarian aid

The second risk is the impediment to the delivery of impartial humanitarian aid because of sanctions. This refers to situations where sanctioning countries try to apply pressure on humanitarian organizations to deliver humanitarian aid in one region and not to others. Naturally, in this situation, humanitarian organizations start to get scared of being sanctioned and listed as well.

Rebuilding societies

When we speak about the risks for civilian populations, especially in the post-COVID world or a post-conflict society, we need to speak about the problem of very narrow interpretations of humanitarian exceptions and very narrow approaches to the delivery of humanitarian aid. As we all know, when we speak about post-conflict society and post-conflict peacebuilding, the reconstruction of civilian institutions and the normal functioning of the government are very important parts of getting past any conflict.

Unfortunately, the existing situation demonstrates that unilateral sanctions impede the reconstruction progress. The situation in Syria is an ideal example when we speak about the difficulty of delivering any aid or starting any activity in the country. The imposition of sanctions, including Caesar Act sanctions,³⁵ affects reconstruction efforts there, as the sanctions are aimed against companies which are involved in these efforts. These measures impede the right to housing for people already affected by a military conflict.³⁶ Therefore, when I talk to humanitarian organizations, they say that sometimes it is possible to get licenses for delivery of life-saving equipment or life-saving goods – for example, food,

35 Caesar Syria Civilian Protection Act, Public Law 116-92, Title LXXIV, 20 December 2019; Executive Order 13894, “Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Syria”, 14 October 2019, available at: www.federalregister.gov/documents/2019/10/17/2019-22849/blocking-property-and-suspending-entry-of-certain-persons-contributing-to-the-situation-in-syria.

36 See AL USA 30/2020, 21 December 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25785>.

vaccines or medicine – but it is impossible to get humanitarian exceptions for any license for any restoration or reconstruction project, and that means that the affected society cannot restore itself. The same is true for equipment and spare parts, especially those that are necessary for the rebuilding of the infrastructure of a State. Post-conflict societies are already suffering because of the destruction of water, electricity, gas and gasoline supplies and other infrastructural damage, and they need resources to rebuild and restore the society. However, you will find no humanitarian license today which provides for the possibility of buying and delivering equipment, spare parts or fuel, which can all be used to rebuild societies. Unfortunately today, all these aspects are limiting any possible aid to only foods and medicine, and in the best case, medical equipment and vaccines. Such aid does not include the restoration of electricity or water supplies, the provision of machinery, the rebuilding of the economy and so forth.

In the same vein, there has been an increasing focus on the gendered effects of sanctions. In your experience, have you seen a relationship between UCMs and gender issues, such as disparities in treatment, legal protections, access to employment, and education? If you have seen such a relationship, how do you believe that the gendered effects of UCMs can best be mitigated or prevented?

The best way to mitigate this is to start acting in accordance with international law and to apply unilateral measures only in ways that are allowed by international law. Indeed, the negative impact on women when we speak about the application of unilateral sanctions is enormous today, both in situations of pre-existing armed conflict and in the absence of armed conflict. As for my experience, women are one of the vulnerable groups of the population that face the impact of the application of UCMs.

Impacts of UCMs on women and girls: Employment, health, sexual and domestic violence

UCMs always affect the economy a lot, and as soon as the economy is affected, women will be the first ones to lose their jobs and be made to work part-time or to get lower salaries. When they lose their jobs, it results in a rise in migration. Women will also be the ones taking care of children because their spouses have to earn a living. Quite often their spouses leave the country, and women are left alone to take care of children even when their spouses have no job. Because of these two reasons, quite often women become involved in criminal activity, including prostitution and human trafficking. When we speak about these two aspects, we come to the health concerns as well. If the society is targeted by unilateral sanctions, there are serious problems with medicine and with various sorts of contraceptives. As a result, increasing cases of opportunistic infections like HIV may spread amongst these women. Moreover, in a situation of total economic crisis, because of the impact of unilateral sanctions, we speak about, for example, prostitution, all these sorts of infections, and human trafficking not only of adult women, but also of teenagers. Multiple cases have been reported to me

where 12- or 13-year-old girls have been involved in prostitution to earn their food, and we come to the issue of adolescent pregnancies, STDs, and various sorts of sexual violence and domestic violence because of that.

Unavailability of food and medical aid

In societies that are affected by unilateral sanctions, cases have been repeatedly reported to me of women ending up in bad health conditions when they become pregnant or when they deliver babies, due to a lack of proper medical care and food/nutrition. Indeed, cases have been reported of increasing rates of maternal mortality and child mortality because of unavailability of food and medical aid. Naturally, if for example pregnant women are not tested, their health is not controlled or they do not have sufficient food intake needed for the baby, this will result in a poor state of health when they deliver the baby.

Right to education

Not only are the right to work, the right to food and the right to health affected, we also speak about the violation of the right to education. Girls will be the first ones who will be withdrawn from school to assist at home or take up some menial jobs.

In light of all of this, I would say that yes, indeed, the gender perspective in the face of the application of UCMs is very important, and women are indeed very vulnerable because of all these aspects. When you look at the reports about women that have been prepared by UN organizations in the course of the pandemic, they demonstrate very similar trends: women are more affected because of unemployment, domestic violence, their health, and their access to education.³⁷ Unfortunately, in the targeted societies, they are made vulnerable twice and affected twice.

Various terms are used when it comes to the mechanisms through which some UCMs seek to allow for humanitarian activities to proceed: “humanitarian exemption”, “exception” and “derogation”. How do you see their respective scopes? Is the lack of a clearly agreed-upon understanding of these terms problematic? How would a good humanitarian carve out a UCM in your view?

The point of terminology is one of the big problems when we talk about the application of unilateral sanctions. We still do not know exactly how to classify unilateral sanctions and UCMs in a legal sense, and the same is true of all these humanitarian exceptions, exemptions and derogations. Generally speaking, I would say that the sanctioning countries or regional organizations are just using the terms which they believe are appropriate. There is no uniform interpretation or application of these terms and that is why I cannot comment on the differences between them. I would prefer to use the term “humanitarian

³⁷ UNGA Res. 75/157, “Women and Girls and the Response to the Coronavirus Disease (COVID-19)”, 16 December 2020, available at: <https://undocs.org/en/A/RES/75/157>.

exceptions” as a generic term for all these sorts of activities. Indeed, it is necessary to take into account and admit that all sanctions regimes theoretically provide for the possibility of humanitarian exceptions and for the possibility of acquiring humanitarian licenses. There are repeated attempts to provide some sort of guidance on how these humanitarian exception licenses can be received and what States or companies or humanitarian actors should do in this sphere. Unfortunately, in practice, all this guidance is virtually non-applicable, and that is the experience of humanitarian organizations I have talked to, as well as the experience of States subject to unilateral sanctions.

Multi-layered sanctions regimes

The first reason for this is that we have multi-layered sanctions regimes and therefore companies and humanitarian actors do not know what humanitarian licenses they should get. For example, when they get a humanitarian licence from the EU, they may still be sanctioned by the United States because they did not get a licence from the United States. At the same time, if we look at the guidance developed by the EU in November 2020 on delivery of humanitarian aid in relation to the COVID pandemic,³⁸ one of the questions asked in this guidance is whether EU companies should observe or act in conformity with someone else’s sanctions. In response, the guidance mentions that EU companies should only observe the EU sanctions regime. In theory this sounds easy, but in practice, banks, donors, business partners, transferors and delivery agencies will take into account all sanctions regimes, and that is why this is one of the problems: the multi-layered character of sanctions and the multi-layered character of getting licenses.

Difficulty in obtaining a license

The second point is that it is not so easy to get a license. You need to know where to go, what sanctions exist, where to apply and how to get the license. In practice, humanitarian actors have to consult compliance companies and therefore have to pay for their services. Quite often it is expensive, and that is why we get to the point of de-risking. We do not know which sanctions regimes exactly exist, and that is why the services are so expensive; as a result, many humanitarian agents or private companies simply prefer not to take the risk. Legal norms applicable to humanitarian exception licenses are pretty confusing and complicated, and it is necessary to know where and how to apply. Humanitarian organizations have reported to me that organizations with legal offices in their headquarters can afford to do this, but the small NGOs cannot as they do not have the resources or workforce, and are not aware of the mechanisms.

38 European Commission, above note 21.

Lengthy application processes

The third problem that exists in this sphere is that usually the application is very lengthy. When you speak about delivery of humanitarian aid to societies where people are malnourished and live in poverty or societies which have been destroyed by armed conflict, you need to deliver humanitarian aid fast to help people survive. Getting licenses may take several months – two, three, sometimes four – as stated by humanitarian actors. Quite often the offices which are responsible for providing the licenses do not reply, so the companies do not even know whether they have been heard or what they should do afterward. This is why, for example, some non-governmental humanitarian organizations have reported to me that they prefer to try to transfer money rather than to try to get licenses for delivery of humanitarian goods, because there are now fewer restrictions concerning transfers of money. However, this means that no new goods are coming to a targeted society. Moreover, this money may be used in the shadow economy, which increases the risk for humanitarian actors and reduces the positive humanitarian effort in this sphere.

Burden of proof: Pure humanitarian character of delivery of humanitarian goods

The fourth point is that the sanctioning States place a burden of proof of the “pure humanitarian character” of the delivery of humanitarian aid on humanitarian actors. They must guarantee that all humanitarian goods will not be used for any activity which is not supported by the sanctioning States. Naturally, humanitarian actors feel they are at risk, and that is why they try to minimize such activity. There is a very narrow interpretation of pure humanitarian delivery of goods. I will cite again the guidance developed by the EU in November 2020. The delivery of medical goods under some situations can be used in targeted societies for non-humanitarian purposes, such as the risk of humanitarian goods going into the black market. There may be corruption or other criminal activity involved with these goods, and all these risks lay on the humanitarian actor delivering them.³⁹ The licenses that can be received are narrow in their very nature and refer only to medicine and food. Quite often, a lot of medical goods are interpreted as dual-use goods, including some medical equipment. It has been reported, for example, that when it comes to the delivery of humanitarian aid to Syria, even toothpaste is considered as being a dual-use good and is limited for the delivery of humanitarian aid.⁴⁰

³⁹ *Ibid.*

⁴⁰ Sibylle Bauer, “For the Bathroom or the Missile Factory? Why Dual-Use Trade Controls Matter”, Stockholm International Peace Research Institute, 12 December 2012, available at: www.sipri.org/commentary/essay/2012/bathroom-or-missile-factory-why-dual-use-trade-controls-matter.

December 2020 guidance on delivery of humanitarian aid

Over-compliance because of all these risks is enormous today. Due to all these aspects, after consultations with humanitarian organizations, I developed a guidance on the delivery of humanitarian aid which was published in December 2020, and in which I tried to ask sanctioning States to withdraw this enormous burden of proof from humanitarian agents because they are trying to help and are trying to bring some relief to people who are suffering.⁴¹

In your first report to the UN General Assembly,⁴² you mentioned the importance of humanitarian exemptions, not simply for specific products, but also for the supply chains of humanitarian organizations. Could you expand on this issue, and what impact it has on field operations? How can States most effectively minimize the risks posed by incomplete exemptions, or otherwise avoid rendering their humanitarian carve-out processes, to use your words, “rather fictitious”?⁴³

The whole supply chain of humanitarian aid delivery is affected by the application of unilateral sanctions, starting from donors of humanitarian aid up to the final beneficiaries. Therefore, in my opinion, States should take into account humanitarian concerns when drafting humanitarian exception clauses. In my opinion, the most important aspects are to not apply secondary sanctions to humanitarian agents and donors when they do their humanitarian work; to withdraw the burden of proof of humanitarian purposes from humanitarian actors because it makes their work complicated; and to provide for the possibility of doing reconstruction work in post-conflict or targeted societies in order to enable the governments to do their duty to guarantee the well-being of their populations, because if there are no resources, how can a government be expected to do it alone? There is a need for equipment, spare parts, medical equipment, medicine, vaccines etc. Also, I believe that it is important to guarantee due bureaucratic process from the side of humanitarian organizations, because if you look at the guidance and explanations existing in the sanctioning States concerning the issuing of humanitarian licenses, they usually state that humanitarian actors need to find their own way – where to go, whom to ask, what documents to submit, and so on and so forth.⁴⁴ This is why we speak about the feasibility of the processes: they should be made as simple and as clear as possible so that they can be used even by the smallest humanitarian organizations, without the need for huge teams of lawyers.

41 UN Human Rights, “UN Expert Issues Sanctions Guidance Amid COVID-19 Aid Concerns”, 10 December 2020, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26589&LangID=E.

42 A. Douhan, above note 13, paras 91–92 (on exempted medical supplies and non-exempted transportation methods).

43 A. Douhan, above note 6, para. 60.

44 European Commission, above note 21.

In the same report, you also noted that while States generally feel their legal processes are appropriate, derogation processes can be so challenging as to go unused by commercial and humanitarian actors.⁴⁵ What challenges have current laws presented? In the end, is a standing exemption for impartial humanitarian activities the only viable option, and how politically achievable do you believe this to be?

Indeed, countries differ a lot when they try to describe the idea of humanitarian exceptions and the delivery of humanitarian aid. Quite often, the sanctioning countries say that they are the main providers of humanitarian aid to the targeted societies and that the mechanism of humanitarian exception licenses in their documents is sufficient and effective. From the other side, the countries under sanctions say that these mechanisms are insufficient, ineffective, lengthy, costly and unhelpful. Humanitarian organizations support this point and echo the ineptness of the current process.

Delivery of humanitarian aid: Assistance from the UN

The only exception concerning the delivery of humanitarian aid that works really well, from my experience, is when it is done with the assistance of the organizations in the UN system. Usually both the targeted societies and the sanctioning countries are ready to cooperate with these organizations, which try to help deliver humanitarian aid and which monitor how this humanitarian aid is distributed in the country.

A new approach to the delivery of humanitarian aid

Unfortunately, I need to mention the following fact when it comes to the delivery of humanitarian aid: governments and opposition groups as well as sanctioning States may disagree about the control over the distribution of this aid. Humanitarian aid as well as access to food and medicine may be used as an instrument of political control, and that is why I try to express in all my reports the main idea that humanitarian perspectives should be of primary importance when we discuss the delivery of humanitarian aid. The life of every individual is the highest value. It must be treated with care. Unfortunately, firstly, the existing humanitarian exceptions mechanism and existing delivery of humanitarian aid are not sufficient. Secondly, they cover only the survival of the population. If you do not allow the population and the country to rebuild, you will have to deliver humanitarian aid all the time afterwards to guarantee survival. That is why, in my opinion, the concept of development is very important. The purpose should be to help people right now and to help the country to rebuild and to be able to guarantee its own means for the future. It is very hard to imagine that the global community and any country will be able to deliver humanitarian aid to all

⁴⁵ A. Douhan, above note 13, paras 87–89.

countries in need for undetermined periods—especially now with the ongoing pandemic, and when according to all reports, the world is facing a major economic crisis, which we are still battling with.

That is also why, in my opinion, it is important to change the very idea of the delivery of humanitarian aid, and our approach to it. First, humanitarian concerns should prevail. Second, there should be no discrimination in access to humanitarian aid. Third, delivery of humanitarian aid and humanitarian assistance should not be used as a political tool. When we speak about the survival of a population, we need to care about the lives of people first, and then about political concerns afterwards. Fourth, there should be a clear understanding of the procedure for obtaining humanitarian exceptions. Fifth, sanctioning countries should do their best to avoid, or at least minimize, over-compliance. This brings me back to a previous point: that no secondary sanctions should be applied.

One area of importance for humanitarian actors, including the ICRC, is the humanitarian–development nexus. Increasingly, we see that humanitarian organizations receive funding from development actors. In turn, the latter precondition such funding with compliance with applicable UCMs. What risks do you see resulting from this requirement for impartial humanitarian actors in terms of their ability to comply with the principles traditionally governing their activities?

Limited resources

This is a very serious question and problem not only for the ICRC but also for other humanitarian organizations. I have mentioned some of the risks already, but generally speaking, firstly, a most important issue is the problem of limited resources because of a need to comply with sanctions imposed and because of the fear of coming under secondary sanctions as well.

Discrimination

Secondly, there is a risk of discrimination. Attempts to bring political concerns and political interests into the work of humanitarian organizations are inadmissible in my opinion. Humanitarian organizations do not have any political purpose in their functioning. They try to bring humanitarian relief to assist people—people affected either by conflict or by economic or humanitarian crises, or by unilateral sanctions as such. Therefore, I believe that the principle of non-discrimination which is applied in the course of military conflict should also be applied to all humanitarian activity. Every person deserves to have their right to food and to medical treatment, and deserves to enjoy the right to life as well as the right to development. That is why, unfortunately, discrimination is a serious problem which I hope will be discussed at the level of the United Nations. It is not acceptable to discriminate against people and to violate their basic human rights

in order to achieve certain common goods, because unfortunately people are suffering because of this.

Limiting the resources of the government

The third risk is that because of all these limitations, political actors may agree to the minimal humanitarian aid but not to reconstruction processes, and that becomes especially evident when we speak about the application of unilateral sanctions. Officially, unilateral sanctions are intended to limit the resources of the targeted government. In an absence or insufficiency of resources, governments are not able to maintain traditional social and development activities. All cooperation stops, all sorts of assistance to the government stops, but who is suffering at the very end? From my experience, it is the people of the country that are affected the most due to a lack of resources for their subsistence.

From a practical perspective, for example, let us imagine a situation where humanitarian aid has already been delivered to the country. How will it be distributed? Considering the constraints in transportation, it is practically only viable to use the supply chains of the government for distribution of these humanitarian goods. That is why I reiterate that humanitarian concerns must be placed above any political motivation as it pertains to the lives of people.

We could speak about different mechanisms. For example, in my preliminary assessment report concerning the situation in Venezuela,⁴⁶ one of my recommendations was that the government should cooperate with the agencies of the UN to guarantee the fair distribution of the goods which are delivered as a sort of humanitarian aid with the assistance of the UN agencies, as well as humanitarian goods which I hope could be bought using the frozen assets in various banks. In this case, monitoring from the side of international agencies can really be useful, but I can hardly imagine any situation where the goods are delivered and fairly distributed over the whole country without any cooperation and involvement by the government.

Is there anything else you would like to share with our readers?

It is high time to stop speaking about the application of unilateral sanctions as something common and as the means to make someone bad become good – that is definitely not the case. Any discourse about unilateral sanctions should stop being assessed in black-and-white terms. This is not about policy; rather, it is about law, human rights, and human lives, and these aspects should always be taken into account before any unilateral measures are taken.

46 UN Human Rights, “Preliminary Findings of the Visit to the Bolivarian Republic of Venezuela by the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights”, 12 February 2012, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26747&LangID=E.

The UN Security Council

I would also like to reiterate the practice concerning the sanctions of the UN Security Council in the 1990s–2000s. The sanctions taken by the Security Council in that period were absolutely legal. At the same time, it appeared that despite their legality, their humanitarian impact was enormous, and as a result the Security Council changed its policy towards sanctions in order to minimize this impact.

Bringing international law back into the discussion

When we speak about the application of unilateral sanctions, the majority of measures are not in conformity with international law. Moreover, being different from the practice of the UN Security Council, a humanitarian assessment of the impact is usually not done, or the impact is politically assessed. That is why my recommendations are to bring international law back into the discussion and to use international law as a means for cooperation between States and for settlement of any differences that States may have between each other. Humanitarian assessments of unilateral measures must be carried out, and the so-called humanitarian precautions principle should be considered before these measures are taken.

The last point is that in my opinion, States should not sacrifice the existing legal mechanisms to bring those who are allegedly guilty to justice or to settle any disputes they have with other States. Here, I refer to the possibility of using various competent international institutions as a means to help address all these problems. I am very happy to see that there are an increasing number of cases in the International Court of Justice relevant to sanctions: I speak about disputes between Qatar and four other States,⁴⁷ and about disputes concerning the interpretation and application of the amity treaty between Iran and the United States.⁴⁸ I would also highlight the referrals which have been brought against⁴⁹ and by Venezuela⁵⁰ to the International Criminal Court, and the disputes that are brought to the World Trade Organization. These are the competent bodies which can help in settlement and in identifying the legality of the activity, can help to bring international law back into the discussion, and can help intermediately to protect and safeguard human rights.

47 International Court of Justice, “Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)”, available at: www.icj-cij.org/en/case/173.

48 International Court of Justice, “Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)”, available at: www.icj-cij.org/en/case/175.

49 See: www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf.

50 See: www.icc-cpi.int/itemsDocuments/200212-venezuela-referral.pdf.



Interview with Gilles de Kerchove*

European Union Counter-Terrorism Coordinator**

Gilles de Kerchove was appointed European Union (EU) Counter-Terrorism Coordinator (EU CTC) on 19 September 2007. In this function, he coordinates the work of the EU in the field of counterterrorism (CT), maintains an overview of all the instruments at the Union's disposal, closely monitors the implementation of the EU CT strategy and fosters better communication between the EU and third countries to ensure that the Union plays an active role in the fight against terrorism.

He was previously Director for Justice and Home Affairs at the EU Council General Secretariat (1995–2007) and Deputy Secretary of the Convention which drafted the Charter of fundamental rights of the EU (1999–2000). Before that he was Head of the Private Office of the Deputy Prime-Minister of the Federal Government of Belgium, Minister of Justice and Minister of Economic Affairs (1993–1995) and Head of the Private Office of the Deputy Prime-Minister of the Federal Government of Belgium, Minister of Justice and Minister of SMEs (1989–1992).

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He has published a number of books and numerous articles on European law, human rights, security and CT.

Keywords: European Union, counterterrorism, foreign fighters.

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* Since this interview was first published, Gilles de Kerchove has moved out of this role.

1. As way of introduction, could you briefly explain your role and responsibilities as the EU Counter-Terrorism Coordinator?

The position of EU Counter-Terrorism Coordinator (EU CTC) was initially created by the European Council after the 2004 Madrid train bombings. The idea was to position someone who would have an overarching view of all the policies with regard to radicalization and terrorism in the EU and could oversee that the several stakeholders that work on the file coordinate amongst themselves. This includes justice, law enforcement, prosecution, diplomatic services, Ministries of Finance, Ministries of Defence, civil society, private sector, etc. In terms of responsibilities, firstly, the EU CTC acts as a bridge between the EU institutions and the Member States. Secondly, he/she must anticipate future challenges and strategize sound policy solutions to mitigate any terrorist threats. Third, the Coordinator supports the work of the Commission and the European External Action Service whilst helping third States outside of the EU in improving their responses to terrorism as well. Finally, the EU CTC is the face of the EU when it comes to CT, which means much engagement with the media and outreach-based activities.

In terms of positioning, my role is located within the General Secretariat of the Council,¹ as that is probably the place where I can function most independently. At the same time, I have always seen my role as serving all EU institutions, and not just the Council. The means of the EU CTC are limited: I work with around five or six advisers, most of whom are seconded from Member States. There is no budget at my disposal and my role is not supported by a clear legal status: my position is rooted in a Declaration by the European Council² and supported by European Council and Council Conclusions. While these documents hold a clear weight, the position of EU CTC is not foreseen by the EU Treaties. Therefore, my impact is dependent on the support and trust of the Member States and on whether they find my position relevant.

I have been in this position for fourteen years and have been through several major crises such as the foreign terrorist fighters (FTFs),³ the terrorist attacks in Paris in January and November 2015 and in Brussels in March 2016, as well as other major attacks in the EU. I am now retiring at the end of August 2021. A successor has been announced. This shows that Member States continue

^{**} This interview was conducted in Brussels on 4 May 2021 by Dr Knut Dörmann, Head of Delegation to the European Union, the North Atlantic Treaty Organization and the Kingdom of Belgium, ICRC.

¹ The Council of the EU is an institution of the EU, informally also known as the Council, that is formed by government Ministers from each EU country who meet to discuss, amend and adopt laws, and coordinate policies. Together with the European Parliament, the Council is the main decision-making body of the EU. It is not to be confused with the European Council, with at least quarterly summits, and where EU leaders meet to set the broad direction of EU policy, and with the Council of Europe which is an international organization in Strasbourg comprising forty-seven countries of Europe and that was set up to promote democracy and protect human rights and the rule of law in Europe.

² Council of the EU, "Declaration on Combating Terrorism", 7906/04, Brussels, adopted by the European Council at its meeting on 25 March 2004, available at: <https://data.consilium.europa.eu/doc/document/ST-7906-2004-INIT/en/pdf> (all internet references were accessed in June 2021).

³ Expression also used in UN Security Council (UNSC) Resolutions. See, for instance, Resolution 2178 (2014), adopted by the UNSC at its 7272nd meeting, on 24 September 2014.

to find the position relevant. I have to admit that I agree with this analysis. Even if I have emphasized in the past that I am working hard to make my role redundant, with the European Commission and European External Action Service increasingly developing and reinforcing their own CT policies, it remains useful to have an independent voice present, an expert travelling throughout the year within the EU and around the world to identify the emerging trends, issues and needs, and enabling the EU to support Member States with regards to these needs.

Notably, during my tenure I helped anticipate and highlight the issue of FTFs (as early as 2013), as well as the issue of right-wing violent extremism in the EU. I also pushed forward difficult subjects such as assisting President Obama to close down the Guantanamo Bay detention centre. In line with this, I also tried to mobilize the system to provide more support to the camps and prisons in North-East Syria (NES) where alleged Islamic State (IS) fighters and family members are held, to avoid the worsening of both the security and humanitarian situation.

Lastly, I think this position needs to continue to exist to ensure that the issue of CT remains on top of the EU agenda. There is always a peak in discussions and plans in the direct aftermath of a terrorist attack, but what follows is something I call “CT fatigue” (the focus moving from CT towards other urgent needs), which I have noticed in the years I have been in this position. My emphasis has always been to remain focused and allocate the necessary resources, and to ensure that we are not just reactive to these threats but that we anticipate them. One of the agendas that I have been working on in the past couple of years is to bolster the capacity of internal security actors to identify and analyse the potential threat of disruptive technology, such as artificial intelligence (AI), drones, weaponization of space, etc., and also to harness the potential such technology can represent regarding justice and security. As an example, two years ago, I helped with the creation of the EU innovation hub for internal security at Europol.

2. What are your observations on the EU approach to CT in the course of your mandate? How did it consider the “Global War on Terror” narrative?

With regard to what changed over time, I would start with the entry into force of the Lisbon Treaty in December 2009⁴ which made internal security a shared competence between the EU and the Member States. Before this, internal security was largely dealt with on an intergovernmental basis, with the use of instruments such as “Framework Decisions”,⁵ and with a minimal involvement of the European Parliament or the European Court of Justice. Under the

4 “Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007”, *Official Journal of the European Union*, C 306/1, 2007, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT>.

5 This type of legally binding act is no longer used since the Treaty of Lisbon came into force in December 2009. A Framework Decision established objectives which the Member States had to fulfil but whereby Member States were free to choose the manner in which they would implement the required objectives.

Lisbon Treaty,⁶ it became a shared competence and subject to the “Community method”: I would refer to this decision-making process as the “noble” procedure, notably because the European Parliament is part of the process as co-legislator, because it allows for the use of “normal” policy and legislative instruments (Regulations, Decisions, Directives, etc.), and because the role of the European Court of Justice is enhanced. This was a major step in terms of integration and it has continued since.

I believe that until 2015, the rhetoric of the Commission was that the EU was a modest player only, providing some form of support to the Member States, by adopting legislation, providing funds, creating agencies in support, etc. However, after the attack against Charlie Hebdo in January 2015, the Commission perceived a huge appetite for more Europe on this file, which translated into more ambitious EU policy. This does not mean that Member States have been replaced on this file, but rather that in the last five years the EU has become a serious player also in the field of security.

Regarding the so-called “Global War on Terror”, the EU has always been against this narrative and we discussed this frequently with the US authorities. This was my first file when I was initially appointed, coinciding with the election of President Obama. When I met with his team for the first time, I got the impression that there was an appetite for closing Guantanamo; upon my return to the EU, I said that I was convinced that the new President would call each Head of State and request that they take a few detainees each. I urged the Member States to provide a collective response because I thought an EU collective response would push the war on terror-narrative aside, so that we could move back to a more traditional approach (which is akin to the EU’s approach to the issue of terrorism). This means that the EU rejected the approach of the Bush administration to treat possible suspects as “enemy combatants”. However, the EU’s approach has always been to apply criminal procedural law to possible suspects of terrorism, with all the human rights safeguards, including the fair trial principle, etc. In our view, international humanitarian law (IHL) only applies in specific armed conflicts such as Afghanistan, Iraq and Syria. There is no overarching global armed conflict against Al-Qaida and/or the IS.

I believe that, in the EU, the balance between security and human rights remains. In my opinion, the EU is probably the only place in the world where at times human rights are put before security concerns. For example, it was difficult to convince the European Parliament to take measures in identifying the sources for dissemination of child pornographic material, as it was regarded an issue of the right to privacy. Overall, human rights like privacy and free speech are strongly protected in the EU. I think we have the necessary checks and balances in place, with strong judicial instances as the European Court of Justice.

3. You were one of the first CT experts to place the issue of so-called “foreign fighters” on the agenda of the EU. When and for which reasons did this file

⁶ Treaty of Lisbon, above note 4.

gain prominence? In December 2020, the European Commission adopted a CT agenda⁷ that “sets the way forward for actions to counter terrorism at EU level”.⁸ How is this agenda and other EU policies addressing the “foreign fighters” phenomenon? In general, how can the EU complement the action of EU Member States regarding this issue? Do you see challenges in having a uniform EU approach and policies regarding this population, even for the most vulnerable among them?

The file gained prominence on the EU’s agenda around 2014, when significant numbers of Europeans began to join IS in Syria and Iraq. Ultimately, about 5000 European citizens joined IS, whereas only a few dozen had fought in the ranks of Al-Qaida before. I placed this issue on the EU’s agenda for two reasons. Firstly, I was of the opinion that we have a responsibility to prevent our citizens, as much as we can, from undertaking activities that harm the stability and security of other countries. Furthermore, although the motivations of Europeans who joined Jabhat al-Nusrah (Al-Qaida’s branch in Syria at the time) and IS as well as the threat they posed at home were the subject of debate, I felt that we should at least prepare for a negative impact on our domestic security. Unfortunately, my concern was proven right in May 2014, when an individual who had spent a year fighting in Syria conducted a shooting at the Jewish Museum in Brussels. Further links between the rise of Jihadism in Syria and Iraq and the terrorist threat in Europe came to light in the wake of the attacks at the headquarters of the satirical magazine Charlie Hebdo and a Jewish supermarket in Paris in January 2015, when at least one accomplice had travelled to IS-controlled territory. Meanwhile IS had started to call on its supporters to mount lone-actor attacks at home. At the time of the mass-casualty attacks in Paris (November 2015) and Brussels (March 2016), which had been prepared and executed by members of IS’s specialized “external operations” outfit, the danger posed by foreign fighters who had joined IS was very much on the agenda.

The extraordinary European Council in February 2015⁹ provided a roadmap for the EU’s fight against terrorism and many tools have been developed since. The updated July 2020 European Commission’s Security Union Strategy¹⁰ (and the

7 European Commission, “Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond”, COM (2020) 795 final, Brussels, 9 December 2020, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0795&from=EN>.

8 See the factsheet on the CT agenda for the EU: European Commission, *Counter Terrorism and Radicalisation*, December 2020, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/counter-terrorism_en.

9 Informal meeting with Heads of State or Government – Statement of the Members of the European Council, Brussels, 12 February 2015; see also Council of the EU, “Council Conclusions on Counter-Terrorism”, 6048/15, as adopted by the Foreign Affairs Council on 9 February 2015, available at: <https://data.consilium.europa.eu/doc/document/ST-6048-2015-INIT/en/pdf>.

10 European Commission, “Communication of the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions

Commission's December 2020 CT Agenda¹¹) reflect a further intensification in the EU's CT efforts. As put forward by these and other strategic documents, to counter the threat posed by FTFs, the EU is taking action in several areas:

- (1) The EU provides humanitarian assistance to prevent a further deterioration of the dire humanitarian situation in the camps and prisons where former IS fighters and their families are held in NES.
- (2) The EU supports EU Member States in identifying best practices for the management of returning FTFs and their family members once they are back, with the aim to reduce the risks they could pose to our societies.
- (3) Furthermore, the EU has improved its border security, in order to make sure that travelling FTFs are detected when they try to enter the Schengen zone. Frontex has been strengthened substantially over the last few years, with a staff that will further grow to 10,000. This will enable it to assist Member States in carrying out effective checks at our external borders. The new Pact on Migration and Asylum proposed by the European Commission, and presently under discussion among Member States, strengthens the security dimension of the EU's asylum process. A new EU Regulation on the screening of migrants at our external borders will also contribute to the detection of terrorist suspects.
- (4) Through Europol, and in particular Europol's Terrorist Identification Task Force at the European Counter Terrorism Centre, resources and expertise are being pooled to identify and investigate FTFs. Furthermore, the deployment of Europol guest officers in migration hotspots in Italy and Greece has allowed for a more thorough security check of incoming migrants.
- (5) The EU supports Member States on the use of battlefield information to identify, detect and prosecute returning FTFs.

4. Many alleged foreign fighters, including EU nationals, and their families are now present in camps and places of detention in NES and Iraq. While the EU provides humanitarian assistance via its partners, the humanitarian situation remains highly precarious. Do you consider COVID-19 to create an additional layer of challenges? What are the measures being taken at the EU level to support principled humanitarian action in this context?

In 2020 the European Commission devoted around 10 percent of its €37 million humanitarian assistance budget for NES. This budget is for a multisector assistance with special emphasis on health via partners, including to alleviate the dire living conditions in the camps¹² and prisons, including through the country appropriation for the International Committee of the Red Cross's (ICRC) work in Syria.

on the EU Security Union Strategy", COM(2020) 605 final, Brussels, 24 July 2020, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0605&from=EN>.

11 European Commission, above note 7.

12 The Directorate-General for European Civil Protection and Humanitarian Aid Operations (EU Commission) (DG ECHO) partners are responding in all camps in NES, including: providing child protection programming in the two camps with foreign annexes (al-Hol, Roj), giving essential protection and recreational support to vulnerable and isolated children, strengthening Global Camp Management and Camp Coordination (CCCM) coordination across NES and finally being the primary

This humanitarian assistance is important for several reasons. First, it is an imperative based on humanitarian principles to provide assistance to persons in need whatever their beliefs, affiliations or possible crimes. We must prevent the deterioration of living conditions in the camps and prisons, and hopefully even improve it in some respects. Secondly, treating camp residents and prisoners humanely may result in less radicalization and violent extremism.

The local authorities, camp management and non-governmental organizations (NGOs) working in the camps have made certain preparations to avoid the spread of COVID-19 inside the camps. However, as we have seen recently, contagion cannot be completely avoided, when it increases in the surrounding communities.

5. Do you consider that the difficulties faced in these camps and places of detention are exacerbated for women and children? How is the EU involved in addressing their specific needs? What would be, in your view, the best long-term solution to the issue?

It is difficult to judge which group is suffering most in the camps and prisons in NES, whether it would be the situations of Syrians, Iraqis or third country nationals, or depending upon the time of arrival (before or after the fall of Baghuz). We can work under the assumption that the living conditions are bad for all involved. Personally, my main concern is on the sad situation of the children, who grow up in deplorable conditions, with lack of protection services, including psycho-social support even if many have already been severely traumatized, few safe spaces, and no or little secular education.

While much can be said in favour of repatriations from a security perspective (to be able to monitor these populations), my role as EU CTC does not extend to potential repatriations of men, women or children from the prisons and camps in NES back to the EU. This is exclusively dealt with by Member States and each Member State defines what is in its short- and long-term interest. From the sideline, I have noticed that some Member States have started to repatriate more children, and in some cases, also their mothers. As I have indicated earlier, Member States—supported by the EU—exchange experiences among themselves on methodologies and best practices on management and for reintegration of children and families, for example through the EU-financed Radicalisation Awareness Network (RAN).¹³

health care providers in five of the twelve camps. Partners provide health assistance throughout NES. They provide full support to over fifteen health facilities—including an emergency field hospital in al-Hol, Raqqa maternity and paediatric hospital, Shiheil hospital, seven primary health centres, mobile units and ambulance services. DG ECHO has been very active in providing the vital humanitarian support to vulnerable people in the camps, but given the limited resources, the situation in al-Hol and the rest of NES also calls for non-humanitarian assistance.

13 The RAN “connects frontline practitioners from across Europe with one another, and with academics and policymakers, to exchange knowledge, first-hand experiences and approaches to preventing and countering violent extremism in all its forms”. For more information, see European Commission,

6. In general, how do you see the role of humanitarian actors regarding the situation of alleged foreign fighters and their families?

During my tenure as EU CTC, I have greatly benefitted from close contacts with the humanitarian actors, not least with the ICRC. The specific status of the ICRC allows the organization to access geographical areas but also populations, like detainees to which no other humanitarian operator has access.

In the camps and prisons in NES, the work of the humanitarian community is absolutely essential, as long as there is no decision of a lasting solution for the destiny of camp residents and prisoners. In my view, unfortunately, this may take some time to reach. In the meantime, we have a moral obligation to ensure the humanitarian assistance.

The European Commission is already supporting a reintegration and rehabilitation project of the United Nations (UN) for some Central Asian States¹⁴ that have taken back their citizens from Syria and Iraq. We are further scrutinizing possibilities on how to enhance EU efforts to provide humanitarian assistance to camps and prisons. This is based on a paper I elaborated late last year, which received Member States' backing in the Political and Security Committee in February. It also entails suggestions for increased efforts to support reintegration of Syrians from the camps in local communities in NES. Similarly, it includes a proposed support for a possible UN project for reintegration in Iraq of Iraqis from the camps. It has five lines of proposed action, which are now being implemented:

- (1) First, for the EU to finance training at a new youth rehabilitation centre. The EU already finances such training at an existing centre. The new centre and possible expansions will enable the local authorities to move youth, presently placed in prisons for adult males, to the much more benign youth rehabilitation centres, which can prepare them for reintegration and scrutinize each individual case. UNICEF¹⁵ coordinates the training at the centres, and strongly encourages this proposal.
- (2) Second, I suggested increasing assistance to alleviate the dismal conditions in prisons, especially for children. The ICRC is among key partners for this endeavour. I hope that the EU as well as EU Member States can facilitate financing, which will enable this important humanitarian action.
- (3) Third, recognizing that conditions at al-Hol camp are lacking in all aspects, I proposed an increased EU assistance through the international organizations and NGOs active in the camp – both the main camp for Syrian and Iraqis and the international annex with residents from around sixty nationalities. The

Radicalisation Awareness Network (RAN), available at: https://ec.europa.eu/home-affairs/what-we-do/networks/radicalisation_awareness_network_en.

14 Joint Plan of Action for the Implementation of the UN Global Counter-Terrorism (CT) Strategy in Central Asia, adopted by the Central Asian States on 30 November 2011. See <https://www.un.org/counterterrorism/ctc/counter-terrorism-in-central-asia>.

15 United Nations Children's Fund.

Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO) supports seven partners (of which three are UN agencies, three civil society organizations and the ICRC) with a strong focus on health services and protection services. Children are a particular group of concern, in light of their high number, health and nutritional status, and level of trauma, amongst others. Some of the partners supported by DG ECHO are able to operate in the foreign annex. The total amount provided exclusively for humanitarian assistance in al-Hol exceeds €3 million in 2020. Recently, the EU initiated preparations of a project aimed at decreasing the isolation of residents in al-Hol through interactive local radio programmes, linking residents in al-Hol with communities outside the camp. We are monitoring the situation in al-Hol and NES very closely. EU Member States would also in this case have to do more for the EU as a whole to make a difference.

- (4) Fourth, I suggested enhanced support to local communities in NES for voluntary reintegration of Syrians from the camps. The EU has some experience that we can build on, and which, hopefully, can be scaled up, such as recently approved preparations of projects aiming at continued support for health care in local communities, as well as for women-led committees that will coordinate local mediation and reintegration support of female-headed families in al-Hol.
- (5) Fifth, I pointed to the EU's support for the voluntary reintegration in Iraq of the large proportion of residents in al-Hol originating from Iraq – around 30,000. An EU support could come in many formats.

An obvious possibility is to provide financing through a UN Office of Counter-Terrorism (UNOCT)-facilitated project. UNOCT is presently assessing the possibilities to reach an agreement with the Iraqi Government through a Dutch-financed scoping exercise.

I have had a dialogue with high-level representatives of the UN (UNOCT and UNICEF), US government and the Global Coalition to Defeat Daesh/ISIS on these proposals. In all conversations the five lines of action have received unanimous and strong support. This is clearly encouraging for the EU institutions currently engaged in contemplating their possibilities to enhance their engagement.

7. In May 2020, Eurojust and the Genocide Network published a report on “Cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences”.¹⁶ What are the main challenges

16 Genocide Network and Eurojust, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences*, The Hague, 19 May 2020, available at: https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.PDF. The Genocide Network was established to enable close cooperation between the national authorities in EU Member States when investigating and prosecuting the crime of genocide, crimes against humanity and war crimes. See also Eurojust, *Genocide Network*, available at: <https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network>.

regarding domestic prosecution of returned alleged foreign fighters? One of the main CT legislative instruments adopted by the EU is the 2017 Directive on Combatting Terrorism.¹⁷ The Directive establishes a list of behaviours that EU Member States must classify as terrorist offences in their national law. In paragraph 37¹⁸ of its Recital, the Directive provides an “IHL saving clause”. Could you tell us more about the purpose and nature of such a clause, and how it relates to the domestic prosecution of alleged foreign fighters?

In order to be better able to prosecute offences related to travelling abroad to fight alongside a terrorist group, the EU updated its CT legislation with the EU CT Directive. This also happened in implementation of UN Security Council (UNSC) Resolution (UNSCR) 2178 from 2014,¹⁹ which obliges UN member countries to criminalize certain activities related to FTFs. The 2017 Directive on combating terrorism²⁰ explicitly requires Member States to criminalize travelling for the purpose of terrorism, both outbound and inbound travelling for example. One of the most important challenges for investigations and prosecutions has been the collection, sharing and use of information from the battlefield, in order to prove not only the travel for terrorist purposes or membership in a terrorist group, but also to prosecute and punish the FTFs for the crimes that they have committed on the ground. Most investigations and prosecutions of IS members and FTFs in EU Member States focused on prosecuting and punishing terrorism-related offences.

However, crimes related to IS should not only be considered as those of a terrorist organization. IS can be considered as a party to a non-international armed conflict in Iraq and Syria under IHL,²¹ acting as an organized non-State armed group. Therefore, its members, including FTFs, could be responsible for committing war crimes and other core international crimes.

The Genocide Network at Eurojust has carried out work in this context with prosecutors from Member States, to share best practices and strengthen cooperation between war crimes and CT prosecutors, to carry out prosecutions regarding all the crimes that the FTFs may have committed on the ground in

17 “Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA”, *Official Journal of the European Union*, L 88/6, 2017, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L0541&from=EN>.

18 *Ibid.*, § 37 of the Recital: “This Directive should not have the effect of altering the rights, obligations and responsibilities of the Member States under international law, including under international humanitarian law. This Directive does not govern the activities of armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of those terms under that law, and, inasmuch as they are governed by other rules of international law, activities of the military forces of a State in the exercise of their official duties.”

19 Resolution 2178 (2014), adopted by the UNSC at its 7272nd meeting, on 24 September 2014.

20 Directive (EU) 2017/541, above note 17.

21 See Genocide Network and Eurojust, above note 16, § 6.1: “Although not all terrorist groups can simultaneously qualify as a party to an armed conflict, ISIS and other conflicting parties, such as the ‘Free Syrian Army’ and the ‘Jabhat al-Nusra’ were all highly organised and therefore can be determined as non-state armed groups”.

Syria and Iraq, including war crimes (cumulative prosecutions). Existing national jurisprudence of EU Member States and developing national practice demonstrate that it is possible to cumulatively prosecute and hold FTFs accountable for war crimes, crimes against humanity and the crime of genocide, in addition to terrorism-related offences. Prosecutions based on core international crimes and war crimes have not only led to greater accountability of the perpetrators for their crimes in the conflict zones than prosecutions based only on terrorist offences, but also such prosecutions entailed longer sentences, no application of the statute of limitations and a more encompassing acknowledgement of victims' suffering. This judicial response to FTFs requires comprehensive collaboration at the national level. Focusing on both the terrorism aspect of IS conduct and on core international crimes requires cooperation and coordination between CT and war crimes practitioners at the national level.

The biggest challenge in the context of domestic prosecutions of returnees from the conflict zone is access of law enforcement and judicial authorities in Europe to battlefield information that allows proving of the horrible crimes committed while in the conflict zones and to attribute those crimes to specific individuals. Biometric data on material collected in the conflict zones as well as other data extracted from mobile phones or hard disks and other documents can be used in criminal investigations and in courts in Europe as evidence. After the territorial defeat of the IS, more information and potential evidence collected on the battlefield in Syria and Iraq became available. Access to battlefield information requires much international cooperation and co-ordination between local authorities, military personnel deployed in the region in the context of the Global Coalition to Defeat Daesh/ISIS and intelligence agencies, law enforcement and judicial authorities in Europe. Many actors work on better access to and the use of battlefield information. For example, the UNSC Counter-Terrorism Committee (UNCTED) launched "Guidelines to facilitate the use and admissibility as evidence in national criminal courts of information collected, handled, preserved and shared by the military to prosecute terrorist offences ('Military Evidence Guidelines')". The Council of Europe is working on guidelines. The North-Atlantic Treaty Organization (NATO) has also just adopted a general policy for the collection of battlefield information in conflict zones. The EU and/or EU Member States actively participated in the adoption of these guidelines and policies. The US government is a key partner for the EU, as it has collected much battlefield information and has experience in its use since 9/11. A real challenge in this regard is over-classification of battlefield information, including contextual information, by the military. However, the EU and its partners are working closely together to address this challenge.

In close cooperation with the US government, the EU organized a workshop in 2019 to further improve cooperation on battlefield information in which EU Justice and Home Affairs agencies such as Europol, Eurojust and Frontex and international organizations were also involved. Eurojust has recently

updated and published a report on the state of play of the use of battlefield evidence in prosecutions in Member States.²²

A final point on the attempt to obtain information from these conflict zones is that this information is often fragmented and incomplete. With this, law enforcement in the EU can often only use it as a link to start criminal investigations and judicial authorities need further evidence to build up the case. This is another challenge. Sometimes, witness interviews conducted by NGOs or investigative journalists in conflict zones exist, but they can be difficult to draw on in court as they have been conducted by listening to only one side and without the chance for the defendant to state his/her perspective in the process of the interview. Due process issues can arise here. There have been cases where prosecutors in Europe have flown in witnesses of international core crimes such as women for the Yezidi community, for example.

With regard to Recital 37 of the EU CT Directive²³ specifically: it confirms that the directive does not alter obligations of Member States under IHL (such as allowing principled and impartial humanitarian assistance anchored in IHL), and also confirms that actions of armed forces that are governed by IHL are not covered by this Directive. The objective is that actions that are lawful under IHL in the context of active hostilities will not be criminalized as terrorist offences.

Indeed, unlike CT legislation, IHL does not prohibit all acts of violence but aims to regulate them specifically in situations of armed conflict by limiting the choice of methods or means of warfare to spare civilians, as well as civilian objects, from the effects of hostilities. Specifically for non-State organized armed groups that take part in non-international armed conflicts (NIACs), any motivation they may have to observe IHL and to fight in accordance with IHL would probably erode if, irrespective of the efforts they may undertake to comply with IHL, all of their actions were subject to prosecution. This does not take away the fact that, according to IHL, combatant status and combatant's privilege are exclusive to situations of international armed conflict and are not provided for NIAC, and therefore non-State organized armed groups can be prosecuted by judicial authorities for their participation in hostilities and any act that is punishable under the applicable national law (e.g. murder or infliction of bodily harm), even if such conduct does not violate IHL. It should be noted, however, that IHL²⁴ aims to grant the broadest possible amnesty to persons having participated in the hostilities without having committed any serious violation of IHL.

It is important to ensure that CT measures are in accordance with international law, including IHL, but also international human rights law and international refugee law. While therefore the objective of the "IHL saving clause" is that actions that are lawful under IHL in the context of active hostilities will

22 Eurojust, *Eurojust Memorandum on Battlefield Evidence*, 29 September 2020, available at: <https://www.eurojust.europa.eu/eurojust-memorandum-battlefield-evidence-0>.

23 Directive (EU) 2017/541, above note 17, § 37 of the Recital.

24 See Article 6(5) of Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

not be criminalized as CT offences, in certain cases the application and the broad formulation of and interpretation given to the IHL saving clause has led to difficulties in terms of prosecution: for instance, in Belgium it has led to the impossibility to prosecute alleged terrorist offences in relation to the PKK.²⁵

8. So-called “violent extremism” continues to be perceived as a threat, including in the EU.²⁶ How are you addressing this issue at EU level? How do you see policies aiming at preventing or countering violent extremism interacting with humanitarian action?

While it is important to investigate and prosecute perpetrators of terrorist attacks, to protect our citizens from terrorism, and to mitigate the impact of terrorist acts, we should also do everything we can to prevent radicalization leading to violent extremism and terrorism from occurring in the first place. This can be done by foiling terrorist plots when they are being devised, but also at an even earlier stage, by addressing the factors that make individuals advocate and adopt violent methods to achieve their political objectives. Our policies on violent extremism are concerned with that objective. Factors that make violent extremist ideologies resonate with individuals may be psychological (e.g. thrill seeking, looking for meaning in life), social (e.g. individual experiences with perceived marginalization and exclusion), political (grievances, e.g. about perceived discrimination of certain groups in our society or against government actions) or religious (belief in an extremist interpretation of a religion). The influence of each of these factors differs from person to person, and they cannot always be neatly distinguished from each other. To address violent extremism, the EU facilitates exchange of good practices and lessons learned between policymakers and practitioners across the Member States as well as in priority third countries such as the Western Balkans.²⁷ The EU’s RAN, as well as a network of prevent policymakers, are leading in this area.

As the internet is the main vector of communication of radical ideologies that may lead to extremist violence and terrorism, the EU adopted on 29 April 2021 a Regulation on terrorist content online²⁸ to better protect EU citizens by obliging online platforms to remove such content within one hour. The EU also works to counter expressions of illegal hate speech and disinformation, notably on the internet, which fuel violent extremism. It addresses these issues in its standing dialogue with major digital companies, but it has also initiated a Code of Conduct on Countering Illegal Hate Speech and a Code of Practice on

25 Kurdistan Workers’ Party.

26 See, for instance, European Commission, above note 7, Introduction.

27 See, for instance, European Commission, *Prevention of Radicalisation: the Commission Steps up Support in the Western Balkans with a New €1.55 Million Project*, 19 April 2021, available at: https://ec.europa.eu/home-affairs/news/prevention-radicalisation-commission-steps-support-western-balkans-new-€155-million-project_en.

28 “Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on Addressing the Dissemination of Terrorist Content Online”, *Official Journal of the European Union*, L 172/79, 2021, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021R0784&from=EN>.

Disinformation²⁹ which will be reviewed soon. Major digital companies have committed to the Code on a voluntary basis. All these issues are discussed within the EU Internet Forum with EU Interior Ministers and representatives of major online platforms, as well as in the Global Internet Forum to Counter-Terrorism since 2017.

The EU also provides funding on preventing and countering of violent extremism (P/CVE) in several thematic areas: education, media awareness, empowerment of women, youth work, socio-economic inclusion, transitional justice, and inter-communal activities including sport and inter-faith and intra-faith dialogue. These can be specific projects for prevention of radicalization or rehabilitation. It can also be more general, positive support and opportunities for at-risk youth (such as increasing critical thinking skills, exchanges, mobilizing culture and sport for integration). Such funding is distinct from humanitarian funding. Personally, I believe that assistance in P/CVE is beneficial to recipients in a different way than humanitarian assistance. Indeed, P/CVE programmes could also encourage promotion of human rights in the security and justice sector, which can build resilience against terrorist and violent extremist groups by developing positive relationships between governments, law enforcement officials and communities through, for example, community policing. Rule of law activities can also contribute to de-radicalization and disengagement programming, or rehabilitation and re-integration for detainees and/or former fighters.

The EU has long recognized the so-called “security–development nexus”, which dictates that there can be no security without development, and vice versa. Fragile States, weak governance and social, economic and political grievances provide space for violent extremists and fertile ground for recruitment and radicalization. Armed conflicts also generate grievances, images and narratives that can be used to radicalize. P/CVE, and the stabilizing impact that building resilience to violent extremism can have, is therefore relevant to improving the delivery of EU assistance and development aid in vulnerable countries.

I am aware of the concerns of humanitarian actors when P/CVE activities are implemented in areas where they are also active, such as in the camps in NES, for fear that it might taint the neutrality and independence of humanitarian efforts and might have an impact on the trust of the people that humanitarians are trying to help. Humanitarian actors also want to remain impartial and assist all persons affected by conflict and violence, regardless of their degree of radicalization. It is therefore important to not associate neutral humanitarian actors with specific P/CVE programmes. However, in practice, I believe both types of assistance are necessary: there is room both for humanitarian assistance such as psycho-social

29 To prevent and counter the spread of illegal hate speech online, in May 2016 the Commission agreed a code of conduct with major digital companies. Other digital companies joined in the course of 2018, in January 2019. The last one joined in September 2020. For more information, see European Commission, *The EU Code of Conduct on Countering Illegal Hate Speech Online*, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

support, education, training, assistance with the restoration of family links, etc. to all (which can incidentally have a positive impact in preventing radicalization and violence) as well as programmes to tackle radicalization specifically. Hence dialogue between the various actors is important.

The security facts on the ground in the camps in NES are worrisome. My experience has been that regarding the camps, the humanitarian community has a different assessment of the security situation than the security services who look with concern into violent incidents in the camps or the availability of Sharia classes, presence of radicalized persons that reject services, etc.

Different funding sources are available: certain for humanitarian activities and others for P/CVE assistance – one does not and should not distract from the other. In any case, progress is being made in this context.

9. On 10 July 2020, during the UN Virtual Counter-Terrorism Week, you stated: “we should ensure that our counterterrorism efforts do not impede the provision of humanitarian assistance. The EU will develop guidelines and good practices for this purpose.”³⁰ Which core considerations should be taken into account when assessing and countering adverse impact of CT on humanitarian action? Can you point to specific examples of good practice?

Throughout my tenure as EU CTC I have had a close and trusted working relationship with humanitarian organizations, especially with the ICRC. I strongly believe that principled and impartial humanitarian action also needs to be able to take place in conflict zones controlled by terrorist groups or in which terrorist groups operate. The international community is more and more aware of the complex issues that arise with regard to CT measures and humanitarian assistance, especially as terrorist groups (IS or Al-Qaida affiliates or local groups) are active in many conflicts today, in particular in the Middle East and Africa.

Together with DG ECHO/the European Commission, I co-organized an expert meeting on Counter-Terrorism Measures and Safeguarding Principled Humanitarian Space in May 2019, aimed at bringing together in a novel format a limited number of humanitarian and CT experts from various EU Member States, EU institutions and humanitarian organizations (including the ICRC). The key questions addressed were the national implementation of CT measures while safeguarding principled humanitarian space with a specific focus on the EU context, and enhancing the advocacy of the EU in this area. The objective was to better define the issues which need to be addressed at EU level moving forward. The discussions showed that there are many serious challenges for humanitarian actors, and not many solutions yet in sight. On the CT side, a variety of stakeholders was represented, which shows the multi-faceted and cross-cutting nature of the issue (including Ministry of Finance, Banking Supervisory Authority, Ministry of the Interior, Ministry of Foreign Affairs, Public Prosecutor,

³⁰ Remarks by Gilles de Kerchove, EU Counter-Terrorism Coordinator, at the UN Virtual Counter-Terrorism Week, 10 July 2020.

CT expert in EU delegation, EU expert on terrorist financing in the Horn of Africa). The activities of humanitarian organizations have been affected by CT measures in a variety of ways. There have been prosecutions of staff of impartial and principled humanitarian organizations. Travel bans implemented under sanctions regimes have affected the transport of fighters to medical care. The import/export of certain goods that are essential for humanitarian aid (pipes, engines) have been blocked, all of which has led to certain activities being put on hold. If humanitarian activities are restricted to government-held areas, reaching populations in need in line with the humanitarian principles becomes challenging. Negotiating access with terrorist groups or engaging with non-State armed groups has therefore also become increasingly difficult for humanitarian actors and has led to meetings taking place in third countries purely due to security measures. Accessing financial services can also be difficult due to banks having to comply with CT measures or adopting a risk-averse approach, which leads to delays, denials of financial services or other problems. Cash-based assistance programmes have also been affected due to concerns surrounding the diversion of funds. The freezing of assets, and the embargo imposed to certain States (Yemen, Syria) cause problems to the humanitarian aid community (however, this is often based on country-based sanctions regimes, not CT sanctions or measures). CT clauses in funding agreements can equally be problematic.

However, in assessing the impact of CT measures on humanitarian action, it is important to keep in mind the following points:

- (1) To have a constructive debate and to make progress it is important to clearly define the problem and the really problematic issues and to distinguish whether a certain problem relates to the donor community as a whole or only to some donors. For example, a number of the issues arise because of the very strict US legislation and practices, which are not replicated by the EU.
- (2) It is important to note that there is the need to allow the work of impartial and principled humanitarian organizations, including NGOs, in areas where terrorist groups operate. However, the difference between the ICRC as an international organization grounded in IHL and certain NGOs that are acting in a non-principled manner needs to be highlighted from a CT perspective: in the past, there have been cases of NGOs disguised as humanitarian operators which have not been impartial and which have been used to finance or otherwise support terrorist organizations. While exceptional, certain small NGOs have even been listed by the UN for financing terrorism.
- (3) It is also important to note that some measures making an impact on humanitarian assistance, especially related to sanctions, are not CT measures: often EU sanctions are country-based sanctions and hence not CT measures. Addressing the impact of those sanctions is a different debate.

At the meta-level, there is agreement that there is a need for a legal and policy framework that allows for principled humanitarian action and on the basis of

which pragmatic solutions can be found. CT measures should not prevent impartial and principled humanitarian action. On the other hand, it has to be ensured that humanitarian assistance is never abused as a pretext to channel funds or other support to terrorist organizations. Hence if CT measures are too strict, they can hinder the delivery of humanitarian aid and can cause restricted access to aid by certain civilian populations, for example. This effect is problematic in view of IHL and the humanitarian principles. The criminalization of humanitarian and medical assistance would in this regard raise important concerns. CT measures may also make an impact on the transfer of humanitarian funds. The ICRC is well established as an organization that is grounded in IHL but smaller, less-known NGOs may be more affected by such restrictive legislation and policies. However, if the CT framework is too loose, it could also open the door for less ethical actors to support terrorism under the guise of humanitarian action. Hence, there is an interest in the CT community to address the issues and find solutions. This is a difficult debate. Recent UN Resolutions such as UNSCR 2462 on terrorist financing include certain humanitarian safeguards. The most important challenge will be national implementation and finding practical, workable ways forward.

Examples of good practices are:

- Roundtables convened by the Ministry of Finance of one Member State and the Human Security Collective (bringing together NGOs) have been held over the past two years, involving all actors (Ministry of Foreign Affairs and banks as well) with an increasingly focused dialogue on specific challenges.
- Good inter-institutional collaboration between the EU Commission's justice service (DG JUST³¹, now DG FISMA³²), dealing with the financial side of terrorist financing and its humanitarian aid service (DG ECHO), has led to good risk assessment of humanitarian non-profit organizations (NPOs) within the EU, for example.
- CT laws that include humanitarian exemptions, such as CT laws criminalizing travel to designated conflict zones, in line with the Recital 38 of the EU CT Directive.

It is important to find mitigating measures that do not put in question the effectiveness of CT measures while letting impartial humanitarian organizations carry out their mandate. Potential solutions could be found at global or EU level (UNSCRs, EU directives), domestic level (States) and donor level. Generally speaking, risk-based rather than risk-averse approaches should be promoted. Over-compliance by banks or private sector actors and donors can also lead to broader restrictions than originally aimed by the CT framework. They should be avoided. Overall, while some mitigating measures have been put in place, the scope of these remains too narrow. Moving forward, it will be important to learn about good practices that have been developed in States and could be interesting

31 The Commission's Directorate-General for Justice and Consumers.

32 Directorate-General for Financial Stability, Financial Services and Capital Markets Union.

to other States as well. In order to elaborate on more concrete solutions, more “digging” needs to be done. Also, in order to avoid the discussions being too broad, more specificity is needed in identifying the issues at stake and with regard to the “asks”. Overall, it is a multi-disciplinary process that must involve different stakeholders, in order to find common ground and strike a better balance. The Council Conclusions on CT of June 2020³³ recognize the importance of safeguarding the humanitarian space, include a strong commitment of the EU to this and promote the collection of good practices in this context. I believe that it would be important for the EU to move forward and look into specific aspects in much more detail and identify good, workable practices that it could share internationally. There is a need for more political discussions on risk. I also strongly believe that some innovative solutions should be explored. New technologies might be a way for that. For example, the World Bank is experimenting with block chain solutions for direct cash payments.

It is also very positive that CT and safeguarding the humanitarian space are now also being discussed in the context of the Global Counter-Terrorism Forum, the UN Counter-Terrorism Week³⁴ and the seventh review of the Global Counter-Terrorism Strategy, adopted by the UN General Assembly on 30 June 2021.³⁵ This shows that there is increasing awareness in the international CT community about these issues and potential side-effects of CT measures. This is a good first step which we can collectively build on. It would now be important to look much more specifically into certain aspects and find practical solutions. In this context it is also important that the humanitarian community presents the various challenges and possible solutions in as much detail as possible. Field experience will be important too, to measure the impact of certain CT measures on the ground and identify and test solutions. However, we have to keep in mind that these are sensitive issues and that it might be possible that sometimes grey zones are preferable, given reputational risks.

10. The Recital of the Directive mentioned here above also includes a “humanitarian exemption”: “The provision of humanitarian activities by impartial humanitarian organizations recognized by international law, including international humanitarian law, do not fall within the scope of this

33 Council of the EU, “Council Conclusions on EU External Action on Preventing and Countering Terrorism and Violent Extremism”, 8868/20, Brussels, 16 June 2020, § 27: “Recalling its conclusions on humanitarian assistance and international humanitarian law of 25 November 2019, and in line with UNSCR 2462 (2019), the Council recognises the need to take into account the potential effect of counter-terrorism measures, including sanctions, on humanitarian action. The Council calls for the avoidance of any potential negative impact of counter-terrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in full compliance with humanitarian principles and international humanitarian law. To that end, the Council reaffirms its continued commitment to preserving the humanitarian space, including inter alia through the development of best practices and the adoption of appropriate mitigating measures.”

34 The Counter-Terrorism Week at the UN is a biennial gathering of Member States and international CT partners.

35 UN General Assembly, The United Nations Global Counter-Terrorism Strategy: seventh review, UN Doc. A/RES/75/291, 30 June 2021, available at: <https://undocs.org/en/A/RES/75/291>.

Directive.”³⁶ Using comparable language, the UNSCR 2462 on Combatting Terrorism urged States, about the financing of terrorism, “when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law”.³⁷ How do you see these two provisions interacting, and what is the rationale behind them? How would you interpret the notion of humanitarian activities contained in both?

The EU CT Directive followed UNSCR 2178³⁸ (2014) and the Council of Europe’s 2015 Additional Protocol to the Council of Europe Convention on Terrorism.³⁹ Recital 38 of the Directive duly recognizes the need to give humanitarians legal certainty within the EU legislation as demanded by international law, including UNSCR 2462⁴⁰ while also recognizing the importance of avoiding loopholes that terrorist groups could exploit. It refers to “impartial humanitarian organizations recognized by international law including IHL”, such as the ICRC. Both the UNSCR 2462 and the EU CT Directive want to avoid that such impartial and principled humanitarian action is criminalized or that provision of humanitarian assistance in areas in which terrorist groups operate or which are controlled by them is regarded as terrorist financing.

As both CT measures and humanitarian aid share the goal of protecting civilians against threats, there is common ground to be built on. Finding the right balance and elaborating ways to reflect this in practice should therefore be a priority. It is important to safeguard humanitarian principles. This is what Recital 38 is about and also what UNSCR 2178 (2014) or UNSCR 2462 is about. The reference to impartial humanitarian actors and IHL makes clear that only this type of humanitarian action, in full respect of IHL, is covered by the exemption (CT directive) and provision to take into account (UNSCR). This is notably a way to prevent non-ethical actors to support terrorism under the guise of humanitarian action.

I have myself pushed to ensure that concerns of humanitarian organizations are adequately taken into account in the UNSCRs and that the US approach is not replicated internationally. I have also pushed for a humane approach to individuals affected by CT legislation; by the way, the European Court of Justice has ruled that social security payments to the family of a terrorist are not covered by terrorist financing as this is just meant to provide the subsistence minimum.

36 Directive (EU) 2017/541, above note 17, § 38 of the Recital.

37 UNSCR 2462 (2019), adopted by the UNSC at its 8496th meeting, on 28 March 2019, § 24.

38 Resolution 2178 (2014), above note 19.

39 Council of Europe, “Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism”, Council of Europe Treaty Series No. 217, 19 May 2015, available at: <https://rm.coe.int/168047c5ea>.

40 UNSCR 2462 (2019), adopted by the UNSC at its 8496th meeting, on 28 March 2019.

It is important to keep in mind that the humanitarian NGO sector does not constitute a higher risk than other sectors, which was highlighted in the supranational risk assessment carried out in 2019, assessing the vulnerability of certain humanitarian NPOs (in particular NPOs receiving institutional funding by the EU or Member States in charge of the management of EU funds) to risks of terrorism financing. The criminalization of the work of impartial and principled humanitarian organizations needs to be avoided.

It is important to highlight that the US and the EU have different approaches to the issue. Forms of spill over from the US approach (prohibiting and criminalizing any type of “material support”, which is an extremely broad concept and has a serious impact on provision of humanitarian support in areas where terrorist groups operate) to the EU or the international level should be avoided. It is a serious issue that criminal investigations have been brought against the staff of impartial and principled humanitarian organizations such as the ICRC by other countries (but not in the EU).

11. We have observed in the last years the development of new national CT legislation, aiming for instance at criminalizing the travel or stay in territories controlled by non-State armed groups designated as terrorists. Do you see a need for EU Member States to take into account the reasoning behind the humanitarian exemption included in the Recital of the Directive when adopting domestic CT legislation?

In terms of EU legislation, it is important to give humanitarians legal certainty, while it is also important to avoid loopholes that terrorist groups could exploit. The EU CT Directive contains a humanitarian exemption in Recital 38, which was incorporated to ensure that IHL is respected when Member States apply the EU CT Directive, which means in particular that principled and impartial humanitarian assistance does not fall within the scope of the Directive. Member States certainly need to take into account the reasoning behind the humanitarian exemption included in the Recital when transposing the EU CT legislation. However, the humanitarian exemption is included in the Recital to the Directive and as it is not part of the operational part of the Directive, Member States were not under an obligation to explicitly transpose it into their national laws. Nevertheless, national laws transposing the EU CT Directive have to be interpreted in light of the Directive, and hence also in light of Recital 38. Due to such interpretation in conformity with the humanitarian exemption, humanitarian actors should not encounter any problems in practice within the EU.

Member States had to transpose the EU CT Directive by 8 September 2018, and the European Commission assessed the notifications, tabling a transposition report in July 2020. The Commission concluded that the transposition of the Directive by the Member States is satisfying overall and has led to the strengthening of the Member States’ criminal justice approach of terrorism, and the rights afforded to victims of terrorism. Via this assessment also, it became clear that Member States have not explicitly transposed the exemption, as they

did not see a need to do so. The Commission is currently evaluating the impact of the EU CT Directive which is a wider process than the mere analysis of its transposition into national law: a public consultation process was held until mid-June 2021 before the evaluation report that will be submitted to the European Parliament in the autumn of 2021. The review of the Directive's impact would be a good moment to raise any concerns from the humanitarian side as the evaluation of the Directive is covering if and how Recital 38 was correctly applied by Member States, and thus covers the possible impact of the Directive on humanitarian action, including but not limited to criminalization of humanitarian action. What could be explored further in the evaluation process is, *inter alia*, whether issues arise regarding criminalization of the activities of local organizations that humanitarian organizations are working with. So far, no cases of criminal prosecution of humanitarian actors have been reported in EU Member States (even if arrests have taken place outside of the EU by other, non-EU, States), which seems to indicate that there is no concern in the implementation of the humanitarian exemption of Recital 38.

12. Before closing this interview, would you like to share with us what you believe have been your most important achievements in this role of EU CTC? The most challenging aspects? Which advice would you give to your successor? Is there anything else you would like to share with our readers?

One main advice I would give my successor is to consider, as a priority file, the preservation of humanitarian action from adverse impact of CT measures. I launched the reflection through the organization of the expert meeting on Counter-Terrorism Measures and Safeguarding Principled Humanitarian Space that I organized in May 2019, but further work remains to be carried out. I believe this will need to be done through further illustrations and concrete examples so as to identify viable, long-term and effective solutions. In this sense, the introduction of the humanitarian exemption in the EU CT Directive was an essential step.

To round up some of my important achievements – I would say that I have already mentioned some in your first question in this interview. I think there are several files in which I made a difference, but I want to stress that it is a collective ownership, as I have not been alone in my work, and have worked extensively with several stakeholders who are also equally responsible for all the achievements made through the years.

I feel among my main achievements must be the fact that I managed to convince the system that my position was useful, that it would not be at the cost of the importance of other EU institutions and that we could work together. Some examples include the policy to handle travel of foreign fighters towards Iraq and Syria. In fact, I think I raised the problem when no one else was raising it and came up with an analysis of the problem, and with a twenty-four-measure plan on how to tackle the issue, even inspiring ensuing UNSCRs. Through the years, I have also managed to keep the file as a priority agenda even during

the periods of “CT fatigue”. Furthermore, I have raised difficult questions such as the right balance between security and freedom, management of the detainees’ crisis (Guantanamo and al-Hol), the linking up of the internal and external dimensions, etc. Additionally, one of the questions that I have insisted on is the role of ideology. Certain Islamist extremist interpretations of Islam have played a problematic role in all this and need to be addressed. I obtained the agreement of the Council to engage with Saudi Arabia on the proselytism of Islamist extremist materials and financing, which we want to stop in Europe, the Western Balkans and the Sahel. We would want to reduce problematic material that can be contained in speeches or books or can be found on the internet; we would also want to halt funding coming from the Gulf to promote Islamist extremist interpretations of Islam. I have created a certain momentum on this, which I am proud of as I have not been unopposed on this topic.

In general, we have been able to convince Member States to a more collective response approach, including by using agencies such as Europol, Eurojust and Frontex. This is quite an achievement, as I am a policy entrepreneur whose goal is to promote EU integration. I feel that we have made significant progress in the last six years in furtherance of this. In a world where we have so many security threats, we need to provide a collective European response. I believe that the European approach is exemplary as it really seeks a balance between freedom and security. Integration (i.e. EU-led approach) in CT matters is obviously challenging because of issues related to sovereignty, but we are moving in the right direction.



Interview with Janez Lenarčič

European Commissioner for Crisis Management*

Janez Lenarčič is currently serving as Commissioner for Crisis Management in the European Commission, a mandate he took up in December 2019. In this capacity, he is responsible for EU civil protection as well as humanitarian aid. Mr Lenarčič served as Ambassador and Permanent Representative of Slovenia to the European Union (EU) in Brussels from 2016 to 2019. From 2014 to 2016, he held the Secretary of State position in the cabinet of the Slovenian Prime Minister. His previous experience also includes the position of Director of the Organization for Security and Cooperation in Europe's (OSCE) Office for Democratic Institutions and Human Rights, in Warsaw, from 2008 to 2014. He has also served as Secretary of State for European Affairs, including representing Slovenia during the Lisbon Treaty negotiations in 2007 and later representing the Slovenian EU Council Presidency to the European Parliament in 2008. In 2002 and 2003 he held the position of State Secretary in the cabinet of the Slovenian Prime Minister, after which he served as Slovenian Ambassador to the OSCE. In 2005, he was also Chairman of the Permanent Council of the OSCE in Vienna. In 2000 he served as Adviser to the Minister for Foreign Affairs, and the following year he became the Diplomatic Adviser to the then Slovenian Prime Minister. Between 1994 and 1999 he was posted to Slovenia's Permanent Representation to the United Nations (UN) in New York, where he also served as the alternate representative of Slovenia on the UN Security Council. Mr Lenarčič holds a degree in international law from Ljubljana University.

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* This interview was conducted by Dr Knut Dörmann, Head of Delegation to the European Union, the North Atlantic Treaty Organization and the Kingdom of Belgium, ICRC.

To begin with, could you describe your role and responsibilities as the Commissioner for Crisis Management? Under this broad question, could you briefly explain to us where the Directorate-General for European Civil Protection and Humanitarian Aid Operations [DG ECHO] is situated within the rather complex EU institutional structure? What is the scope of your and DG ECHO's mission in relation to humanitarian action?

Solidarity is one of the fundamental values of the European Union. The action carried out within my portfolio is the expression of this moral responsibility that we, as the EU, carry together with the rest of the international community. My role and responsibilities, as Commissioner for Crisis Management, if I were to sum them up in a few words, are about how the EU translates this solidarity from words into action in emergencies.

The mandate within which we act is explained in the Treaty on the Functioning of the European Union. We act to “encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters”¹ and “to provide *ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations”.² It is, therefore, a mandate that covers both civil protection and humanitarian response to crises.

Each response has its own tools and mechanisms, such as the EU's Civil Protection Mechanism or the EU's Humanitarian Implementation Plans. Depending on needs and contexts, these instruments are deployed separately or in complementarity to each other. To give a tangible example of how this works in practice, in the wake of the Beirut blasts last year, the EU coordinated the sending of in-kind assistance and specialized teams, all requested by Lebanon, provided by member and participating States through the EU Civil Protection Mechanism. At the same time, the EU mobilized emergency humanitarian funding to provide life-saving assistance to the affected people and operated three EU Humanitarian Air Bridge flights to deliver essential aid. Therefore, the mandate and the instruments available to us allow us to address a crisis from different angles.

The tools which we have at our disposal are implemented through DG ECHO. For those who are unfamiliar with the structure of the European Commission, a directorate-general could be compared to a ministry at the national level. While DG ECHO's headquarters are based in Brussels, it has a field network around the globe, with field offices in more than forty countries. We also count on 155 international humanitarian experts that help us assess needs on the ground, tailor the response to needs and monitor implementation.

When it comes to humanitarian aid, the EU and its member States are the leading donors worldwide. This year alone, the European Commission has an initial

1 Consolidated Version of the Treaty on the Functioning of the European Union, OJ L. 326/47-326/390. 26 October 2012, Art. 196.

2 *Ibid.*, Art. 214.

annual humanitarian budget of €1.4 billion. This is funding that is provided to humanitarian organizations so that they can assist people in need. This year's funding represented an increase of more than 60% compared with the initial humanitarian budget adopted last year. With it we will strive to provide a meaningful contribution to the response to global humanitarian needs, which are steeply and steadily growing.

The COVID-19 pandemic brought an additional layer of challenges to already fragile communities. To meet these challenges, the EU is acting on different fronts. The EU was among the first to support the World Health Organization's Coronavirus Response Plan. We mobilized additional humanitarian funding. We organized EU Humanitarian Air Bridge flights to fragile countries to help unblock the transport of essential humanitarian aid and workers, as well as of much-needed medical supplies that were held up by transport restrictions. At this stage of the pandemic where vaccines are available, we are also providing humanitarian funding of €100 million to support the roll-out of vaccines in countries with critical humanitarian needs and fragile health systems in Africa. This is in addition to the significant contribution – €2.47 billion – given by the EU to the COVAX Facility, which will allocate up to 100 million doses of COVID-19 vaccines for use in humanitarian contexts.

In your answers to the European Parliament in October 2019, before even taking up your mandate, you declared: "I will firmly advocate for EU humanitarian aid to be delivered in accordance with International Humanitarian Law and the humanitarian principles. The Commission's experience clearly shows that respecting International Humanitarian Law and humanitarian principles is an operational necessity helping to provide access to assistance, to protect the most vulnerable and to ensure the security of humanitarian workers."³ Could you elaborate on why you insisted on the respect for international humanitarian law [IHL] and humanitarian principles as an operational necessity?

IHL and humanitarian principles face a number of challenges, but these challenges do not, in my view, call into question the absolute validity and necessity of this set of rules. On the contrary, they call on our collective responsibility to relentlessly remind all involved, in the interest of victims of conflicts and natural disasters and of humanitarian workers, that they not only exist but need to be known and respected.

One of the paradoxes, though, is that IHL, whose importance and necessity is very broadly recognized – with the 1949 Geneva Conventions being among the most widely accepted legal instruments, and most of their provisions having become customary law – is nevertheless all too frequently violated. We have been observing an alarming trend in the last couple of years where the basic principles of humanitarian law have been dramatically and blatantly violated. Zones

3 See "Janez Lenarčič's Answers to the European Parliament Questionnaire", p. 7, available at: https://ec.europa.eu/commission/commissioners/2019-2024/lenarcic_en (all internet references were accessed in July 2021).

established to shelter the wounded, the sick and civilians, like hospitals or schools, have been deliberately targeted. This has a critical effect on civilians, including millions of children affected by conflicts. Violations of IHL are also one of the drivers of conflict-induced hunger. Trucks delivering food and medical equipment to millions have been destroyed on purpose, recently again in northeast Syria. Not least, the recurrent disrespect for humanitarian norms and principles makes the delivery of critical aid increasingly difficult and dangerous for humanitarian and medical workers. Humanitarian workers have been the target of attacks, with 481 aid workers being victims of major attacks in 2019.

In addition to IHL, the fundamental humanitarian principles of impartiality, neutrality and non-discrimination guarantee that aid is provided solely based on existing humanitarian needs.⁴ These principles are not mere declarations of intent. They guide and safeguard the operations of our partners in the field on a daily basis. They have, in the EU order, the highest legal value as they are enshrined in Article 214 of the Treaty on the Functioning of the European Union. As a principled donor, we implement this mandate together with our partners.

So yes, I can only reiterate that compliance with IHL and humanitarian principles is at the core of the EU's humanitarian action. Humanitarian principles need to be respected by all – parties to the conflict, donors, humanitarian organizations – as a means to guarantee, in practice, that aid reaches the most vulnerable. On our side, we will continue to use the EU's existing toolbox in support of IHL, as outlined in the EU's dedicated IHL Guidelines⁵ that we have had at our disposal for over a decade. But we are also committed to putting IHL at the heart of the EU's external action, using all instruments available to us to promote compliance with IHL. This is one of the key messages of the Communication on the EU's Humanitarian Action which we recently adopted.⁶

The recitals of Directive (EU) 2017/541 on Combating Terrorism contain an “IHL saving clause”: “This Directive should not have the effect of altering the rights, obligations and responsibilities of the Member States under international law, including under International Humanitarian Law. This Directive does not govern the activities of armed forces during periods of armed conflict, which are governed by International Humanitarian Law.”⁷ Why was such a clause considered necessary?

4 The humanitarian principles are defined, *inter alia*, in the European Consensus on Humanitarian Aid, OJ 2008/C25/1, 30 January 2008, Part 2.

5 EU, *Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law*, OJ 2009/C303/06, 15 December 2009 (EU IHL Guidelines).

6 European Commission, *Communication from the Commission to the European Parliament and the Council on the EU's Humanitarian Action: New Challenges, Same Principles*, COM (2021) 110 final, Brussels, 10 March 2021 (Communication on the EU's Humanitarian Action).

7 Directive (EU) 2017/541 of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 15 March 2017, Recital 37.

Over recent years, we have seen an increase in the number of counterterrorism frameworks, both globally and in the EU. These may serve legitimate security objectives. Their aim should be to protect the safety and security of the same civilians that humanitarian organizations serve. But in many cases, counterterrorism measures have over the years made it increasingly difficult for humanitarian organizations to deliver aid to people who may need it most. The need for assistance is often highest in complex environments where designated terrorist groups are parties to an armed conflict. It is also estimated that over 60 million people live in areas where non-State actors exercise control, including some that are designated under counterterrorism regimes.

It is important that all counterterrorism measures are in accordance with international law, including IHL, but also international human rights law and international refugee law. One of the critical aspects in this respect is safeguarding the space of humanitarian organizations in armed conflicts.

This is why it is important that Directive (EU) 2017/541 includes an IHL saving clause. The purpose is to ensure that activities which are governed by, and not prohibited under, IHL are not prosecuted under counterterrorism legislation. It is really critical that IHL remains respected and relevant in all contexts of armed conflicts, in order to maintain the integrity of IHL, to safeguard the humanitarian space, and to ensure that vulnerable communities in areas living under the control of these groups are not left behind.

In recent years, there has been an increase in global, regional and local regulatory measures in the field of international sanctions regimes, including with regards to EU sanctions, also called “restrictive measures”. In May 2020, you declared: “Sanctions should not impede the delivery of humanitarian assistance, including medical assistance, in line with International Humanitarian Law.”⁸ What kind of impediments were you thinking of?

Our partners – non-governmental organizations, international organizations and national agencies – often implement actions in countries for which sanctions apply, and in such environments they have to comply both with the obligations created by sanctions regimes and with humanitarian principles. Whilst sanctions are not intended to stand in the way of or impede the delivery of humanitarian assistance, they can create difficulties for the provision of humanitarian aid on the ground, as frequently reported by humanitarian organizations, including our partners.

Many humanitarian organizations report that complying with sanctions regimes can affect their ability to conduct life-saving operations. They point out that sanctions regimes can create difficulties for them in carrying out money transfers necessary for their operations, in engaging with non-State armed groups, and in purchasing and importing equipment. Other indirect adverse effects, such

8 See European Commission, “Commission Publishes Guidance on Coronavirus-Related Humanitarian Aid to Syria Despite Sanctions”, press release, Brussels, 12 May 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_831.

as over-compliance, bank de-risking and an overall chilling effect, can also translate to operational difficulties for partners who operate on the ground. Some humanitarian partners have become reluctant to engage in areas impacted by sanctions, due to the high costs and uncertainty involved in ensuring compliance; when they do continue to engage, they have to spend significant resources on ensuring compliance.

I attach the utmost importance to these concerns and difficulties shared by our humanitarian partners. A consistent implementation of sanctions regimes is essential to ensuring that EU funds cannot be diverted from their purpose and used, for instance, to finance illicit or criminal activities such as terrorism. At the same time, the European institutions are committed to ensuring unimpeded access of humanitarian assistance to the most vulnerable and that it is delivered in full compliance with international law and humanitarian principles.

Several practical guidance notes have been published in 2020⁹ by the European Commission on how to comply with EU sanctions when providing humanitarian aid, in particular medical assistance, to fight the coronavirus pandemic. They were much appreciated by the humanitarian community. What are the concrete reasons that triggered the drafting of these guidance notes? In general, what are the elements of the EU sanctions policy aimed at minimizing potential obstacles to humanitarian action? Can you identify other possible measures to support humanitarian actors, including EU-funded organizations, operating in countries subject to EU restrictive measures?

The European Commission takes seriously the concerns relating to any possible obstacles to the swift and effective delivery of humanitarian aid and is committed to preserving the humanitarian space. That is why the Commission has developed guidance notes that are aimed at providing further clarity to our partners on regulatory requirements.

We have, for example, developed guidance for humanitarian organizations and economic operators on the provision of humanitarian aid to fight the COVID-19 outbreak in environments subject to EU restrictive measures.¹⁰ Over the last year, the scope of this guidance was gradually expanded and it currently covers sanctions regimes in Syria, Iran, Venezuela and Nicaragua. I would particularly stress the principle that final beneficiaries of humanitarian assistance cannot be subject to vetting against sanctions lists. We have had positive feedback on the guidance from our partners, which has prompted the European Commission to develop further guidance, for instance on the implementation of the EU Global Human

9 The European Commission released and then expanded its guidance note on how COVID-19-related humanitarian aid can be provided to countries and areas around the world that are subject to EU restrictive measures (sanctions), namely Syria (published in May 2020), Iran and Venezuela (published in October 2020) and Nicaragua (published in November 2020). See European Commission, *Guidance Note on the Provision of Humanitarian Aid to Fight the Covid-19 Pandemic in Certain Environments Subject to EU Restrictive Measures*, C (2020) 3179, Brussels, 11 May 2020, 9 October 2020, 16 November 2020 (EU Guidance Note).

10 *Ibid.*

Rights Sanctions Regime, published in December 2020, and on restrictive measures related to the situation in Myanmar/Burma, in May 2021. A horizontal guidance on the provision of humanitarian aid in environments subject to EU sanctions is currently in preparation.

Our support to humanitarian organizations goes beyond that, however. An EU-level single contact point was set up in March this year, in the context of the COVID-19 pandemic. This is a dedicated channel to help humanitarian organizations identify the authorities competent for granting humanitarian assistance derogations, when these are included in sanctions regimes.

We can also provide comfort letters to our partners, aimed at facilitating their interactions with banks and financial institutions for financial transfers linked with EU-funded humanitarian actions. An overview of the support provided to our partners and related information can be found on the DG ECHO partners' website.¹¹ Furthermore, we promote a continuous dialogue between all parties involved in order to facilitate the delivery of humanitarian assistance to all those in need and to find practical solutions to obstacles. We actively participate in various advocacy and awareness-raising activities and continuously engage with our partners.

A humanitarian exemption is included in the recital of Directive (EU) 2017/541.¹² There is a strong call from humanitarian organizations for the systematic introduction of such exemptions in EU sanctions regimes as well. In EU language, the term "exemption" means that "a restriction does not apply when the purpose of the action is to provide humanitarian aid", and that humanitarian operators can carry on without delay as their humanitarian activities would be considered outside the scope of EU restrictive measures.¹³ How do you assess this option in comparison to derogations—i.e., ad hoc authorizations? What is the stance of the EU on humanitarian exceptions overall?

In order to preserve the humanitarian space and to guarantee the delivery of humanitarian assistance to people in need, sanctions regimes may provide for humanitarian exceptions. EU restrictive measures can contain two types of exceptions: exemptions and derogations. Exemptions—similar to the one included in Recital 38 of Directive (EU) 2017/541—mean that a restriction does not apply when the purpose of the action is to provide humanitarian aid. Any conditions established in the sanctions regime to guarantee the genuine humanitarian character of the operations concerned must of course be met for the exemption to apply. In that context, humanitarian organizations can carry out their activities without any prior authorization. In case of a derogation, a restricted action can be carried out only after an authorization is granted by a competent authority.

In the latter scenario, this process can pose difficulties to humanitarian organizations, ranging from the identification of the competent authority to

11 Available at: <https://dgecho-partners-helpdesk.eu/sanctions/eu-restrictive-measures>.

12 See Directive (EU) 2017/541, above note 7.

13 EU Guidance Note, 11 May 2020, above note 9, Question 24.

possible delays in, and suspension of, life-saving activities. In order to overcome such practical challenges, the EU is working with all involved actors to streamline and facilitate procedures for granting humanitarian derogations.

The inclusion of humanitarian exceptions is one of the most important tools for safeguarding the humanitarian space in practice. At present, only seven out of forty-two EU sanctions regimes in force contain a humanitarian exception of any kind. Among the exceptions currently in place there are both derogations and exemptions, notably in the specific cases of the fuel exemption for humanitarian actors for Syria, and the measures transposing the UN sanctions with regard to Somalia.

The European Commission is committed to pursuing the consistent inclusion of humanitarian exceptions in EU sanctions regimes, and to putting in place a complete and effective framework for the use of such exceptions by all our partners receiving EU funding. This approach has been clearly set out in the Communication on the EU's Humanitarian Action adopted by the Commission in March this year. Of course, it is not the Commission that decides on sanctions, but the Council, so we will continue working with the Council to ensure inclusion of the humanitarian exception into any upcoming sanctions regime.

On 7 October 2020, the Council adopted a decision and a regulation establishing a Global Human Rights Sanctions Regime.¹⁴ It allows for the targeting of individuals, entities and bodies responsible for, involved in or associated with serious human rights violations and abuses worldwide. Could sanctioning violations of IHL also be an effective way to ensure better compliance with IHL? Under this broad question, could you also address whether this possibility has been considered at the EU level? What are the main causes of enthusiasm and reticence on this option? How would it be integrated into EU legislation?

The EU IHL Guidelines that I've previously referred to specifically recognize that the use of sanctions may be an effective means of promoting compliance with IHL. Such measures can therefore be considered by the EU against State and non-State parties to a conflict, as well as individuals. Our recent Communication on the EU's Humanitarian Action also points to the inclusion of serious IHL violations among the grounds for listing under EU sanctions regimes as a potentially significant way of promoting compliance with IHL, while underlining the need to avoid any potential negative impact on humanitarian activities. And the EU is already using this instrument. There are a number of geographical regimes, aimed, *inter alia*, at preventing or responding to violations of IHL. To mention some examples, these include Burundi, the Democratic Republic of the Congo, Somalia, Libya and Mali.

The EU's global human rights sanctions regime, adopted at the end of last year, focuses on serious human rights violations and abuses. For the first time, the

14 Council of the European Union, [Council Decision \(CFSP\) 2020/1999 concerning Restrictive Measures against Serious Human Rights Violations and Abuses](#), 7 December 2020.

EU has a flexible and forceful framework that will allow it to target individuals, entities and bodies—including State and non-State actors—responsible for, involved in or associated with serious human rights violations and abuses worldwide, no matter where they occur. Under this framework, restrictive measures may cover acts such as genocide and crimes against humanity, but also cases of sexual and gender-based violence. As such, this regime may also be a relevant tool for sanctioning serious human rights abuses in humanitarian contexts.

The average time that the International Committee of the Red Cross [ICRC] has been present in its ten largest operations is forty-two years.¹⁵ Protracted armed conflicts are characterized by their longevity, intractability and mutability, and their complexity is blurring the traditional lines between humanitarian action and development cooperation. The EU embraced the humanitarian–development–peace nexus approach and has launched integrative projects in various contexts. What are the first conclusions of the EU “operationalization” of this approach? Some commentators have brought up concerns about how the nexus approach can digest/integrate humanitarian principles—what are your views on this?

The reality of the world is indeed complex, and we continue to face serious crises. Humanitarian needs are escalating, with violent conflicts as their main driver. Natural disasters and the effects of climate change add to the complexity and severity of crisis—COVID-19, and its dire socio-economic consequences, being a case in point. In view of the magnitude, diversity and complexity of the crises that we are facing, it is imperative that we work together, across the humanitarian, development and peace spectrum.

Council conclusions on operationalizing the nexus,¹⁶ adopted in May 2017, encourage the Commission and EU member States to work together to implement the nexus approach in selected pilot countries. We have done just that in six pilot countries¹⁷ and have seen positive results emerging at the country level. In addition to the pilots, we work on implementing the nexus approach in many other contexts. Together with High Representative Borrell and Commissioner Urpilainen, we gave strong political backing to nexus considerations in the guidelines for the programming of the Neighbourhood, Development and International Cooperation Instrument. The current programming period of the new development instrument provides an excellent opportunity to include the nexus approach in the development country strategies. We also requested all EU delegations around the world to contribute to nexus implementation. In sum, we put great emphasis on improving continuous dialogue between the respective

15 See online introduction to the *International Review of the Red Cross* issue on “Protracted Conflict”, Vol. 101, No. 912, 2020, available at: <https://international-review.icrc.org/reviews/irrc-no-912-protracted-conflict>.

16 Council of the European Union, “Operationalising the Humanitarian-Development Nexus”, Council Conclusions, Ref. No. 9383/17, 19 May 2017.

17 The six pilot countries are Chad, Iraq, Myanmar, Nigeria, Uganda and Sudan.

arms of the EU, in headquarters and in the field. And we work towards joint context analysis for each country.

Most of our partners are already applying new ways of working, including the humanitarian–development–peace nexus. They are bringing valuable lessons learned and experiences on how to work to reduce unmet needs, vulnerabilities and risks, addressing root causes of conflict and working to increase people’s resilience. From the humanitarian point of view, we will continue to require partners to focus on addressing urgent humanitarian needs. This should not, however, prevent them from reflecting on how their interventions fit into the wider context of response to a crisis, and when relevant, how their interventions can have a more long-term or sustainable impact. Examples may include linking up to existing water infrastructure instead of water trucking, providing cash in order to allow for more dignified choices, or linking humanitarian social safety nets to existing country-led social protection programmes – all, of course, bearing in mind the local context.

A nexus approach implies – where the local context permits – working to improve coherence in coordination, programming and financing. Such an approach provides opportunities for funding from different EU budget lines over time.

All in all, the EU’s view is that the triple nexus should certainly contribute to addressing protracted crises, but not to the detriment of a principled humanitarian approach.

On 10 March 2021, the Commission published its Communication on the EU’s Humanitarian Action.¹⁸ Could you describe the main messages delivered by the Commission? What will be the next steps in terms of the implementation of the Commission’s agenda?

First of all, by adopting the Communication on the EU’s Humanitarian Action, the European Commission has underlined the prominent place of humanitarian aid in the EU’s external policy. The Communication sets out an agenda for giving renewed impetus to the EU’s humanitarian aid policy at a time when humanitarian needs are at an all-time high, and growing. Given the unprecedented challenges that humanitarian aid is facing today – exacerbated by the COVID-19 pandemic – we need both more resources globally for humanitarian response, and a better enabling environment for the delivery of principled and effective humanitarian assistance to those most in need. But as the Communication underlines, we also need to step up action to tackle root causes – complex underlying drivers of conflicts and crises. For that, we need to continue linking up emergency relief with longer-term approaches through more systematic, close cooperation among humanitarian, development and peacebuilding actors.

Second, as the title of the Communication indicates, while humanitarian aid is facing new challenges, the underlying principles remain the same. The

18 Communication on the EU’s Humanitarian Action, above note 6.

starting point is a clear reaffirmation of the EU's commitment to providing principled, needs-based humanitarian assistance in line with the European Consensus on Humanitarian Aid, which remains our reference framework. The Communication also underlines the importance of effective advocacy for unrestricted and unconditional humanitarian access to people in need, and it seeks to put IHL at the heart of the EU's external action. It commits us to using all available EU instruments to ensure respect for IHL – not least by calling for the inclusion of serious IHL violations among the grounds for listing in EU sanctions regimes, whenever appropriate. As mentioned earlier, the Communication also sets out a commitment to ensuring that IHL is fully reflected in EU sanctions policy, including through the consistent inclusion of humanitarian exceptions in EU sanctions regimes.

Third, given the unprecedented level of humanitarian needs and the growing funding gap, the Communication underlines the urgent need to broaden the resource base for humanitarian action. It is simply not sustainable that a very small group of donor countries and the EU provide almost the entirety of official humanitarian funding, year in, year out. Providing the resources needed for humanitarian aid is a responsibility that needs to be shared much more broadly, both globally and inside Europe.

In addition, the Communication sets out how we can enhance the effectiveness and efficiency of the EU's humanitarian assistance, *inter alia* by enhancing quality and programmatic funding in line with the Grand Bargain, by expanding the use of innovative approaches, by supporting local responders and by strengthening anticipatory action.

Fourth, the Communication seeks to enhance the EU's role as an active enabler of principled and effective humanitarian assistance. The Communication thus proposes the establishment of a European Humanitarian Response Capacity to help fill temporary gaps in humanitarian response, building notably on the positive experience with the Humanitarian Air Bridge¹⁹ established to address transport and supply chain disruptions during the COVID-19 pandemic.

This ambitious agenda can only be taken forward by working closely with EU member States, other EU institutions and services, and our humanitarian partners. My services have already started translating the proposals of this Communication into action. In some cases, implementation is already under way, for example when it comes to multi-year programmatic partnerships. Other actions will be launched soon, such as a proposed pilot initiative for blending some of our funding with private sector resources. In other cases, a sustained effort over the long term will be needed – for instance, when it comes to engaging with traditional and emerging donors to expand the resource base or to operationalize the nexus in a more systematic way.

19 European Commission, "European Union Humanitarian Air Bridge", available at: https://ec.europa.eu/echo/what/humanitarian-aid/humanitarian-air-bridge_en.

Before closing this interview, would you like to share with us what have been the most rewarding and/or challenging aspects of your work since you took up your position? Is there anything else you would like to share with our readers?

What I consider most challenging is the human toll of crisis. People's livelihoods, safety, dignity, health and resilience diminished or wiped away. Opportunities taken away from children when they lack access to quality education in humanitarian crises. These realities are heart-breaking, but more than a year and a half into my mandate, I am convinced that we can succeed in alleviating them, in large part due to the dedication, expertise and hard work of each and every one of our partners—currently about 200 in total—and the many local non-governmental organizations that they work with. Engagement with local partners in humanitarian activities, coordination and capacity-building is something I am firmly committed to supporting.

Not least, I am heartened by the important and difficult work carried out by the ICRC, one of our closest partners. And I look forward to continuing to work towards jointly instilling, in all conflict situations, a stronger respect for IHL.



Sanctions, international humanitarian law and the humanitarian space in the Canadian perspective: An interview with Elissa Golberg

Assistant Deputy Minister, Global
Affairs Canada

Elissa Golberg is Assistant Deputy Minister for Strategic Policy at Global Affairs Canada. She is also currently the department's Champion for Innovation and Experimentation, and Head of Performance Management and Results. Ms Golberg has held several senior Canadian government roles, including Assistant Deputy Minister – Partnerships for Development Innovation (2015–17); Ambassador and Permanent Representative to the United Nations (Geneva) and to the Conference on Disarmament (2011–15); Director-General of the Stabilization and Reconstruction Task Force (2009–11); and Representative of Canada in Kandahar, Afghanistan (2008–09).

Ms Golberg's areas of expertise include crisis management coordination, human rights, humanitarian action and sustainable development cooperation, geopolitics, and peace and security policy. She has extensive experience working with multilateral institutions, civil society organizations and the private sector, and in encouraging institutional innovation and effectively managing change.

Ms Golberg is a member of the United Nations (UN) Secretary-General's Advisory Board on Disarmament Matters, and the UN Central Emergency Revolving Fund Advisory Group. She sits on the boards of the Centre for Global Governance and Innovation and the Lewis Perinbaum Award, and the Advisory Board for the 2021 Canada Forum for Impact Investment and Development.

Ms Golberg holds a master's degree in international relations. She is a recipient of the NATO ISAF General Service medal, the Queen's Jubilee Medal, the Public Service Award of Excellence, and three Ministers' Awards for Foreign Policy Excellence. She has been a World Economic Forum Young Global Leader and has published articles on humanitarian, fragile State and public policy-related matters.

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By way of introduction, could you briefly explain your role as the Assistant Deputy Minister of Strategic Policy at Global Affairs Canada? What is the role of the Sanctions Policy and Operations Coordination Division [Sanctions Division], and the various other divisions within Global Affairs Canada working on humanitarian action and sanctions?

The Strategic Policy Branch is responsible for advancing Canada's existing and emerging foreign, economic and international assistance policy and programme priorities through the development, coordination and implementation of high-quality strategic analysis and policy-making. The Branch is also responsible for evaluation, data and results delivery functions. In essence, it is the home for "insight, hindsight and foresight" at Global Affairs Canada. As Assistant Deputy Minister, I oversee the work of Canada's Permanent Mission to the Organization for Economic Cooperation and Development, and four Bureaus in Ottawa: the Strategic Foreign Policy Bureau, the International Assistance Policy Bureau, the International Economic Policy Bureau and the Evaluation and Results Bureau. The sanctions-related responsibilities fall within the International Economic Policy Bureau.

In that context, the Sanctions Division serves as the government of Canada's centre of excellence for the development and coordination of sanctions policy and operations. This involves extensive engagement with other federal government departments and agencies to foster broader coherence and consistency in how Canada's sanctions are developed, implemented and enforced. This includes coordinating with the Department of Justice, Department of Finance, Privy Council Office, Royal Canadian Mounted Police and Canadian Border Services Agency, with the latter two being responsible for investigating and enforcing possible violations of sanctions. Internal to Global Affairs Canada, the Sanctions Division engages regularly with officials responsible for overseeing bilateral, regional and multilateral relations. It works closely with those responsible for Canada's humanitarian assistance and human rights policies and programmes, and with members of the Trade Commissioner Service, who are responsible for engaging with Canadian businesses to promote Canada's economic interests in the global marketplace.

The Sanctions Division also works to enhance compliance by developing and disseminating information and resources to internal and external partners in order to facilitate a better understanding of sanctions measures. It regularly engages with Canadian stakeholders, including financial institutions, civil society, legal practitioners and key commercial sectors. The team also collaborates extensively with other countries and international organizations to discuss and advance key sanctions policy and implementation questions.

Finally, I would note that the Sanctions Division plays a vital role in the government of Canada's ability to stay at the forefront of sanctions policy. The team has a research and analysis function to map and understand existing and emerging sanctions policy themes and questions. Work undertaken in-house by the team is complemented by engagement and supporting research by civil society, academics, think tanks and others. In the same vein, and to further contribute to international peace and security, Global Affairs Canada also manages dedicated annual funding to support projects and programming that aims to enhance the effectiveness of sanctions and assist in better understanding their impact.

Could you outline the different types of sanctions that Canada imposes?

As many of your readers may already know, Canada has three different sanctions laws that are calibrated to deal with current international realities. First, Canada supports broad-based international action through the implementation of UN Security Council decisions to impose sanctions under the United Nations Act. We have an international legal obligation to implement these sanctions as a UN member State.

Beyond this, Canada also has two laws that enable us to impose sanctions autonomously:

- The Special Economic Measures Act [SEMA] authorizes Canada to impose autonomous sanctions that target foreign States directly, along with individuals and entities in those States, or nationals of those States not ordinarily resident in Canada. When it was first enacted in 1992, Canada could impose autonomous sanctions in two situations: when there had been a grave breach of international peace and security that had resulted, or was likely to result, in a serious international crisis; or when an international organization or association of States to which Canada belonged called on its members to impose sanctions. SEMA was updated in 2017 to also enable Canada to respond to situations where gross and systematic human rights violations or acts of significant corruption are carried out in a foreign State.
- The Justice for Victims of Corrupt Foreign Officials Act was enacted in November 2017, and enables Canada to respond to cases of gross violations of human rights and acts of significant corruption anywhere in the world by focusing on individuals who are responsible for or complicit in such acts without first sanctioning a foreign State. Since the Act entered into force, Canada has announced targeted sanctions against seventy foreign nationals from Myanmar, Russia, Saudi Arabia, South Sudan and Venezuela.

It should be noted that the decision to impose sanctions is not one taken lightly, and is done in concert with other diplomatic efforts. It is informed by a range of foreign policy, economic and humanitarian considerations and consultations taken in the context of relevant legal authorities. Canada applies sanctions as part of its wider suite of foreign policy and national security tools, which includes diplomatic engagement and dialogue, capacity-building, and other programmes. The goal is to reinforce the rule of law, support human rights and end impunity, and counter threats to international peace and security.

Which divisions within Global Affairs Canada are involved in the drafting, adoption, implementation and enforcement of Canada's sanctions policy and legislation? Could you briefly describe the decision-making process, both with respect to Canada's autonomous sanctions, as well as in terms of the implementation of decisions of the UN Security Council to impose sanctions into Canadian domestic law? Have there been any major shifts in Canada's approach recently?

When Canada imposes sanctions measures, the implementation of new measures and changes to existing sanctions require the adoption of regulations following a rigorous regulatory development and approval process. To do this, the Sanctions Division works closely internally with departmental officials responsible for a range of policy and legal issues, including notably those responsible for overseeing the relevant geographic regions, our missions abroad, and those teams focused on human rights and humanitarian action. It also coordinates closely with the Department of Justice, the Privy Council Office and the Treasury Board Secretariat, as well as with other government departments, to enable whole-of-government coherence and coordination on issues related to sanctions administration and enforcement.

While the regulatory process used to implement sanctions measures is the same for all three Acts, there are important differences in how we determine what specific measures should apply. First, as a UN member State, Canada has an international legal obligation to implement decisions of the UN Security Council to impose sanctions taken under Chapter VII of the Charter of the United Nations. These decisions are integrated into Canadian law through regulations made under the United Nations Act. Under this Act, Canada does not have the discretion to impose any additional prohibitions or exceptions beyond what is included in the Security Council resolutions, to the extent that our domestic legislative framework allows. Additionally, with the exception of the sanctions imposed by UN Security Council Resolution 1373 (2001), which requires that member States autonomously identify persons associated with terrorism, Canada integrates the names of individuals and entities sanctioned by the Security Council into our regulations by referencing the lists maintained by the relevant Security Council Sanctions Committee.

With regard to Canada's two autonomous sanctions regimes, which are imposed under either SEMA or the Justice for Victims of Corrupt Foreign

Officials Act, the process for implementing and revoking measures is pursued through Canada's cabinet (the body of ministers that sets the federal government's policies and priorities) and via the Governor in Council (to bring the measures into effect). Canada has established a rigorous due diligence process for considering and evaluating possible situations that may warrant the use of sanctions, such as cases of human rights violations or corruption. It also considers the broader political and international contexts when deciding whether sanctions or one of the other tools in Canada's foreign policy toolkit may be an appropriate response.

Once sanctions measures are in place, the Sanctions Division at Global Affairs Canada oversees the broader administration and operations of the regime. First, the team is responsible for developing and managing resources and guidance to assist Canadians in recognizing and understanding their compliance obligations. This includes ongoing communication and engagement with members of the public, whether in response to inquiries received or through our active participation in or organization of outreach events, panel discussions, round tables and conferences. The team has built excellent relationships with a broad network of key stakeholders, whose ongoing feedback and engagement has been extremely valuable to us in fulfilling our mandate.

The team also manages a number of regulatory application processes. This can include applications from persons in Canada or Canadians outside Canada seeking authorization for activities that would otherwise be prohibited by sanctions. It can also involve applications from listed individuals and entities who are seeking to have their name removed from Canada's sanctions lists, or from individuals and entities seeking a certificate stating that they are not a listed person. When such applications are received, the Sanctions Division works diligently to conduct the necessary analysis of the information provided. The goal is to be both thorough and respectful of the need to operate efficiently and effectively in order to meet the needs of those applying. Where these applications relate to United Nations Act regulations, extensive engagement is often also needed with the relevant UN Security Council Sanctions Committee, whose approval may be needed before a decision can be reached.

Finally, from a broader compliance and enforcement perspective, the Sanctions Division works closely with other government departments to ensure that their activities and policies are consistent with Canada's sanctions. This involves providing advice and guidance on the application of sanctions regulations, including in the assessment of any potential risk of contraventions of sanctions measures.

In terms of recent shifts, it should be noted that Canada is continuously assessing its approach in order to be responsive to lessons and changes in global best practice. For instance, in light of the COVID-19 pandemic, Canada has worked hard to make certain that its sanctions measures do not present an unintended barrier that would hinder a humanitarian response to the crisis. Furthermore, and in an effort to respond to the needs of organizations operating in countries targeted by Canada's sanctions regime during the COVID-19

pandemic, the Sanctions Division has also taken steps to enhance and accelerate the review of any application for permits and certificates where applicants have identified a link to the global health crisis.

More broadly, through the use of targeted sanctions measures, Canada strives to minimize adverse consequences for civilian populations and for legitimate humanitarian, business or other activities. Canada has also mitigated the unintended humanitarian consequences of sanctions through legislated exceptions for certain activities, and through the permit and certificate processes, which enable the minister of foreign affairs to authorize activities which would otherwise be prohibited by Canada's sanctions. When imposing new measures, Canada has implemented humanitarian exceptions for activities such as delivery of food, medicine and medical supplies, to limit the negative impact and potentially adverse effects on vulnerable groups such as women and girls.

The United Nations Act enables Canada to “give effect to decisions passed by the United Nations Security Council”.¹ In particular, Section 2 states: “When, in pursuance of Article 41 of the Charter of the United Nations, set out in the schedule, the Security Council of the United Nations decides on a measure to be employed to give effect to any of its decisions and calls on Canada to apply the measure, the Governor in Council may make such orders and regulations as appear to him to be necessary or expedient for enabling the measure to be effectively applied.”² Could you discuss Canada’s general approach to implementing relevant UN Security Council resolutions?

When the UN Security Council determines that an act of aggression or a threat to or breach of the peace has occurred, it may adopt a resolution deciding that certain sanctions measures must be taken by its member States to restore or maintain international peace and security. As a UN member State, Canada has an international legal obligation to implement these decisions into Canadian law, and does so by making regulations under the United Nations Act. These regulations remain in force until such time as they are repealed.

Canada integrates the sanctions measures imposed by the UN Security Council into its domestic regulations following important engagement with the Security Council, the relevant Sanctions Committees and other UN member States so that its actions appropriately reflect the intent of the resolutions, and so that its approach is consistent with that taken by other member States. Canada also regularly assesses its regulations in light of newly adopted Security Council resolutions, and/or reporting or guidance produced by Security Council Sanctions Committees or the associated Panels of Experts.

With respect to the individuals or entities designated by each UN Security Council Sanctions Committee, Canada’s standard approach is to refer to Security

1 Government of Canada, “Canadian Sanctions Legislation”, available at: www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/legislation-lois.aspx?lang=eng (all internet references were accessed in July 2021).

2 United Nations Act, 1985, available at: <https://laws-lois.justice.gc.ca/eng/acts/U-2/page-1.html>.

Council listings by reference to the list that each Committee maintains. This applies to all United Nations Act regulations, with the exception of the measures Canada implemented to comply with UN Security Council Resolution 1373, which requires that member States autonomously identify persons associated with terrorism as noted above. In alignment with this approach, individuals or entities who wish to have their listing reversed must apply directly to either the UN Security Council Focal Point for Delisting or the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee, as required.

SEMA lists circumstances in which Canada may impose sanctions autonomously or in coordination with other like-minded countries. These are in addition to sanctions that the UN Security Council has decided to impose, which Canada implements into Canadian domestic law under the United Nations Act. Could you explain the rationale for adopting sanctions beyond those imposed under the United Nations Act? What is the rationale behind pursuing sanctions under both regimes at once with respect to a single country situation?

Autonomous sanctions are an important complement to Canada's wider suite of foreign policy and national security tools, which includes diplomatic engagement and dialogue, capacity-building, and other programmes. The toolkit reflects a principled and pragmatic approach to foreign policy which emphasizes the importance of the rule of law and respect for human rights, and the maintenance or restoration of international peace and security.

The decision to impose sanctions is not one that Canada takes lightly. They are typically a measure of last resort, a tool to be applied judiciously and only when the relevant legal thresholds have been met. Canada considers the broader political and international contexts when deciding whether sanctions or one of the other tools in its foreign policy toolkit may be an appropriate response.

Autonomous sanctions are generally undertaken in concert with other diplomatic efforts in order to influence a change in behaviour or policy, and to promote accountability and deterrence of potential criminality or impunity. When Canada chooses to impose autonomous sanctions, it does so to send a strong and clear message that it is concerned about gross human rights violations, acts of significant corruption, or behaviour that flouts the rule of law and threatens global peace and security, and will hold those who commit such actions to account. Its autonomous sanctions prevent listed persons from profiting from their activities in Canada, or using the Canadian financial system to do so, and in certain circumstances from entering Canada. Similar to the measures that Canada imposes under the United Nations Act, the autonomous measures apply to the actions of persons in Canada and Canadians outside of Canada.

With respect to imposing sanctions in relation to a country under both SEMA and the United Nations Act, Canada has only done so in four contexts: Iran, Libya, North Korea and South Sudan. In these four situations, Canada either imposed autonomous measures before the UN Security Council made the

decision to implement sanctions, or wanted to build on the Security Council measures. These additional measures sought to increase pressure and send a clear message that Canada would not accept egregious behaviour that threatened international peace and security.

Regarding a recent adoption of sanctions, Canada stated: “These measures are being taken in coordination with the United States and the United Kingdom, and in solidarity with the European Union.”³ Similarly, in response to recent sanctions by the United States and European Union [EU], Canada stated that these sanctions “are part of an important and incisive diplomatic effort to end impunity for those responsible for gross human rights violations”.⁴ How does Canada coordinate with other countries on its sanctions policy? Could you describe how Canada’s approach might differ from that of others?

Canada has always maintained that sanctions are more effective when applied in a coordinated manner. Collaboration with partners can be an important way in which the impact of such measures can be augmented. It also offers a key means of sending a strong collective signal that gross violations of internationally recognized human rights, acts of significant corruption, or other breaches of international norms are of profound concern. To that end, Canada seeks opportunities, where appropriate, to discuss and collaborate with other countries when considering the application of sanctions under its two autonomous sanctions regimes. We also coordinate closely to advocate for enhanced compliance with sanctions measures, including in relation to measures imposed by the UN Security Council.

The legislative framework through which countries impose sanctions can differ significantly from one country to the next, including with respect to some of the thresholds that must be met in order to impose sanctions measures. There are differences in the legislative basis due to different countries’ legal structures, and differences in the processes for imposing sanctions can be stark as well. For example, the United States can impose sanctions by executive order, while the EU requires full member State consensus. For its part, Canada has established a rigorous method of considering and imposing sanctions using the Governor in Council regulatory process.

We have developed excellent relationships with governments who have similar sanctions tools as Canada. More broadly, through bilateral discussions and multilateral exchanges, we are able to pursue pressing policy questions around sanctions and to share best practices and lessons learned on policy issues and our respective sanctions processes.

3 Global Affairs Canada, “Canada Joins International Partners in Imposing New Sanctions in Response to Human Rights Violations in Xinjiang”, 22 March 2021, available at: www.canada.ca/en/global-affairs/news/2021/03/canada-joins-international-partners-in-imposing-new-sanctions-in-response-to-human-rights-violations-in-xinjiang.html.

4 Global Affairs Canada, “Canada Welcomes U.S and EU Sanctions against Russian Officials Responsible for Serious Human Rights Violations”, 2 March 2021, available at: www.canada.ca/en/global-affairs/news/2021/03/canada-welcomes-us-and-eu-sanctions-against-russian-officials-responsible-for-serious-human-rights-violations.html.

The government of Canada has made repeated reference to its use of “targeted sanctions”, and this concept has also featured in previous statements by Canada’s minister of foreign affairs, as well as discussions with his counterparts from like-minded countries.⁵ Could you elaborate on what the government of Canada means by “targeted sanctions”? How are these similar or different from the broader country sanctions regimes? How does Canada assess different country situations and determine what type of sanctions to use in a given context?

The decision to impose autonomous sanctions is not one that Canada takes lightly, and this process includes careful consideration of the circumstances at issue. The goal is to secure a change of behaviour, to constrain actions of significant concern that violate international law, and to stigmatize behaviour such as gross and systematic violations of human rights in order to deter similar actions in future. Canada carries out considerable due diligence in considering and evaluating the broader political and international context when deciding whether imposing sanctions is appropriate.

Canada is mindful of lessons from the past imposition of sanctions by the international community that were too broad-based in their application and caused harm. Canada was a thought leader in the late 1990s and early 2000s, along with Switzerland and a few other countries, in supporting extensive lessons-learned efforts to develop more strategic sanctions regimes that would more specifically target decision-makers or perpetrators of human rights violations, acts of significant corruption or breaches of peace and security, and limit the impact on civilian populations more broadly. Therefore, in designing and implementing sanctions, Canada applies a targeted approach and rigorous analysis to minimize the possibility of adverse consequences for civilian populations, including vulnerable groups, as well as for legitimate business, humanitarian or other activities.

How does Canada protect and preserve the humanitarian space when imposing sanctions (i.e., by minimizing the impact sanctions may have on humanitarian action)? Could you elaborate on the different approaches Canada takes to humanitarian exceptions under the United Nations Act and Canadian autonomous sanctions?

Canada firmly believes in the necessity of upholding humanitarian law and principles, and is a leading humanitarian donor in response to global crises. Its efforts are grounded in a gender-responsive approach to humanitarian action as outlined in the Feminist International Assistance Policy, which addresses the specific needs and priorities of people in vulnerable situations, particularly women and girls, and its related Action Area Policy.⁶

5 Global Affairs Canada, “Minister of Foreign Affairs Speaks with U.K. Foreign Secretary Dominic Raab”, 4 March 2021, available at: www.canada.ca/en/global-affairs/news/2021/03/minister-of-foreign-affairs-speaks-with-uk-foreign-secretary-dominic-raab.html.

6 Government of Canada, “Action Area Policy: Human Dignity (Health and Nutrition, Education, Gender-Responsive Humanitarian Action)”, available at: www.international.gc.ca/world-monde/issues_

In this context, Canada is invested in ensuring that its sanctions measures do not present an undue barrier that would hinder humanitarian access. It seeks to avoid unintended humanitarian consequences of sanctions through a targeted approach and legislated exceptions for certain activities where possible. With respect to sanctions imposed under the United Nations Act, Canada implements the exceptions that are included in the relevant UN Security Council resolutions into Canadian domestic law. As we cannot unilaterally implement exceptions that the Security Council has not included in its resolutions, international institutions and civil society may need to apply for an exemption certificate in order to proceed with humanitarian assistance. In such circumstances, Canada proactively engages with the relevant Security Council Sanctions Committee, which often needs to either be consulted or approve any decision to grant certificates, in order to accelerate the application process. A number of Security Council Sanctions Committees have made dedicated efforts to promote humanitarian access, which Canada has strongly supported.

With respect to Canada's autonomous sanctions, regulations under SEMA include humanitarian exceptions for activities such as the delivery of food, medicine and medical supplies. These exceptions allow for the delivery of aid into sanctioned countries, to ensure that humanitarian assistance can reach vulnerable groups. It is important to note that these exceptions are not the same for all countries sanctioned under SEMA, as Canada may assess that a narrower exception is warranted in light of a particular country situation, including if we consider that the risk of diversion of such aid is high. Where these exceptions do not apply, persons in Canada and Canadians outside Canada may request a permit or certificate from the minister of foreign affairs to authorize specified activities or transactions that would otherwise be prohibited by Canada's sanctions. These permits and certificates are issued on an exceptional, case-by-case basis. Canada maintains a regular dialogue with civil society organizations and international organizations in order to understand any concerns and mitigate any unintended humanitarian consequences of its sanctions measures.

In addition to permits, certificates and exceptions, as part of our commitment to protecting and preserving the humanitarian space, Canada is also investing in research and analysis and programming support. Specifically, Global Affairs Canada pursues research and activities that seek to improve our understanding of the impacts and effectiveness of sanctions regimes, and to contribute to the global evidence base on the potential humanitarian, political and social impacts of imposing sanctions (autonomously or multilaterally). Similarly, we have dedicated resources to supporting projects by civil society organizations, seeking to enhance the effectiveness of sanctions and mitigate any of their potential unintended consequences. For example, Canada sponsored a virtual round table organized by the International Peace Institute [IPI] in February 2021 to facilitate engagement between humanitarian actors and UN

sanctions authorities, as well as other relevant stakeholders including donors, financial institutions and the private sector. The purpose of this round table was to develop a shared understanding of the challenges faced by humanitarian actors delivering assistance in areas where the UN Security Council sanctions regime relating to the so-called Islamic State in Iraq and the Levant and Al-Qaeda applies, and to identify concrete solutions to address these problems. The result of these discussions will be incorporated into an issue brief that the IPI intends to publish and disseminate widely. This year, through our dedicated programming, we are bringing key sanctions policy questions together with Canada's commitment to advancing the global Women, Peace and Security Agenda. To that end, our project support will seek to further examine the impacts of sanctions on women, children and other vulnerable groups, while also considering how sanctions can contribute to addressing gender-based sexual violence.



Interview with H.E. Ambassador Vladimir Tarabrin

Vladimir Tarabrin – Special Representative of the Minister of Foreign Affairs of the Russian Federation for international anti-terrorist cooperation, Director of the Department on the Issues of New Challenges and Threats of the Ministry of Foreign Affairs of the Russian Federation (MFA). He graduated from the USSR Ministry of Foreign Affairs’ Moscow State Institute of International Relations. He has been working in the Ministry of Foreign Affairs of USSR/Russia (MFA) since 1979 and held various diplomatic posts in the central office of the MFA and abroad. 1995–1998 – Head of Division, Deputy Director of the Legal Department. 1998–2002 – Senior Counsellor and Legal Advisor of the Permanent Mission of the Russian Federation to the United Nations in New York / Alternate Representative of the Russian Federation to the United Nations Security Council. 2002–2008 – Deputy Director of the Legal Department. In 2008–2013 he served as the Ambassador Extraordinary and Plenipotentiary of the Russian Federation to the Gabonese Republic. In 2013–2017 he was Ambassador at large (international anti-corruption cooperation). In 2017–2019 – Director of the Department Crisis Situation Centre of the MFA. Has diplomatic rank of Ambassador Extraordinary and Plenipotentiary.

Keywords: terrorism, international humanitarian law, international criminal law, foreign terrorist fighters.

Ключевые слова: терроризм, международное гуманитарное право, международное уголовное право, иностранные террористы-боевики.

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1. On the growing effect/impact of counterterrorism policies on the humanitarian space: Especially over the past two decades, the counterterrorism space has seen an expansive growth in terms of policies and frameworks to curb acts of terrorism and hold terrorists accountable. How are these measures formulated from the Russian perspective, keeping in mind the need to protect the humanitarian space as well as other general human rights standards?

First of all, I would like to emphasize that the expansion of the counterterrorism legal framework in the Russian Federation is a direct response of our country to changing and evolving terrorist threats which have become over the recent years extraordinarily sophisticated and multifaceted: terrorists are complicating their tactics, resorting actively to information communication technologies, and using propaganda with the aim of disseminating radical ideas and recruiting newcomers. In this regard, the Russian law-making activity in the prevention of counterterrorism is reasoned by the aspiration of our government to effectively respond to real terrorism-related threats, and, despite all fears, is not aimed at “overregulating” this sphere, with the Russian Federation as one of the world leaders in counterterrorism having elaborated an extremely detailed and practicable counterterrorism legal framework.

The fundamental principles to which the Russian Federation adheres whilst preventing and countering terrorism include the principle of the maintenance and protection of human rights and fundamental freedoms of a person and a citizen, the principle of legality, and the principle of the protection of rights of victims of terrorism (these principles are envisaged amongst the first in Article 2 of the *Federal Law of the Russian Federation of 6 March 2006 No. 35-FZ “On Countering Terrorism”*). All these regulations entirely correspond to Article 18 of the *Constitution of the Russian Federation* (which is part of Chapter 2 thereof, which is not subject to amendments), which says that rights and freedoms of a person and a citizen shall be directly operative; they determine the essence, meaning, and implementation of laws, the activities of the legislative and executive and local authorities, and shall be ensured by the administration of justice.

However, the enjoyment of human rights, with the exception of certain so-called absolute rights (such as the right to be free from torture), can always be subject to derogations, when they are law-based, proportionate, and necessary in a democratic society (this approach correlates with the provisions of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*). Additionally, sacrificing the interests of national security for human rights not only goes beyond the bounds of common sense, but also it can scarcely be consonant with the very concept of human rights. Therefore, there is a good reason why many international documents on counterterrorism contain a clause that counterterrorism measures and human rights are not mutually exclusive, but mutually reinforcing.¹

¹ For instance, in paragraph 7 of the preambular part of *United Nations Security Council Resolution 2178*, the Council underscores that respect for human rights, fundamental freedoms and the rule of law are

The principled position of the Russian Federation upon which the domestic legislation in counterterrorism is based consists in the assumption that any person who participates in the financing, planning, preparation, or perpetration of terrorist acts or in supporting terrorist acts should unconditionally be brought to justice. In that respect, the principle of the inevitability of punishment for terrorist offences, which is reflected in paragraph 2(e) of the operative part of *United Nations Security Council Resolution 1373* and duly followed by the Russian Federation, is an indispensable prerequisite for quite harsh counterterrorist measures, especially from a criminal justice perspective. Particularly, the statutory criminal law provisions relating to counterterrorism are amongst the most detailed in the world and are in harmony with general principles of *lex certa* and *nullum crimen sine lege*: the majority of the respective *corpora delictorum* are categorized as grave or particularly grave ones;² terrorist offences in Russia are not subject to statutes of limitations; there is no possibility to impose a conditional sentence for individuals convicted for terrorist offences; it is also impermissible to impose on terrorists more lenient punishment than that provided for the given crime; when having endured punishment, all former terrorists who are released from penitentiary institutions are subject to a special administrative surveillance carried out by competent law enforcement agencies. Nevertheless, the necessity of such severe measures is reasoned not only by considerations of general prevention and high level of danger that terrorists pose to the public, but also it stems from the international legal obligations of the Russian Federation making it incumbent for us to qualify terrorist offences as serious ones in accordance with domestic legislation and duly punish them.

2. On the “terrorism–violent extremism” terminology used for classification and adjudication of justice: Considering the challenge posed due to a lack of a universally recognized definition for terrorism as well as the expansion of the preventing and countering violent extremism (PVE/CVE) narrative—how does the Russian Ministry of Foreign Affairs work around these terminologies in their policy making/legislative drafting, so as to ensure that principles of international law are not infringed upon?

To begin with, it is important to clarify what principles are meant. If you ask about *jus cogens* principles, I consider it suitable to make a reference to Article 15, paragraph 4, of the Constitution of the Russian Federation which says that universally recognized norms and principles of international law and

complementary and mutually reinforcing with effective counterterrorism measures, and are an essential part of a successful counterterrorism effort. Moreover, in the preambular paragraph 6 of *United Nations Security Council Resolution 2395*, the Council underscores that effective counterterrorism measures and respect for human rights, fundamental freedoms, and the rule of law are complementary and mutually reinforcing, and are an essential part of a successful counterterrorism effort.

- 2 According to Article 15 of the *Criminal Code of the Russian Federation*, grave crimes are intentional acts for the commission of which the maximum punishment stipulated by the Code exceeds five years' deprivation of liberty, but does not exceed ten years' deprivation of liberty, whereas particularly grave crimes are those punishable by deprivation of liberty for a term exceeding ten years or a more severe punishment.

international treaties of the Russian Federation shall be an integral part of its legal system. As interpreted in the *Decree of the Plenum of the Supreme Court of the Russian Federation of 10 October 2003 No. 5 "On the Application of Norms and Principles of International Law and International Treaties of the Russian Federation by Regular Courts of the Russian Federation"*, a universally recognized norm of international law is the rule accepted by the whole international community as legally binding. Given the fact that the *United Nations Charter* enshrining fundamental *jus cogens* principles is a component of the Russian national legal system, the problem of "non-ensuring" principles of international law does not exist in Russia, since such principles are guaranteed by the Constitution of the Russian Federation.

You are quite right in underlining the non-existence of a universal definition of terrorism. Nevertheless, such a fact does not mean that there are no "meeting points" amongst various members of the international community; otherwise, no international document in this sphere could be agreed upon either in the United Nations, or in any regional organization dealing with counterterrorism.

First, now we have nineteen universal international treaties (conventions, protocols thereto, and one amendment) criminalizing different types of terrorism (from hijacking to attacks against nuclear installations). References to them are included in almost all regional international legal treaties, in particular, for instance, the *2005 Council of Europe Convention on the Prevention of Terrorism* which was ratified by the Russian Federation as its first State party.

Second, we have the *1999 International Convention for the Suppression of the Financing of Terrorism* which actually counts 189 States parties and hereby makes it one of the most well-represented international treaties of contemporary international law. In accordance with Article 2, paragraph 1, subparagraph (b), of the Convention, it is prohibited to carry out acts intended to cause death or serious bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such acts, by their nature and context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Third, in conformity with Chapter I, paragraph 3, of the *1994 Declaration on Measures to Eliminate International Terrorism* (approved without a vote by United Nations General Assembly Resolution 49/60), any 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, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them, are condemned.

To sum up, a notion that terrorism always implies the commission of illegal and ideologically motivated violent acts for the purpose of spreading terror or coercing an authority to do any act or to abstain from doing it has already emerged within the international community. Everything seems rather clear. However, it is so only at first glance, for then there are nuances. For example, the Russian Federation, alongside the majority of the United Nations Member States,

does not recognize the doctrine of state terrorism, utilized by certain countries for labelling their political adversaries and justifying interventions in matters which are essentially within the domestic jurisdiction of sovereign States, contrary to the *United Nations Charter*. In this case, the Russian Federation adheres to a generally recognized approach that terrorist offences can be perpetrated by private persons only.

As to violent extremism, questions regarding this Anglo-Saxon concept have been raised by us from the beginning.

Why is extremism *violent*? It follows that there can also be non-violent extremism, cannot there? In context of violent extremism, the question is: if the term implies extremism involving violence, why is it necessary to contemplate such extremism in a counterterrorism context only? If it seems to be the case, what is the difference between violent extremism and terrorism? In the Russian Federation, non-violent extremism is also criminalized (for instance, public propaganda of extremist ideas).

What is *extremism*? Once Voltaire claimed: “If you wish to converse with me, define your terms.” When it comes to drafting international documents, there is a well-established common practice to cite internationally agreed terms which (in this case) do not exist. Against the backdrop of the incapacity of the international community to agree on the definition of terrorism, it seems unclear why—putting it in great medieval scholastic philosopher William Ockham’s terms—we should multiply entities without necessity and introduce in the international discourse a new vaguer concept.

Is it possible to imagine such *forms of violent extremism that are outside a counterterrorism context*? In the case of a positive answer, it should be noted that such “terrorism-unrelated” extremism is a rather different issue which has nothing to do with a counterterrorism agenda, due to its different purpose and subject matter, and, consequently, remains outside of the boundaries of the existing counterterrorism legal framework. Our reply is negative, since the Russian Federation insists all references to violent extremism in international counterterrorism documents to be used in conjunction with the phrase “conducive to terrorism”,³ for otherwise it will run counter to the purpose of the respective international documents and undermine their subject matter.

3. Treatment of foreign fighters; their repatriation, return and domestic adjudication: A brief note on the foreign fighter phenomenon and its effect in Russia. How are they being treated in terms of domestic prosecution, repatriation, etc.?

From the outset, let me challenge the terminology used in your question. The term “foreign fighter” is neither incorporated in any of the existing international treaties

3 A reference can be made to paragraphs 6, 9, 17, 24 and 31 of the preambular part of *United Nations Security Council Resolution 2396* and to paragraphs 7 and 9 of the preambular part and paragraph 17 of the operative part of *United Nations Security Council Resolution 2482*.

in the field of international humanitarian law (IHL) or international criminal law, nor it is used in the United Nations Security Council resolutions or United Nations General Assembly resolutions on counterterrorism. There are no compelling reasons for the usage of that term in a counterterrorism context. In this regard, we believe that “foreign terrorist fighter” is a more suitable term, which has an international legal dimension: in particular, in accordance with paragraph 8 of the preamble of *United Nations Security Council Resolution 2178*, foreign terrorist fighters are individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict. In furtherance of *United Nations Security Council Resolution 2178*, the Council of Europe elaborated the *2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* addressing the phenomenon of foreign terrorist fighters. In accordance with the *Additional Protocol*, a series of *corpora delictorum* are criminalized, namely receiving training for terrorism, travelling abroad for the purpose of terrorism, as well as funding, organizing or otherwise facilitating travelling abroad for the purpose of terrorism. All relevant provisions of the *Additional Protocol* are duly implemented in the domestic criminal legislation of the Russian Federation. Specifically, in light of the interpretative declaration made by the Russian Federation when signing and ratifying the *Additional Protocol*, travelling abroad for the purpose of terrorism is considered as a preparation for or an attempt to commit a terrorist crime and in this regard entails criminal responsibility (such legal construction is provided for in Article 30 of the *Criminal Code of the Russian Federation*).

If an offence perpetrated by a foreign terrorist fighter is completed, the delinquent is subject to criminal responsibility in conformity with the specific articles of the *Criminal Code of the Russian Federation*: the Russian Federation has produced a substantial jurisprudence of holding foreign terrorist fighters accountable in accordance with Article 205.4 “Organization of a Terrorist Community or Participation therein”, Article 205.5 “Organization of a Terrorist Organization or Participation therein” and Article 208 “Organization of an Illegal Military Formation or Participation therein”. The jurisdictional grounds allowing for the prosecution of foreign terrorist fighters who committed relevant offences abroad are laid down in Article 12 of the Criminal Code of the Russian Federation.

As to the repatriation of foreign terrorist fighters, despite the urgency of this issue, there are various opinions thereupon. Under international law, any person has the right to return to the country of his/her nationality. Anyway, the Russian Federation has gathered a unique experience in repatriating children of foreign terrorist fighters: relevant activities are carried out under the auspices of the Office of the Presidential Commissioner for the Rights of the Child. The Russian Federation is willing to share it with other countries.

4. What are the different types of sanctions or restrictive measures that are implemented by Russia?

Alongside criminal law measures described above, the Russian Federation applies a variety of administrative measures: asset freezing, restrictions placed on the freedom of movement over the course of the administrative surveillance, terrorist designations, and restrictions imposed on financial transactions.

Since it is a very big topic, I will give you just two examples.

In 2016, the President of the Russian Federation signed a bill prescribing that the perpetration by a naturalized person of a terrorist offence serves as grounds for the revocation of a previously taken decision to grant such a person the nationality of the Russian Federation. In particular, according to Article 22 of the *Federal Law of 31 May 2002 No. 62-FZ “On Nationality of the Russian Federation”*, the fact established by a court decision that a person committed, prepared, or attempted to commit at least one of the offences criminalized,⁴ if its commission involved terrorist activity, shall be treated as being equivalent to the establishment of a fact of a willingly false commitment made before the naturalization to observe the *Constitution of the Russian Federation* and the legislation of the Russian Federation. Thereby, on the one hand, this measure is not a deprivation of nationality, since it implies the revocation of a previously taken decision to grant nationality and does not entail statelessness; on the other one, this mechanism possesses a sufficient preventive potential and underscores the willingness of the Russian Federation to take harsh and severe measures to combat terrorism for the sake of national security.

Moreover, within the context of sanctions regimes relating to terrorists, the Russian Federation has been duly and timely implementing sanctions against individuals and entities associated with Islamic State in Iraq and the Levant (ISIL) or Al-Qaida listed by *United Nations Security Council Committee 1267/1989/2253*, since the obligation to observe the relevant sanctions regime stems from Article 25 of the *United Nations Charter*. In particular, the Federal Financial Monitoring Service of the Russian Federation is administering the List of Entities and Individuals Engaged in Extremism or Terrorism, which is subject to amendments, *inter alia*, in accordance with relevant decisions of the United Nations Security Council.

5. Implementation of IHL in counterterrorism policies and sanctions regimes: How are human rights standards and IHL principles incorporated in the counterterrorism policies and sanctions regimes used in the region?

First and foremost, there are no regional sanctions regimes with the participation of the Russian Federation. However, there is more than one way to skin a cat. In this respect, I would like to underline that at the regional level there are more effective

4 See Articles 205, 205.1, 205.2 (paragraph 2), 205.3–205.5, 206, 208, 211 (paragraph 4), 281, 282.1–282.3 or 361 of the Criminal Code of the Russian Federation.

mechanisms of countering terrorism which fully conform to the universally accepted human rights standards.

For instance, as provided for in the 2002 *Charter of the Shanghai Cooperation Organization*, the protection of human rights is considered as one of the fundamental purposes and principles of this influential regional organization. It is under the auspices of the Shanghai Cooperation Organization (SCO) that the 2009 *Yekaterinburg Convention against Terrorism* was elaborated. The *Yekaterinburg Convention* is one of the well-designed, most inclusive and extensively developed international legal instruments laying a solid basis for the intergovernmental cooperation amongst SCO Member States in the field of counterterrorism. Not only does the *Yekaterinburg Convention* accurately and legally irreprehensibly envisage what “terrorism”⁵ and “act of terrorism”⁶ mean, but also it scrupulously defines principles and mechanisms of criminalization of different types of terrorist offences⁷ (including terrorist propaganda or public justification of terrorism;⁸ recruitment to terrorism;⁹ other forms of the facilitation of terrorist activity), stipulates exceptionally concrete measures of holding legal entities accountable for terrorism,¹⁰ provides for clear mechanisms of mutual legal assistance (MLA) and extradition,¹¹ as well as information exchange amongst the competent authorities of States parties.¹²

The *Yekaterinburg Convention* duly reflects universal human rights standards. The extradition mechanism provided for in Article 11 corresponds to all generally recognized criteria, including those of specialty, dual criminality, and *aut dedere aut judicare*. The treaty also introduces the strictest possible confidentiality requirements whilst applying MLA procedures, which is especially relevant when it comes to sensitive information relating to the fundamental rights of a person. In a similar vein, the disposition of the norm included in Article 17, paragraph 2, of the *Yekaterinburg Convention* leaves room for refusing an MLA request if it is contrary to laws of a requested party; therefore, States parties to the *Yekaterinburg Convention* can refuse an MLA request if its execution comes into collision with domestic human rights laws. Moreover, in accordance with Article 11, paragraph 8, of the *Yekaterinburg Convention* the procedure of the transfer of sentenced persons can be applicable only if the consent of a convicted person is obtained, which is totally compliant with a universal practice. Above all, Article 7, paragraph 1, of the *Yekaterinburg Convention* stresses the necessity to maintain, as and when appropriate, an inter-religious and inter-cultural dialogue which can involve various stakeholders, including non-governmental organizations and other civil society actors. A particular emphasis should be laid

5 Article 2, paragraph 1, subparagraph 2, of the *Yekaterinburg Convention*.

6 Article 2, paragraph 1, subparagraph 3, of the *Yekaterinburg Convention*.

7 Article 5 of the *Yekaterinburg Convention*.

8 Article 9, paragraph 1, subparagraph 4, of the *Yekaterinburg Convention*.

9 Article 9, paragraph 1, subparagraphs 5 and 6, of the *Yekaterinburg Convention*.

10 Article 10 of the *Yekaterinburg Convention*.

11 Article 11 of the *Yekaterinburg Convention*.

12 Article 12 of the *Yekaterinburg Convention*.

upon Article 23 which prohibits States parties to grant refugee status to individuals engaged in terrorism and therefore contributes to elevating the significance of international refugee law as well as to preventing terrorists from abusing fundamental guarantees that refugee status endows to refugees.

Special attention should be given to the Commonwealth of Independent States (CIS) with its absolutely unique counterterrorism regime. The *1999 Treaty on Cooperation amongst CIS Participating States against Terrorism* lies at the heart of this regime. Under the umbrella of the Treaty, a series of special agreements were developed.¹³ All the above-mentioned agreements were drafted in strict accordance with the key human rights standards and bearing in mind the provisions of Article 2 of the *1991 Agreement on the Establishment of the Commonwealth of Independent States* providing for the obligation to observe human rights on the territory of CIS participating States. Another big achievement of CIS is the elaboration of a model law for the prevention of terrorism adopted by the CIS Inter-Parliamentary Assembly in 2009. This model law also categorizes the principle of the protection of human rights as a cornerstone of counterterrorism activities in CIS.

Regarding IHL, the Russian Federation believes that the subject matter and purpose of IHL is different from those of international legal counterterrorism instruments.

First, the subject matter of IHL is the relations of parties to an armed conflict and in connection with an armed conflict, with the purpose of IHL consisting in minimizing the horrific consequences of war for persons (primarily, those who do not take part in hostilities or ceased their participation therein). On the contrary, the subject matter of international counterterrorism treaties is the cooperation amongst States and other subjects of international law for the elimination of terrorism by means of different mechanisms, including those of criminalization of relevant offences, establishment of criminal jurisdiction, exercise of MLA and extradition, with the purpose consisting in the eradication of terrorism as a phenomenon.

Second, a vast majority of norms and principles of IHL are inherent in general international law and, consequently, directly enforceable, whereas international counterterrorism conventions need to be implemented into national legislation. Therefore, serious violations of IHL constitute international crimes (or core crimes) which are subject to universal jurisdiction, with responsibility for offences criminalized by international counterterrorism conventions arising insofar as a State party thereto prescribed it in its domestic legislation.

To sum up, we do not see any convincing legal grounds to include IHL provisions in the regional counterterrorism treaty law. I can assure you that it is a world common practice.

13 E.g. the 2008 Agreement on Cooperation amongst CIS Participating States for the Protection of Persons subject to Protective Measures, the 2012 Agreement on Cooperation in Training of Specialists in the field of the Prevention of Terrorism in Educational Institutions of CIS Participating States, and the 2012 Agreement on the Exchange of Information in CIS for the Prevention of Terrorism and Other Violent Forms of Extremism and Their Financing.

6. Need for humanitarian exemptions in the counterterrorism/sanctions space: What does the Russian Ministry of Foreign Affairs think about the need for humanitarian exemptions being incorporated in domestic counterterrorism legislations to ensure that the work done by humanitarian actors is not affected by the measures that are incorporated? As these clauses vary between States, is there an ideal framework/model that the Russian Ministry of Foreign Affairs believes should be used as good practice?

The Russian Federation is quite cautious about such exemptions. We believe that the protection of humanitarian workers and medical personnel is one of the key elements of IHL enforcement. According to Article 9 of the 1949 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, there are no obstacles to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief. Furthermore, actors that impartially and upon a non-discrimination basis participate in relief actions at the approval of the party in whose territory they carry out such activities are also under the protection of IHL, namely Article 71 of the 1977 *Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Conflicts*, and Article 18 of the 1977 *Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*. Therefore, any attack against such actors constitutes a violation of IHL, whilst those responsible for it should be brought to justice.

Nevertheless, we find unacceptable any abuses of guarantees envisaged in IHL in this field. Furthermore, we consider absolutely inappropriate when medical and humanitarian actors support terrorism or in any way contribute to their criminal activities, for it undermines international counterterrorism efforts, including in the sphere of the suppression of the financing of terrorism. Such a strict approach that the Russian Federation adheres to is fully compliant with operative paragraph 24 of *United Nations Security Council Resolution 2462* urging States, when designing and applying measures to counter the financing of terrorism, to take into account only those activities that are: (1) exclusively humanitarian, (2) carried out impartially, and (3) carried out in a manner consistent with IHL. This approach was confirmed in the recent United Nations General Assembly Resolution 75/291 on the seventh review of the Global Counter-Terrorism Strategy.

7. Decision making/drafting process in the formulation and implementation of sanctions regimes: Which divisions within the Russian Ministry of Foreign Affairs are involved in the drafting, adoption, implementation and enforcement of Russia's sanctions policy and legislation? Could you briefly describe the decision-making process? Have there been any major shifts in Russia's approach recently?

The Ministry of Foreign Affairs of the Russian Federation is fully involved in the drafting, adoption, implementation and enforcement of the sanctions policy of the Russian Federation as far as the United Nations Security Council sanctions regimes are concerned. The respective activities are exercised by the Department of International Organizations of the Ministry of Foreign Affairs of the Russian Federation and the Department on the Issues of New Challenges and Threats of the Ministry of Foreign Affairs of the Russian Federation in close coordination with competent governmental agencies of the Russian Federation. Under paragraph 2, subparagraph (b), of the *Decree of the President of the Russian Federation of 8 November 2011 No. 1478 "On the Coordinating Role of the Ministry of Foreign Affairs of the Russian Federation in Conducting a Unified Foreign Policy of the Russian Federation"*, the Ministry of Foreign Affairs is authorized to coordinate international activities of various Russian federal public agencies and their officials with the aim of ensuring the principle of unity of foreign policy and observing the international legal obligations of the Russian Federation.

The Russian Federation sticks to a well-balanced and depoliticized approach in finding solutions to relevant problems.

International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues

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Abstract

In recent years, the international community has worked to confront the large and growing threat of terrorism, including by introducing new counterterrorism (CT) measures and tightening existing ones. These measures take many forms, including international, regional and domestic sanctions against individuals, groups and other entities. Such efforts pursue the legitimate aims of security and international peace – things that terrorism undermines and goes against – but they have, at the same time, implicated a degree of overlap and confusion between international humanitarian law (IHL), on the one hand, and the law and policy framework underwriting CT measures and sanctions regimes, on the other, particularly as both apply to and affect principled humanitarian action. This article addresses this area of overlap and confusion. First, it examines the applicability of IHL to CT measures and operations. Next, it addresses the co-application of IHL, CT regulations and sanctions regimes, from the mindset of preserving IHL without

* This article does not necessarily reflect the views of the ICRC.

impeding CT measures and their objectives. The article then examines the legal questions that arise when sanctions regimes and CT measures affect IHL-mandated and IHL-protected activities undertaken by impartial humanitarian organizations. Finally, the article analyzes recent developments and makes proposals aimed at preserving an effective humanitarian space in contexts where IHL, CT legal frameworks and sanctions apply simultaneously.

Keywords: counterterrorism, sanctions, international humanitarian law, IHL applicability, classification of armed conflict, co-application, IHL exclusion clause, impartial humanitarian organization, humanitarian exemption.

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Introduction

Recent years have seen the multiplication of armed conflicts involving non-State armed groups designated as terrorist by States and international organizations. The latter have reacted to this situation by tightening existing counterterrorism (CT) measures and introducing new ones, as well as by conducting an increasing number of CT operations, including extraterritorially. States and international organizations have also increasingly resorted to sanctions—taken at the international, regional and domestic levels—as responsive measures aimed at changing the behaviour of individuals and entities, at times extending to State authorities who are perceived as potentially endangering the sanctioning authority’s political and/or security interests.

When faced with terrorism, there is no doubt that it is legitimate and necessary for States and international organizations to take responsive action in order to ensure their security and, in the case of States, the security of those subject to their jurisdiction, as well as to restore and maintain international peace and security. Terrorism negates the basic principle of humanity, and goes against the underlying principles and core objectives of international humanitarian law (IHL).

Efforts to combat terrorism may take various forms. CT measures have been passed, and CT operations have been conducted by States’ armed forces—alone, through coalitions, or under the umbrella of an international organization—using military means and methods of warfare against non-State armed groups in the Middle East, South and Southeast Asia, the Sahel, the Lake Chad Basin and Eastern Africa, for instance. Combating terrorism may indeed take the form of armed conflict. Some groups are sufficiently well armed and resourced, and show sufficient levels of organization, to carry out sustained and concerted armed operations, thus triggering an escalation of violence that might be difficult for relevant authorities to curb. These developments and the constant adaptation of CT measures to the evolving threat posed by international terrorism have led to an increased focus on the interaction between CT regulations and IHL, both being concomitantly applicable in such contexts, thus raising a host of legal issues.

The CT discourse in both domestic and international fora has not facilitated answers to the questions that this interaction raises. On the contrary, it has significantly contributed to the blurring of lines between armed conflict and terrorism, with potentially adverse effects on IHL and on principled humanitarian action.

In this regard, it is important to clarify the interactions between armed conflict and terrorism, and between IHL and the CT/sanctions legal framework, and to address the misconceptions surrounding the relationship between armed conflict and terrorism. There is a need to clear up the recurrent misunderstanding that IHL is not applicable to the fight against terrorism, or that it does not allow an efficient response to threats emanating from individuals or armed groups designated as terrorist. It is also necessary to address the adverse effects of CT measures and sanctions regimes on the work of impartial humanitarian organizations such as the International Committee of the Red Cross (ICRC), with a view to preserving an essential humanitarian space in situations of armed conflict.

This article aims to address some of the legal challenges relating to the interactions between IHL, principled humanitarian action, the CT legal framework and sanctions regimes. It first considers the recurrent but fundamental question of the applicability of IHL to CT operations. It then deals with the pressing question of the co-application of IHL and CT regulations, with a view to preserving the integrity and purpose of IHL while not impeding CT objectives. The article goes on to examine the legal questions arising from the impact of CT measures and sanctions regimes on the IHL-mandated activities undertaken by impartial humanitarian organizations. Finally, it analyzes recent developments at the international, regional and domestic levels and – in light of relevant IHL rules – makes proposals aimed at preserving an effective humanitarian space in contexts where IHL, CT legal frameworks and sanctions apply simultaneously.

The applicability of IHL to the fight against terrorism¹

Identifying whether entities designated as terrorist can become a party to an armed conflict is not a new issue – it has manifested itself in different ways over the years – and nor is it merely a theoretical exercise. It has very real practical and legal consequences.

States have taken varying approaches to classifying situations of terrorist violence. In contexts where governments are threatened by the rise of organized armed opposition, one can observe a tendency by some State authorities to consider that any act of violence carried out by non-State armed groups is purely “terrorist” in nature and is therefore necessarily unlawful, even if such acts are

1 This part only addresses selected recent legal issues in relation to the fight against terrorism. This section also focuses on situations of non-international armed conflict (NIAC) as they constitute the prevalent context involving non-State armed groups designated as terrorist.

not prohibited under IHL when applicable.² In parallel, the concern of States that the recognition of the existence of an armed conflict will legitimize “terrorists” remains as present today as it has always been. This concern lives on notwithstanding IHL norms (notably Article 3 common to the four Geneva Conventions of 1949) which expressly recognize that their applicability does not confer any legitimacy on armed groups and does not modify those groups’ legal status under international law.³

One result of this state of affairs is a denial by some States that non-State organized armed groups designated as “terrorist” can be a party to an armed conflict according to IHL,⁴ or that an armed confrontation with such groups may even amount to an armed conflict. That discourse puts the applicability of IHL to the fight against terrorism into question.

This position is not shared by all stakeholders, however. Many recognize that IHL can be applicable to and relevant for their CT activities when the conditions for its applicability are met, and acknowledge that groups designated as terrorist can be parties to an armed conflict.⁵

In fact, denying the status of belligerent to non-State armed groups simply because they are designated as “terrorist” under CT regulations, or because they are included in international, regional or domestic sanctions lists, is not commensurate with IHL. Indeed, IHL is agnostic in relation to labels and designations given to parties to an armed conflict. It does not recognize any specific legal categories or special regime governing individuals or groups designated as terrorist or included in sanctions lists.⁶ IHL applies independently of whether the acts which trigger its application are lawful, unlawful or even characterized as “terrorist”.⁷ IHL applies to individuals and groups appearing in CT or sanctions lists in the same way that

2 See, for instance, UK Supreme Court (UKSC), *Regina v. Mohammed Gul*, 2013 UKSC 64, 25 October 2013, paras 48–49 (affirming England and Wales Court of Appeal, *Regina v. Mohammed Gul*, 2012). For more details see, Kimberley N. Trapp, “The Interaction of the International Terrorism Suppression regime and IHL in Domestic Criminal Prosecutions: The UK Experience”, in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, TMC Asser Press, The Hague, 2014.

3 See, for instance, US Department of Defense (DoD), *Law of War Manual*, 2015, para. 3.3.1.1.

4 See Rogier Bartels, “When Do Terrorist Organizations Qualify as ‘Parties to an Armed Conflict’ under IHL?”, *Military Law and Law of War Review*, Vol. 56, No. 2, 2018. See also recent court cases in Belgium deciding that non-State armed groups such as ISIS and Jabhat Al-Nusra do not qualify as parties to an armed conflict for the purposes of IHL: for instance, Court of Appeal of Antwerp, *The Prosecutor v. FB et al. (Sharia4Belgium)*, Judgment No. C/101/2016, 27 January 2016, pp. 53–54. For an analysis on these cases, see Vaïos Koutroulis, “How Have the Belgian Courts Dealt with the Interplay between IHL and Counter-Terrorism Offences?”, in Stéphane Kolanowski (ed.), *Proceedings of the Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law*, No. 47, College of Europe and ICRC, 2017.

5 See for instance, Claire Landais, “Legal Challenges in Fighting Armed Groups Extraterritorially”, in S. Kolanowski (ed.), above note 4. See also Israel High Court of Justice, *Public Committee against Torture v. Israel*, HCJ 769/02, 14 December 2006, para. 21; UK Ministry of Defence (MoD), *The Joint Service Manual of the Law of Armed Conflict*, UK JSP 383, 2004, para. 1.33.4.

6 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 33rd International Conference of the Red Cross and Red Crescent, Geneva, 2019 (2019 Challenges Report), pp. 61–62.

7 Marco Sassòli, “Legal Qualification of the Fight against Terrorism”, in S. Kolanowski (ed.), above note 4, p. 55.

it applies to more classic belligerents. It is therefore submitted that the mere fact that armed violence is labelled as “terrorist” – in political discourse or by legal norms outside IHL – does not mean it should not be classified as an armed conflict. This type of violence may well cross the threshold of armed conflict and trigger the application of IHL rules.

Classifying terrorism-related situations as armed conflicts under IHL

The determination of whether an act of armed violence will trigger the application of IHL must be made objectively and exclusively on the basis of the facts on the ground, according to the classic criteria of an armed conflict derived from IHL norms, regardless of any designation given to those involved in the violence. This view is reflected in decisions of international judicial bodies,⁸ appears in military manuals,⁹ and is widely supported in the academic literature.¹⁰ As a result, with respect to the involvement in armed violence of non-State armed groups designated as terrorist and the numerous CT measures taken against them at the domestic and international levels, a case-by-case approach to analyzing and classifying situations of violence according to the law must be applied. It is the author’s view that the fight against terrorism can lead to situations classified as international armed conflicts (IACs), non-international armed conflicts (NIACs) or situations of armed conflict with a double classification. Situations involving individuals or groups designated as terrorist falling below the threshold of an armed conflict are not governed by IHL.¹¹

Generally speaking, armed conflicts involving non-State armed groups designated as terrorist are most often non-international in nature.¹² The two legal

8 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 174; International Criminal Tribunal for Rwanda, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (Trial Chamber I), 6 December 1999, para. 92; International Criminal Court (ICC), *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment (Trial Chamber), 14 March 2012, paras 533 ff.; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Art. 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor (Pre-Trial Chamber), 15 June 2009, paras 220 ff.

9 Australian Defence Force, *Law of Armed Conflict*, Executive Series, ADDP 06.4, 11 May 2006, para. 3.5; MoD, above note 5, para. 3.3.1.

10 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart, Oxford, 2008, pp. 75–76; Geoffrey S. Corn *et al.*, *The Law of Armed Conflict: An Operational Approach*, Wolters Kluwer Law & Business, New York, 2012, pp. 72, 80; International Law Association, Committee on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law*, 74th Conference of the International Law Association, The Hague, 2010, pp. 4, 28–33.

11 2019 Challenges Report, above note 6, pp. 58–59; DoD, above note 3, para. 17.1.1.6.

12 However, the possibility that the fight against terrorism will trigger a situation of IAC cannot be discarded. Indeed, theoretically, a non-State armed group designated as terrorist could operate under the overall control of a State, making it a subsidiary organ of that State and therefore turning an initial NIAC into an IAC. See Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (1952 Commentary on GC I), common Art. 2, paras 265–273; for the application of this approach to the fight against terrorism, see M. Sassòli, above note 7, p. 49. One could also envisage a situation in which a non-State armed group designated as terrorist becomes *itself* a party to an IAC—for instance, if the group in question becomes the effective government of a State or if it is effectively fighting against colonial domination, alien occupation or racist regimes in the

conditions for such armed conflicts must of course be met: the existence of (at least) two parties—including non-State armed groups—with a sufficient degree of organization involved in an armed confrontation of a sufficient intensity.¹³ When these criteria are met, terrorism-related violence would amount to a NIAC.¹⁴

Interestingly, terrorism is present in international tribunals' decisions addressing conflict classification. First, the International Criminal Tribunal for the former Yugoslavia (ICTY) used the criteria of intensity and organization in order to distinguish an armed conflict "from banditry, unorganized and short-lived insurrections, or *terrorist activities*".¹⁵ This statement should not be interpreted as meaning that terrorist activities cannot trigger an armed conflict or cannot have a nexus therewith; it only underscores that unorganized, sporadic or isolated terrorist actions by themselves cannot reach the threshold of NIAC under IHL. The ICTY—in the *Boškoski* case—has made it clear that terrorist acts can be included in the assessment of the intensity requirement:

[W]hile isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict.¹⁶

It can be inferred that what matters for conflict classification is less the terrorist nature of the actions concerned, but rather whether they are part of coordinated military operations involving means and methods of warfare.¹⁷ As aptly put by Ben Saul, "[t]errorist activity may ... possess a dual legal character as both crime

exercise of its right of self-determination provided in Article 1(4) of Additional Protocol I (AP I). See R. Bartels, above note 4. An IAC can also be triggered by the military operations conducted by a State or a coalition of States against a non-State armed group designated as terrorist in the territory of another State without the latter's consent. In such case, it is the ICRC's view that an IAC erupts between the intervening State(s) and the territorial State alongside the NIAC existing between the former and the non-State armed group. See 1952 Commentary on GC I, above, common Art. 2, paras 261–263; Vaïos Koutroulis, "The Fight against Islamic State and Jus in Bello", *Leiden Journal of International Law*, Vol. 29, No. 3, 2016, pp. 836–841.

13 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Judgment (Trial Chamber II), 7 May 1997, para. 562;

ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, 3 April 2008, paras 49, 60. See also 1952 Commentary on GC I, above note 12, common Art. 3, paras 421–437, for a detailed analysis of the legal conditions for determining the existence of a NIAC. See also Ben Saul, "Terrorism and IHL", in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2020, pp. 210–211.

14 It is important to underline that for the purposes of determining whether a non-State armed group designated as terrorist is sufficiently organized for the purposes of IHL, the group is not required to meet the same level of organization as that of a State's armed forces. International tribunals have stated that a rather limited command structure would suffice, provided the non-State party to the NIAC is able to carry out coordinated military operations against the enemy using military means and methods of warfare (ICTY, *The Prosecutor v. Haradinaj et al.*, Judgment (Trial Chamber), 2008, para. 89). The various factors identified in the tribunals' jurisprudence in order to assess the organization criterion are only indicative and need not all be met.

15 See ICTY, *Tadić*, above note 13 (emphasis added).

16 ICTY, *Boškoski*, above note 8, paras 187, 190.

17 *Ibid.*, para. 187.

and conflict; the categories (as well as the legal approaches to combating them) are not mutually exclusive”.¹⁸

The fact that tribunals consider that terrorist acts committed by non-State armed groups should be taken into account for the purposes of determining the existence of a NIAC supports the notion that groups designated as terrorist can become party to an armed conflict. It would be illogical to take such acts into account when determining the existence of a conflict and then deny belligerent status to such groups on the basis of the same acts. Whether such groups are legally or politically branded as terrorists has, from an IHL standpoint, no bearing on the determination of the existence of an armed conflict or a group’s involvement therein as belligerents.¹⁹ In addition, the purpose and the motivation of the parties to the armed conflict, State and non-State party alike, are not part of the conflict classification equation under IHL.²⁰

Coalitions in terrorism-related contexts: The aggregation and support-based approaches

Often, armed conflicts involving groups designated as terrorist or appearing in sanctions lists are fought by coalitions, with a number of States and armed groups joining forces on both sides. Determining the applicable legal framework in such situations is complex, as it is often difficult to understand the structure and organizational levels of various actors involved in the armed confrontation, or the relationships between them. This is particularly true with regard to the phenomenon of coalitions of non-State armed groups (including those designated as terrorist) that has been observed in the Middle East and Africa. In such situations, it may appear difficult to identify the groups that could be considered as parties to the armed conflict. In some situations, the activities of distinct armed groups might not reach a sufficient level of intensity to meet the threshold of a NIAC when looked at separately and individually. However, the circumstances prevailing in some contexts may require taking a broader view, as the military actions of these groups often appear to be closely connected with the operations undertaken by other belligerents, necessitating a collective approach in determining the applicability of IHL.

When armed groups satisfying the organization criterion coalesce and conduct coordinated military operations against the same adversary (or adversaries),

18 B. Saul, above note 13.

19 See *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”*; Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, para. 62, stating that the fact that Israel considered Hezbollah to be a terrorist organization and its fighters terrorists did not influence the classification of the armed conflict between Israel and Hezbollah.

20 1952 Commentary on GC I, above note 12, common Art. 3, paras 447–450. See also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 31st International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 2011 (2011 Challenges Report), p. 11; ICTY, *The Prosecutor v. Limaj*, Judgment (Trial Chamber), 2005, para. 170; Germany, Federal Prosecutor General at the Federal Court of Justice, *Fuel Tankers Case*, Decision to Terminate Proceedings, 2010, p. 33.

it is submitted that it would be legally sound to aggregate the intensity of identified organized non-State armed groups for classification purposes.²¹ This must be done carefully, however.²²

Likewise, in coalition warfare against non-State armed groups, new parties to a pre-existing NIAC may be determined using a “support-based approach”, provided certain conditions are met.²³ The rationale of the support-based approach is to link to IHL the armed forces’ actions that objectively form an integral part of a pre-existing NIAC. The approach revolves around one very simple principle: the closer States’ or non-State armed groups’ armed forces are to the military operations occurring in a pre-existing NIAC through their military support to one of the belligerents, the closer they are to crossing the threshold of IHL applicability to their own actions and to becoming a party to the pre-existing NIAC as a logical consequence of this situation.

In such situations, it is submitted that it is not necessary to assess whether the military support provided fulfils *per se* the criteria for determining the existence of a NIAC, in particular the criterion of intensity, because these conditions have already been met when determining the existence of the pre-existing NIAC onto which the military support is grafted. In these circumstances, the support provided should be interpreted not as a constitutive element of a potential new NIAC but, on the contrary, as being directly related to the pre-existing NIAC. Thus, the support-based approach focuses only on the nature of the activities performed in support of one of the belligerents,²⁴ evidencing a functional approach towards IHL’s applicability to coalition warfare in NIAC.

21 2019 Challenges Report, above note 6, pp. 51–52: “When several organized armed groups display a form of coordination and cooperation, it might be more realistic to examine the intensity criterion collectively by considering the sum of the military actions carried out by all of them fighting together.”

22 *Ibid.*; Jelena Nikolic, Thomas de Saint Maurice and Tristan Ferraro, “Aggregated Intensity: Classifying Coalitions of Non-State Armed Groups”, *Humanitarian Law and Policy Blog*, 7 October 2020, available at: <https://blogs.icrc.org/law-and-policy/2020/10/07/aggregated-intensity-classifying-coalitions-non-state-armed-groups/> (all internet references were accessed in December 2021). On an approach of classification based on aggregation, see also Jann K. Kleffner, “The Legal Fog of an Illusion: Three Reflections on ‘Organization’ and ‘Intensity’ as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict”, *International Law Studies*, Vol. 95, 2019, pp. 172–177; Chiara Redaelli, “A Common Enemy: Aggregating Intensity in Non-International Armed Conflicts”, *Humanitarian Law and Policy Blog*, 22 April 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/04/22/common-enemy/>.

23 For more details on the support-based approach, see ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32nd International Conference of the Red Cross Red Crescent, Geneva, 2015 (2015 Challenges Report), pp. 21–23; Tristan Ferraro, “The Applicability and Application of IHL to Multinational Forces”, *International Review of the Red Cross*, Vol. 95, No. 891–892, 2013, pp. 583–587; Tristan Ferraro, “Military Support to Belligerents: Can the Provider Become a Party to the Armed Conflict?”, in Stéphane Kolanowski (ed.), *Proceedings of Bruges Colloquium: Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts*, No. 49, College of Europe and ICRC, 2019. For views challenging the ICRC support-based approach, see Marten Zwanenburg, “Double Trouble: The ‘Cumulative Approach’ and the ‘Support-Based Approach’ in the Relationship between Non-State Armed Groups”, *Yearbook of International Humanitarian Law*, Vol. 22, 2019; Terry D. Gill, “Some Thoughts on the ICRC Support Based Approach”, *Questions of International Law*, 31 May 2019, available at: www.qil-qdi.org/some-thoughts-on-the-icrc-support-based-approach/.

24 M. Sassoli, above note 7, p. 54.

Once the conditions for the applicability of IHL are met, nothing in IHL precludes non-State armed groups designated as terrorist from becoming parties to a NIAC – and consequently having rights and obligations under that body of law. On the other hand, not every actor designated as a terrorist organization is necessarily an organized armed group in the sense of IHL,²⁵ as such groups may lack the required level of organization, may be involved in armed violence not meeting the intensity requirement, or may simply be acting without any nexus to an armed conflict.

Finally, to be clear, the expressions “terrorist group”, “armed group” and “non-State party to the armed conflict” are not mutually exclusive. The fact that a group is a party to an armed conflict does not affect the qualification (as “terrorist” or otherwise) of that group under other applicable international law rules such as CT regulations or sanctions regimes. This understanding is in line with common Article 3²⁶ and also with Article 3 of Additional Protocol II (AP II), which makes clear that the applicability of AP II does not impede governments from “defend[ing] the national unity and territorial integrity of the State” or limit States’ right to maintain or re-establish law and order by all lawful means.

Addressing the challenges arising from the co-applicability of IHL and CT regulations in situations of armed conflict

Although IHL and the CT legal framework are two separate legal regimes, as illustrated by their specific objectives, rationales and structures,²⁷ the applicability of IHL to the fight against terrorism and the increased push for making the CT legal framework applicable to situations of armed conflict have inevitably raised questions relating to their interaction. Addressing these questions is not an easy task, and it is rendered even more complex by the multiplication of CT regulations since 2001 and the continued blurring of the lines in the public domain between acts of violence committed in armed conflict and acts of terrorism.

Understanding how IHL addresses terrorism

IHL does not provide a definition of terrorism, and no internationally agreed-upon definition of terrorism exists today. However, in situations of armed conflict, IHL prohibits most acts that are criminalized as “terrorist” acts in domestic legislation and in international conventions specifically addressing terrorism. For instance,

25 *Ibid.*, p. 48.

26 DoD, above note 3, para. 3.3.1.1.

27 For details on the differences between IHL and the CT legal framework, see 2011 Challenges Report, above note 20, pp. 48–49; Jelena Pejic, “Armed Conflict and Terrorism: There Is a (Big) Difference”, in Ana María Salinas de Frías, Katja L. H. Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2012, pp. 172–174.

in armed conflict, IHL prohibits direct attacks against civilians based on the principle of distinction, which is a cornerstone of this body of law. It also prohibits indiscriminate attacks and hostage-taking, to name but two more examples. These prohibitions apply in both IAC and NIAC and are binding upon all belligerents as a matter of treaty-based or customary international law.

Even if IHL does not define terrorism, it is not silent on the issue.²⁸ It expressly prohibits “measures of terrorism”²⁹ and “acts of terrorism”³⁰ against persons not or no longer taking part in hostilities, regardless of who – among the parties to the armed conflict – commits such acts. The main objective of these provisions is to prohibit parties to an armed conflict from terrorizing civilians under their control.

IHL rules governing the conduct of hostilities also expressly cover certain forms of terrorist acts. Both Additional Protocols to the 1949 Geneva Conventions prohibit acts aimed at spreading terror among the civilian population.³¹ The prohibitions reflected in these provisions are binding not only as treaty law but also as customary law.³²

IHL thus provides a strong legal framework with explicit prohibitions that also apply to non-State armed groups designated as terrorist. Violations may trigger individual criminal responsibility both at the domestic and international levels. Indeed, IHL prohibits – as war crimes – specific acts of terrorism perpetrated in armed conflict, as well as a range of other acts that would commonly be deemed “terrorist” if committed outside armed conflict.³³ Under IHL, war crimes are subject to prosecution by the territorial State or by the State of nationality of the perpetrator and may be subject to universal jurisdiction.

In addition, it is important to recall that in NIACs, States always retain leeway at the domestic level to criminalize any actions undertaken by individuals in the absence of combatant privilege and immunity in such situations. This remains true for NIACs that are part of the fight against terrorism and in regard to individuals designated as terrorist. Concerns that the applicability of IHL can

28 Marco Sassòli, “Terrorism and War”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, pp. 967–971.

29 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 33.

30 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 4.

31 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 51(2); AP II, Art. 13(2).

32 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 2, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

33 For more specific details on the war crime of intending to spread terror amongst a civilian population, see Ben Saul, “Terrorism, Counter-Terrorism and IHL”, in Dapo Akande and Ben Saul (eds.) *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, pp. 405–409.

result in impunity for the perpetrators of acts of terrorism in armed conflict are therefore unfounded.

To be clear, there is an essential legal difference between IAC and NIAC concerning combatant status. In NIAC, there is no combatant status (in the technical/legal meaning of the term) or related prisoner of war status in case of capture by the enemy. In the absence of combatant privilege and related immunity under IHL rules governing NIAC, members of non-State armed groups involved in the conflict have no right under domestic law to engage in hostilities against the armed forces of an enemy government (the rationale of combatant status), nor can they be entitled to immunity from prosecution for attacks against military objectives (the core of combatant privilege).³⁴ As a result, States have long been entitled to criminally prosecute members of non-State armed forces for offences against national security, whether labelled terrorism or otherwise. States' domestic criminal laws often prohibit and penalize violence perpetrated by persons or groups not affiliated with the State authorities, including all acts of violence that would be committed in the course of a NIAC.³⁵ Therefore, in NIAC, the fact that IHL applies does not impede States from prosecuting, trying, sentencing or extraditing persons suspected of criminal offences, including CT offences, according to applicable law.³⁶

It thus appears that the co-applicability of IHL and CT regulations in situations of armed conflict may lead to situations in which the same act can constitute a violation both of IHL and of CT regulations (for instance, a direct attack on civilians or a civilian object). Or it may lead to situations where the action of a non-State party to a NIAC is not prohibited under IHL (for instance, an attack against a legitimate military objective) while being considered a terrorist offence. While it may be reassuring that it remains possible to prosecute such an action under CT legislation, this state of affairs is problematic because it can nullify incentives for armed groups to comply with IHL.³⁷ As respecting IHL can significantly reduce the impact of armed conflict on civilians, actions that diminish incentives to comply are cause for concern, as will be explained further below.

34 At the Diplomatic Conference of 1974–77, a proposal to introduce prisoner of war status into the law of NIACs was similarly rejected (*Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, Vol. 5, Federal Political Department, Berne, 1978, p. 91). See also Sandesh Sivakumaran, “Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 477; DoD, above note 3, para. 17.4.1.1; MoD, above note 5, para. 15.6.5.

35 In addition to IHL violations/crimes, domestic common criminal law can also apply to certain terrorist acts in NIAC. More particularly in NIAC, the penal laws of the State party to the conflict continue to apply and members of the non-State party could be still prosecuted under various counts such as rebellion, treason, treachery, sedition or other national security-related offences according to the applicable domestic laws.

36 B. Saul, above note 33, p. 410.

37 See AP II, Art. 6(5); ICRC Customary Law Study, above note 32, Rule 159.

Understanding how the CT legal framework addresses armed conflicts

The interaction between IHL and CT regulations is made more complicated by the fact that States have adopted a range of CT measures internationally,³⁸ regionally³⁹ and domestically to prevent and punish acts of terrorism. These measures can take various forms, often consisting in the criminalization of certain acts, notably in situations of NIAC.

Alongside the international and regional CT instruments, the current CT legal framework has also been heavily influenced by the work of the United Nations (UN) Security Council. Since the 2001 adoption of Resolution 1373 onwards, the Security Council has increasingly acted as a legislator in the CT field, with multiple binding resolutions requiring States to criminalize terrorist acts and support to terrorism, and has developed a separate CT sanctions regime for persons and entities associated with Al-Qaeda, the Islamic State of Iraq and the Levant (ISIL) and affiliated groups.⁴⁰ Security Council Resolution 2178 of 2014 expressly applies with respect to conduct in the context of armed conflict, again confirming the co-applicability of IHL and CT obligations in such situations.⁴¹

The scope of the CT offences that States are obliged to implement at the domestic level has become particularly wide and has recently been broadened even further by Security Council Resolution 2462.⁴² This widening of CT offences increases the risk of normative clashes with IHL.⁴³

The heavy burden placed by the UN Security Council on member States with regard to the criminalization of terrorism-related acts has been further amplified by

38 There are nineteen so-called “sectoral” CT conventions which have been adopted since 1963. These oblige States Parties to criminalize specific acts of transnational violence committed by persons and groups (including those designated as terrorist), to establish jurisdiction over the offences, to investigate, and to arrest and prosecute or extradite perpetrators. For a detailed analysis of these conventions in light of IHL, see Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2008.

39 Regional measures include the Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism of 1997, the Organisation of the Islamic Conference Convention on Combating International Terrorism of 1999, the Shanghai Cooperation Organization Convention on Combating Terrorism, Separatism and Extremism, the Council of Europe Convention on the Prevention of Terrorism of 2005, and the EU Directive on Combating Terrorism of 2017. For an analysis of the CT instruments adopted in Asia, see Ben Saul, “Counter-Terrorism Law and Armed Conflict in Asia”, in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2020.

40 This Security Council practice of imposing binding CT obligations on States, rather than leaving them to negotiate treaties amongst themselves, has been significantly criticized by some. See Fionnuala Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/73/45453, 3 September 2018, paras 8–18; Stefan Talmon, “The Security Council as World Legislature”, *American Journal of International Law*, Vol. 99, No. 1, 2005; Luis Miguel Hinojosa Martínez, “The Legislative Role of the Security Council in Its Fight against Terrorism: Legal, Political and Practical Limits”, *International and Comparative Law Quarterly*, Vol. 57, No. 2, 2008; Matthew Happold, “Security Council Resolution 1373 and the Constitution of the United Nations”, *Leiden Journal of International Law*, Vol. 16, No. 3, 2003.

41 UNSC Res. 2178, 24 September 2014, para. 6.

42 UNSC Res. 2462, 28 March 2019.

43 For an analysis of how to address these conflicts of norms, see above.

the fact that its resolutions do not explicitly define “terrorist acts”,⁴⁴ nor do they provide detailed guidance on how the offences established should relate to IHL.

Despite this lack of clear guidance,⁴⁵ since 2003 the Security Council has repeatedly underlined that States must respect their IHL obligations when countering terrorism.⁴⁶ Resolution 2462 constitutes an important step forward. Operative paragraph 6 of that resolution

[d]emands that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law.

While it is still unclear how member States will implement these requirements, it is submitted that the adoption by the Security Council of a resolution with binding legal effects, expressly requiring consistency and compliance with IHL when designing and implementing all CT measures, indicates that the Council had never intended the CT legal framework to override IHL rules on the basis of Article 103 of the UN Charter.⁴⁷ Rather, Resolution 2462 implies that CT regulations must give way to IHL in the event of friction with the latter.⁴⁸ This

44 UNSC Res. 1566, 8 October 2004, provides a “working definition” of terrorist acts which can guide member States, although they are not required to follow it. That definition confines terrorist offences to criminal acts, including acts against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, which are already offences under CT conventions and are committed to provoke a state of terror in the public, a group of persons or particular persons in order to intimidate a population or to compel a government or international organization.

45 See also Fionnuala Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/75/337, 3 September 2020, para. 24, available at: <https://undocs.org/pdf/symbol=en/A/75/337>: “most references to the [IHL] legal regime are generic and lack the specificity required to ensure their observance”.

46 While this request was initially included in preambular paragraphs of resolutions (see, for instance, UNSC Res. 1535, 26 March 2004, preambular para. 4; UNSC Res. 1566, 8 October 2004, preambular para. 6; UNSC Res. 1624, 14 September 2005, preambular para. 2), the Security Council went one step further by incorporating it into operative paragraphs of CT-related resolutions (UNSC Res. 2170 15 August 2014, op. para. 8; UNSC Res. 2178, 24 September 2014, op. paras 2, 3, 5, 11; UNSC Res. 2396, 21 December 2017, op. paras 3, 4, 7, 8).

47 For a contrary view, see David McKeever, “IHL and Counter-Terrorism: Fundamental Values, Conflicting Obligations”, *International and Comparative Law Quarterly*, Vol. 99, No. 1, 2020, pp. 71–73. In any case, the invocation of Article 103 of the UN Charter would not necessarily solve the question of potential clashes between IHL and CT legal frameworks, taking into account the unsettled scope of application of the provision—notably as to whether it includes customary law. See Johann Ruben Leïe and Andreas Paulus, “Article 103”, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary*, Vol. 2, 3rd ed., Oxford University Press, Oxford, 2012, paras 66 ff. Article 103 cannot be invoked in relation to IHL rules of a *jus cogens* nature: see Alexander Orakhelashvili, “The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions”, *European Journal of International Law*, Vol. 16, No. 1, 2005.

48 In his article for this issue of the *Review*, Ben Saul argues that “[t]he better view is that States must implement [CT law] obligations in conformity with IHL, which the Council increasingly appears to recognize as the *lex specialis*—and not vice versa”.

would mean that CT regulations must be adopted, implemented and interpreted in light of IHL.

Despite this significant and positive evolution, the request of the UN Security Council to ensure that *all* CT measures at domestic level comply with IHL is unfortunately far from being fully implemented. While States have generally duly enacted CT offences into national laws, very few have taken into account IHL and armed conflict as required by specific Security Council resolutions and certain instruments to which they have adhered.⁴⁹ Domestic CT laws most often criminalize terrorism without making any exception or qualification to accommodate armed conflict and IHL. Consequently, CT laws can criminalize acts that are not prohibited under IHL, such as attacks by a non-State party to a NIAC on legitimate military objectives.

While, as noted above, States are free to criminalize behaviour that is lawful under IHL in the context of NIACs, doing so using a CT framework reduces incentives to comply with IHL, potentially putting the civilian population at greater risk. In addition, these laws serve as a basis for transnational cooperation with other States to suppress terrorism, giving the criminalization of lawful acts of war an extraterritorial dimension that is even more detrimental to the preservation of the integrity of IHL.

Courts dealing with acts of terrorism in armed conflict have generally approached such acts from a CT legal perspective, ignoring IHL⁵⁰ on various counts.⁵¹ This may be due to the absence of exclusion clauses in relevant Security Council resolutions, or to the fact that international law does not prohibit the

49 See, for instance, Canada, Criminal Code, RSC 1985, c C-46, 1985, Section 83.01 (“Terrorist activity ... does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict”); New Zealand, Terrorism Suppression Act, 2002, Section 5.4 (“[A]n act does not fall within subsection (2) [defining a terrorist act] if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict”); Belgium, Code Pénal, Art. 141*bis* (“Le présent titre [relative aux infractions terroristes] ne s’applique pas aux activités des forces armées en période de conflit armé, tel que définis et régis par le droit international humanitaire, ni aux activités menées par les forces armées d’un État dans l’exercice de leurs fonctions officielles, pourvu qu’elles soient régies par d’autres règles de droit international”); Chad, Loi 03/PR/2020 portant repression des actes de terrorisme en République du Tchad, 2020, Art. 1(3) (“Aucune disposition de la présente loi ne peut être interprétée comme dérogeant au droit international humanitaire et au droit international des droits de l’homme”); Switzerland, Code Pénal, Art. 260^{quinquies} sur le financement du terrorisme (“L’al. 1 ne s’applique pas si le financement est destiné à soutenir des actes qui ne sont pas en contradiction avec les règles du droit international applicable en cas de conflit armé”); EU, Directive (EU) 2017/541 on Combating Terrorism, 2017, Recital 37 (“This Directive does not govern the activities of armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of those terms under that law, and, inasmuch as they are governed by other rules of international law, activities of the military forces of a State in the exercise of their official duties”).

50 The choice to apply CT offences may be explained by the misapprehension according to which IHL would lead to the impunity of the offenders, by the imperative of judicial effectiveness (CT offences, notably ancillary offences, being considered as easier to prove from a criminal law standpoint) or by policy choices aimed at activating the stigmatization and delegitimization attached to the terrorist label.

51 For more details on these counts, see the article by Ben Saul in this issue of the *Review*.

criminalization of organized armed violence in NIACs, whether via CT legislation or regular domestic criminal law.⁵² Some have accepted as CT offences actions that are in conformity with IHL but are carried out by members of non-State parties to a NIAC.⁵³

On the other hand, tribunals in Colombia and Italy, for instance, have handed down decisions rejecting the qualification as CT offences under applicable domestic law of actions carried out by a non-State party to a NIAC when they complied with IHL,⁵⁴ or even when they were simply governed by IHL, regardless of whether the actions were lawful under it.⁵⁵

The varying approaches at the national level, oscillating between a tendency to favour the application of CT laws without taking into account some of the underlying IHL principles (notably the fact that under IHL, belligerents are expected to attack each other's armed forces and military objectives) and the sole application of IHL considered as the *lex specialis*, illustrate the need to ensure an appropriate articulation of the relationship between IHL and CT regulations in domestic law, taking into account their co-applicability in situations of armed conflict, notably in NIAC.

Dealing with the interplay between CT regulations and IHL

The interplay between CT regulations and IHL has been first and foremost articulated in the various sectoral CT conventions adopted at the international level.⁵⁶

The multiplication of IHL exclusion clauses in CT instruments

At the international level, IHL has generally been dealt with by way of clauses carving out from an instrument's scope of application⁵⁷ certain actions in armed

52 EU Court of Justice, *LTTE v. Council of the EU*, Case Nos T-208/11, T-508/11, Judgment of the General Court (6th Chamber, Extended Composition), 16 October 2014, para. 56.

53 See UKSC, *Gul*, above note 2, paras 52 ff. For a detailed analysis of the decision, see K. N. Trapp, above note 2.

54 Council of State, Bogotá, *G.O. Plazas c. Ministerio de Defensa Nacional-Ejército Nacional*, 29 April 2015. In this decision the court ruled that in light of the existence of a NIAC in Colombia, the lower courts erred in qualifying as terrorist the conduct of non-State party to the conflict directed at military objectives. It also held that under IHL non-State armed groups can act lawfully, notably when they harm the State's military assets; that attaching a terrorist label to those involved in the armed conflict makes it more complicated to demand compliance with IHL; and that the sporadic commission of specific acts of terrorism as defined under IHL by FARC members does not change the nature of the whole group from belligerent to terrorist group.

55 Court of Naples, *Repubblica Italiana contro TJ e altri*, 23 June 2011.

56 For a detailed analysis of the various forms taken by the relationships between IHL and CT international instruments, see the article by Ben Saul in this issue of the *Review*; B. Saul, above note 33, pp. 410–416; J. Pejic, above note 27, pp. 186–193.

57 Emanuela-Chiara Gillard, *IHL and the Humanitarian Impact of Counter-Terrorism Measures and Sanctions: Unintended Ill Effects of Well-Intended Measures*, Research Report, Chatham House, September 2021, p. 9.

conflict and/or indicating that the provisions of those treaties shall in no way be interpreted as derogating from IHL.⁵⁸

More specifically, so-called “IHL exclusion clauses” have been almost systematically included in international and regional instruments since the 1979 UN Hostages Convention.⁵⁹ The content of these clauses differs between instruments,⁶⁰ but the formulation which appeared with the 1997 UN Terrorist Bombings Convention has since been replicated in other instruments.

Such clauses articulate the relationship between CT and IHL by establishing limits on what qualifies as a CT offence for the purposes of the instrument by exempting from its scope of application certain actions, actors or targets in armed conflict contexts. These IHL exclusion clauses facilitate the co-application of IHL and CT instruments and aim to avoid, as far as possible, the interference of CT regulations with IHL’s delicate balance between humanitarian imperatives and military necessity.

Despite their presence in most CT instruments, IHL exclusion clauses have unfortunately rarely expressly been incorporated into domestic legislation by the States party to these conventions. This oversight is cause for concern: it is important that these clauses be properly incorporated. IHL exclusion clauses are an essential element of CT treaties as they determine the latter’s respective scope of application; as such, they cannot be ignored or circumvented by States Parties.⁶¹

Another difficulty lies in the fact that when exclusion clauses have been incorporated into domestic law and used by legal authorities, they have been

58 See, for instance, UN International Convention for the Suppression of Terrorist Bombings, 1997, Art. 19 (1): “Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law”; OAU Convention of on the Suppression and Combating of Terrorism, 1999, Art. 22(1): “Nothing in this Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law”; Directive (EU) 2017/541 on Combating Terrorism, 2017, Recital 37: “This Directive should not have the effect of altering the rights, obligations and responsibilities of the Member States under international law, including under international humanitarian law”.

59 See the article by Ben Saul in this issue of the *Review*.

60 The existing sectoral CT treaties have generally taken a cautious approach to regulating acts in armed conflict covered by IHL. One treaty, the 1979 UN Hostages Convention, does not apply at all to the war crime of hostage-taking under IHL. Other treaties exclude attacks on certain military targets (such as military aircraft or ships, or combatants), thus only applying to attacks on civilians or civilian objects during armed conflict (thereby regulating such acts alongside existing IHL prohibitions and war crimes). Some treaties exclude acts committed by armed forces, deferring to IHL as the *lex specialis*. For a detailed analysis of the various IHL exclusion clauses, see the articles by Ben Saul and by Thomas Von Poecke, Frank Verbruggen and Ward Yperman in this issue of the *Review*. For an Asian perspective on these clauses, see B. Saul, above note 39.

61 For a contrary view arguing that the incorporation of IHL exclusion clauses into domestic law is only optional, see the article by Thomas Von Poecke, Frank Verbruggen and Ward Yperman, in this issue of the *Review*. However, this approach appears directly at odds with Article 26 of the 1969 Vienna Convention on the Law of Treaties, on the basis of which it can be argued that IHL exclusion clauses must be applied so as to ensure the preservation of the integrity of IHL, which is the “raison d’être” of these provisions. States are therefore only required to criminalize, and transnationally cooperate, in relation to the enumerated conduct that is not covered by the exclusionary provisions. National offences that go further would be at odds with the IHL exclusion clauses binding the State authorities and, in any case, would not enjoy the benefits of transnational cooperation (including extradition and mutual assistance) under the treaties.

interpreted in various and even contradictory ways, creating legal uncertainty concerning their contours and implications. An emblematic example is the IHL exclusion clause contained in the Terrorist Bombings Convention. Article 19.2 of this convention reads:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

Judicial decisions – albeit limited – dealing with this exclusion clause reflect issues regarding the clause’s ambiguity, notably in relation to the personal, geographical and material scope of application of IHL. Decisions rendered by UK,⁶² Dutch⁶³ and Belgian⁶⁴ courts in recent years illustrate the difficulties encountered when interpreting and applying the IHL exclusion clause. They also show an inclination to reverse the clause’s rationale, with a view to securing the prevalence of CT laws over IHL when it comes to certain conduct in armed conflict.⁶⁵ Further, they demonstrate that an overly broad IHL exclusion clause – or one perceived to be too broad by those applying the law – may result in attempts to restrict its operation.⁶⁶ This can occur through erroneous interpretation of IHL principles and concepts, such as the notion of NIAC, the geographical boundaries of IHL’s applicability, or the definition of armed forces.

The key elements of the IHL exclusion clause

In order to curb the tendency to circumvent the object and purpose of the IHL exclusion clause, it is essential to clarify some key elements.

62 UKSC, *Gul*, above note 2.

63 District Court of The Hague, *Prosecutor v. Maher H*, 1 December 2014; District Court of The Hague, *Prosecutor v. Imane B et al.*, 10 December 2015; Court of Appeal of The Hague, *Prosecutor v. Maher H*, 7 July 2016.

64 Court of First Instance of Antwerp, *The Public Prosecutor v. FB et al. (Sharia4Belgium)*, File Nos FD35.98.47-12, AN35.F1.1809-12, 11 February 2015; French-Speaking Court of First Instance of Brussels, *The Public Prosecutor v. ZK and Others*, FD35.97.15-12, FD35.97.5-13, FD35.98.144-15, 29 July 2015; Court of Appeal of Brussels, *The Public Prosecutor v. ZK and Others*, Case No. 2016/1262, 9 FC 2015, Correctional Affairs (12th Chamber), 14 April 2016.

65 For a detailed analysis of this domestic jurisprudence, see the article by Thomas Von Poecke, Frank Verbruggen and Ward Yperman, in this issue of the *Review*; K. N. Trapp, above note 2; Hanne Cuyckens and Christophe Paulussen, “The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship between CT and IHL”, *Journal of Conflict and Security Law*, Vol. 24, No. 3, 2019; Marten Zwanenburg, “Foreign Terrorist Fighters in Syria: Challenges of the ‘Sending’ State”, *International Law Studies*, Vol. 92, No. 1, 2016; V. Koutroulis, above note 4.

66 This even led some to envisage an abrogation of the exclusion clause in order to ensure the full applicability of CT legislation and to avoid situations in which persons accused of terrorist acts could invoke the clause in order to preclude their conviction for CT offences. See Tom Ruys and Sebastiaan Van Severen, “Art. 141bis Sw. – Vervolging tussen hamer en aambeeld van terreurbestrijding en internationaal humanitair recht”, *Rechtskundig Weekblad*, Vol. 82, No. 14, 2018, pp. 539 ff.; District Court of The Hague, *Prosecutor v. Imane B et al. (Context Case)*, Judgment, 10 December 2015, para. 7.42.

To start with, it is submitted that the wording of the IHL exclusion clause, in itself, requires that its content be exclusively determined by IHL. The expression “as those terms are understood under international humanitarian law” used in the clause clearly defers to IHL to establish the meaning of the concepts it addresses, and therefore to define its exact scope of application in armed conflicts. This also aligns with the practice of the UN Security Council requiring States to act consistently with IHL while taking CT measures. This requirement means that CT measures need to be adopted, implemented and interpreted by courts, tribunals and other judicial authorities in a manner which ensures that they comply with IHL’s rules, principles and concepts. In other words, when State authorities apply the IHL exclusion clause, or a judicial authority has to pronounce on whether armed conflict constitutes the background of the case at hand and/or whether the person suspected of having committed the act in question is a member of armed forces, they must carry out their analysis based exclusively on IHL.⁶⁷

This means that the notion of “armed conflict” in the clause must be assessed on the basis of the IHL conditions for armed conflict, as derived from common Articles 2 and 3 (for international and non-international armed conflict respectively) and customary law.

Similarly, the expression “armed forces” contained in the clause must be interpreted exclusively within its IHL meaning. This precludes an interpretation taking into account elements foreign to IHL, as has been the case in Dutch jurisprudence. In the *Context* case of 2015, the Hague district court adopted a narrow reading of the notion of armed forces, confining it to State armed forces only, based on an interpretation exclusively made for the purposes of the CT convention at hand. The position held by the Dutch court is not new and reflects long-standing debates on the meaning of the phrase “armed forces” used in certain CT conventions. The issue is not yet settled, as the current discussions surrounding the Draft UN Comprehensive Convention on International Terrorism show.⁶⁸ However, it is submitted that the Hague district court erred when interpreting the IHL exclusion clause, first by indicating that the clause only excludes the activities of State armed forces and then by justifying this narrow reading by an interpretation carried out *for the purposes* of the CT law. By doing so, the court held a position incompatible with the fact that under IHL the notion of “armed forces” is not limited to States’ armed forces and that certain acts committed by non-State parties to a NIAC are not prohibited under IHL, and so should not be deemed “terrorist”, if both the logic and rules governing such conflicts are to be preserved.

Indeed, if the notion of “armed forces” is to be interpreted exclusively in light of IHL, as required by the clause, the activities of a non-State party to a NIAC should be excluded from the scope of the CT convention. While the

67 See, for instance, Court of Naples, *TJ*, above note 55, pp. 33–34, using a renvoi to IHL in order to interpret CT instrument provisions.

68 See the article by Ben Saul in this issue of the *Review*; J. Pejic, above note 27, pp. 190–193.

notion of “armed forces” is not defined in the Geneva Conventions, it is submitted that the term must include members both of governmental forces and the forces of non-State organized armed groups. In the context of common Article 3, the term “armed forces” refers to the armed forces of both the State and non-State parties to the conflict. This is implied by the wording of common Article 3, which provides that “each Party to the conflict” must afford protection to “persons taking no active part in the hostilities, including members of armed forces”. Furthermore, common Article 3 does not refer to “the” armed forces, which could suggest State armed forces alone, but rather to “armed forces”. Under IHL, the existence of a NIAC requires the involvement of fighting forces on behalf of the non-State Party to the conflict that are capable of engaging in sustained armed violence, which requires a certain level of organization. Such organized armed groups constitute the “armed forces” of a non-State party to the conflict in the sense of common Article 3.⁶⁹ Otherwise, the latter would either not be protected at all, or they would be privileged in that they – unlike governmental armed forces – would be protected at any moment except when they are directly participating in hostilities.

This interpretation of the notion of armed forces strictly based on IHL is also supported by a close examination of the *travaux préparatoires* of the Terrorist Bombings Convention, which clearly highlight the will of the drafters to exclude the acts of non-State armed groups that are parties to an armed conflict from the scope of the instrument.⁷⁰ This is reflected in the dichotomy incorporated – as a compromise proposed by the United States and Belgium – by the drafters between “activities of armed forces during an armed conflict” and “military forces of a State in the exercise of their official duties” in Article 19.2. Had the drafters wanted to exclude non-State armed forces from the scope of the clause and therefore authorize the criminalization *as CT offences* of their acts in armed conflict, they would have used the expression found in the second part of Article 19.2, “military forces of a State in the exercise of their official duties”, which clearly refers only to States’ armed forces. Instead, the drafters opted for a broader formula, reflecting their wish that the IHL exclusion clause also cover the activities of the armed forces of the non-State party to the armed conflict.⁷¹ This has later been clearly recognized by the UK Supreme Court in the *Regina v. Mohammed Gul* case, stating that “it is also fair to say that [the Terrorist Bombings Convention and the 1999 UN Terrorist Financing Convention] ... appear

69 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), common Art. 3, paras 529–534.

70 United States: A/C.6/52/WG.1/CRP.49, reproduced in UN General Assembly, *Measures to Eliminate International Terrorism: Report of the Working Group*, UN Doc. A/C.6/52/L.3, 10 October 1997, p. 58; Germany: A/C.6/52/WG.1/CRP.51, reproduced in *ibid.*, p. 58; Korea: A/C.6/52/WG.1/CRP.54, reproduced in *ibid.*, p. 59; Costa Rica: A/C.6/52/WG.1/CRP.55, reproduced in *ibid.*, p. 59; New Zealand: A/C.6/52/WG.1/CRP.56, reproduced in *ibid.*, p. 60.

71 Samuel M. Witten, “The International Convention for the Suppression of Terrorist Bombings”, *American Journal of International Law*, Vol. 92, No. 4, 1998; Marco Sassòli, “Terrorism and War”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 977.

to have been drafted so as to exclude insurgent attacks on military forces in non-international armed conflicts from their respective ambits”.⁷²

Framing an IHL exclusion clause

The repeated controversies surrounding the interpretation of the IHL exclusion clause as it is presently formulated serve as an invitation to clarify its content and application.

In this regard, it can be argued that an IHL exclusion clause fully excluding all activities carried out in armed conflicts may be unnecessary, may be counterproductive from a judicial standpoint, and may lead to interpretation by judges aimed at limiting or annihilating the effects of the clause with a view to ensuring the applicability of CT laws to certain behaviours in armed conflicts. Indeed, even if IHL addresses the terrorist phenomenon in armed conflict, IHL rules governing terrorism may not be sufficient to comprehensively suppress terrorist-related armed violence in armed conflict. The sole applicability of IHL to terrorist-related conduct in armed conflict may leave gaps in this regard, while the CT legal framework may effectively fill them with criminalization of conduct not covered by war crimes—for instance, for preparatory offences (financing, recruitment, training, membership or travelling). The CT legal framework may also add further specialized offences (such as civilian aircraft hijacking) or cover acts committed during an armed conflict but with no nexus to it.⁷³

A clause completely excluding situations of armed conflict from the scope of CT instruments would eventually run counter to the trend observed for years in CT instruments, CT-related Security Council resolutions and CT domestic laws, which highlight States’ inclination to ensure the co-applicability of IHL and the CT legal framework in situations of armed conflict.

Therefore, it can be contended that the debate on an IHL exclusion clause focuses not so much on whether *armed conflict situations* should be excluded from the scope of application of CT instruments, but rather on defining *which acts* committed during armed conflict should be excluded and thus exclusively regulated by IHL.

In order to dispel the ambiguities raised by current formulations of IHL exclusion clauses found in CT instruments (notably the Terrorist Bombings Convention), clarity should be provided on *who* and *what* should be covered by the clause. A more precise delineation of the nature of the acts covered by the exclusion, and also of their authors, will help to prevent misinterpretation and attempts at circumventing the operation of the clause, as have been observed in certain contexts.

Discussions on the wording of an IHL exclusion clause have predominantly revolved around the notion of “armed forces”—notably, whether this notion is limited to States’ armed forces or expands to non-State armed groups in order to

⁷² UKSC, *Gul*, above note 2, para. 52. For a similar view, see Court of Naples, *TJ*, above note 55, p. 30.

⁷³ For a detailed analysis of the complementary advantages proposed by CT legislations, see the article by Ben Saul in this issue of the *Review*.

reflect IHL. In order to avoid misunderstanding and to ensure that the exclusion clause is interpreted in light of IHL, it is suggested that the expression “armed forces” be replaced by the phrase “parties to the armed conflict”. The inclusion of this phrase in the IHL exclusion clause would be in line with IHL, as that is the term of art used to designate the opposing sides in an armed conflict, whether international or non-international. It is through its armed forces that a party engages in hostilities; one of the IHL criteria for considering that a non-State group may be considered a party to a NIAC is that it has reached a sufficient organizational threshold, demonstrated by the existence of an armed force with the capacity to engage in sustained and coordinated military operations and to implement IHL.

Another option that would avoid the controversies relating to the expression “armed forces” is to simply exclude from the scope of a CT convention all action carried out in armed conflict in accordance with IHL. This is the approach taken by Canada and New Zealand to implement the IHL exclusion clauses contained in the CT instruments to which they have adhered in their domestic law.⁷⁴ This option therefore focuses exclusively on the nature of the actions, instead of being driven by the status of their authors, such that it covers the lawful acts of war carried out by members of the armed forces of the parties to the armed conflict as well as those of persons acting on their behalf (such as civilians directly participating in the hostilities). This option thus preserves the ambit and purpose of IHL by exempting actions in conformity with IHL from the scope of CT offences, while allowing judges to rely on CT legislation for acts committed in armed conflict that do not comply with the applicable rules of IHL.

On this basis, it is submitted that an appropriate IHL exclusion clause should exclude from the scope of a CT instrument activities conducted in armed conflict by the parties thereto and persons acting on their behalf, which are regulated *and* not prohibited by IHL. It would therefore cover actions of all belligerents, including State and non-State armed forces and civilians directly participating in hostilities. The clause would apply only in relation to actions that are governed by IHL (i.e., with express rules applicable to the action concerned, such as rules regulating detention or the conduct of hostilities) and, *cumulatively*, that are not prohibited by it.

The rationale of this proposal is to ensure that actions of belligerents that comply with IHL—State and non-State parties to the armed conflict alike (including those non-State organized armed groups that are designated as terrorist groups)—will not be labelled and criminalized as terrorist acts or offences. This approach would be in line with the development of the international jurisprudence on acts of terrorism in armed conflict, notably the war crime of intending to spread terror amongst the civilian population. In the *Galić* case, the ICTY made it clear that for the purposes of the elements of the crime, the notion of “acts of violence” does not encompass acts against legitimate military objectives but only

74 See the quotes from the Canadian Criminal Code and the New Zealand Terrorism Suppression Act at above note 49.

includes unlawful attacks against civilians,⁷⁵ confirming that lawful acts of war should not be considered acts of terrorism.⁷⁶

This proposal also preserves the policy and legislative space of States because certain offences, notably CT offences related to preparatory activities, are not regulated by any IHL provisions. This would include, for instance, the financing of terrorism, travelling in order to join groups designated as terrorist, training, or recruiting. In addition, the proposal leaves to the discretion of State authorities the option to prosecute under either CT laws or IHL acts carried out in armed conflict that contravene both the CT legal framework and IHL.⁷⁷

Furthermore, excluding from the scope of CT laws actions that are regulated and not prohibited by IHL would help avoid a “lopsided legal situation unfavourable to [non-State armed group] compliance with IHL”.⁷⁸ IHL presumes that military objectives can and will be attacked by both parties to a conflict and seeks to protect those not participating in hostilities from such attacks. A clause that fails to take this rationale of IHL into account would allow the incrimination as “terrorist” acts of conduct that is not unlawful under IHL, which may in turn discourage IHL compliance by non-State armed groups. Much of the motivation for fighting in accordance with the law is likely to erode in such cases. In addition, labelling acts that are lawful under IHL as “terrorist” makes the implementation of Article 6(5) of AP II even more difficult.⁷⁹ The objective of that provision is to encourage respect for IHL by granting the broadest possible amnesty to persons who have participated in hostilities and respected applicable IHL rules. For obvious reasons, the prospect of amnesty would be significantly diminished if even lawful acts of war were to be qualified as acts of terrorism under the CT legal framework. This may ultimately become an obstacle to peace negotiations and reconciliation efforts in the future.

While it must be recognized that certain non-State armed groups have deliberately rejected IHL and the values underpinning it, it is important to look beyond these specific cases. Even today, in many NIACs, an IHL dialogue with non-State armed groups, including those designated as terrorist, is possible and even valued by such actors. CT regulations should not undermine efforts to reach out to non-State organized armed groups in order to promote and enhance compliance with IHL.

This concern is also why the ICRC does not find the term “terrorist” to be helpful to describe behaviour in armed conflict that conforms to IHL, and considers

75 ICTY, *The Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, paras 133–135.

76 Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, p. 27: “in armed conflicts, only acts contrary to IHL should be classified as terrorist acts in international anti-terrorism law”.

77 “Session 1 – Setting the Scene”, in S. Kolanowski (ed.), above note 4, pp. 42–45; “Panel Discussion: State Responses to Foreign Fighters”, in S. Kolanowski (ed.), above note 4, pp. 107–133.

78 2011 Challenges Report, above note 20, p. 50.

79 Granting amnesty for behaviour that complies with IHL has also been identified as a rule of customary IHL. See ICRC Customary Law Study, above note 32, Rule 159.

that conduct regulated and not prohibited by IHL should not be labelled “terrorist” in international conventions or in domestic laws, so as to reflect the reality of armed conflicts and the underlying rationale of IHL (that military objectives can and will be attacked).⁸⁰ Acts directed at military objectives constitute the very essence of armed conflict and should never be legally defined as terrorist under a co-applicable regime of international law. To do so implies that such acts are prohibited and must be subject to criminalization under that other international legal framework, which weakens efforts to achieve coherence between IHL and the CT legal framework.

The impact of CT measures and sanctions regimes on humanitarian action: The need to reconcile CT and sanctions legal frameworks with IHL

Efforts to curb all possible direct and indirect support to designated individuals and entities via CT measures and sanctions have led to increased control and restraint on all activities, including humanitarian activities, seen as potentially benefiting such actors. There has been increasing evidence in recent years that CT measures and sanctions regimes have had an adverse impact on principled humanitarian action; indeed, some are of particular concern for humanitarian activities in armed conflict.

CT measures adopted by States are frequently based on the UN Security Council resolutions that have been adopted since 2001, as well as on CT instruments. While the exact content and scope of the CT offences may vary from one State to another, many States have made it a criminal offence to provide “support”, “services” or “assistance” to entities or persons involved in terrorist acts.⁸¹ Often, the relevant provisions are broadly worded and can be interpreted to include within their ambit any humanitarian activity directly or indirectly benefitting “individuals or entities associated with terrorism”. In practice, this broad scope results in the potential criminalization of the core activities of impartial humanitarian organizations and their personnel.⁸²

Sanctions regimes are also an increasing source of concern for impartial humanitarian organizations.⁸³ Financial sanctions, restrictions on the import of certain commodities or material, and travel bans have all impacted on humanitarian action. All three types of measures pose challenges, but financial sanctions have proven to be the most problematic for humanitarian action. Financial sanctions prohibit making funds, financial assets or economic resources available, directly or indirectly, to designated individuals and entities. The purpose of the prohibition is to deny listed individuals and entities—for as long as they remain subject to sanctions—the means to support or conduct any action considered to be a threat to

⁸⁰ 2015 Challenges Report, above note 23, p. 18.

⁸¹ For a recent detailed analysis of CT measures taken at the international, regional and domestic levels, see E.-C. Gillard, above note 57, pp. 11–27.

⁸² 2015 Challenges Report, above note 23, p. 20.

⁸³ See Rebecca Brubaker and Sophie Huvé, *UN Sanctions and Humanitarian Action*, United Nations University, Centre for Policy Research, January 2021, available at http://collections.unu.edu/eserv/UNU:7895/UNSHA_ScopingPaper_FINAL_WEB.pdf.

international peace and security, or to be terrorist in nature. The notion of “economic resources” is understood to include assets of every kind, whether tangible or intangible, movable or immovable, actual or potential, which may potentially be used to obtain funds, goods or services.⁸⁴ This prohibition may encompass the activities and *modi operandi* of impartial humanitarian organizations. The payment of utilities taxes, the hand-over of humanitarian items (such as medicines), the rehabilitation of medical or other essential civilian public infrastructure (such as water treatment or power plants), and certain humanitarian activities such as large-scale food assistance operations can fall within the scope of the prohibition.⁸⁵ When financial sanctions target governments, ministries, or non-State armed groups exercising governmental functions (such as in Eastern Ukraine or Gaza) or controlling parts of a country (such as in Syria, Somalia or Yemen), they increase the likelihood that a number of humanitarian activities may be deemed to constitute a proscribed provision of assets or support to listed entities.

Sanctions regimes also often include restrictions on the import of goods, which can delay or even block the import of goods needed to implement humanitarian activities. Sanctions measures sometimes encompass dual-use objects which can be used for military purposes but are also indispensable for the implementation of humanitarian operations.⁸⁶

Travel bans can also raise impediments to humanitarian action. They require States to prevent entry into and transit through their territory by designated individuals. This can be an issue as such restrictions may prevent impartial humanitarian organizations from organizing meetings with designated persons in third countries with a view to negotiating access, obtaining security assurances or even implementing the ICRC’s neutral intermediary role.

Humanitarian organizations also potentially face the risk of being listed themselves for having carried out their humanitarian mandates. For instance, the UN sanctions regime established under Security Council Resolution 1267 takes a broad approach to the criteria for individuals or entities to be designated. The

84 Al-Qaida Sanctions Committee, “Assets Freeze: Explanation of Terms”, 24 February 2015, available at: www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_assets_freeze_-_english.pdf. In addition, certain sanctions regimes interpret this prohibition in light of the notion of “fungibility”, according to which “support provided to a terrorist group for activities that are not unlawful ‘frees up’ resources that would have been used for such lawful purposes, and allows them to be put to violent ends”. See E.-C. Gillard, above note 57, p. 25.

85 See, for instance, European Commission, *Commission Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures*, C(2021) 5944 final, 13 August 2021, response to question 3: “Providing batches of medicine, medical equipment, [and/or] disinfectants to a designated person allows that person to, for instance, sell the goods and obtain funds in exchange. Hence it amounts to making economic resources available to, or for the benefit of, a designated person or entity. This could be the case where medical devices are provided to designated persons or entities active in the charity field or in an area which is *de facto* controlled by a designated person or entity.” See also the response to question 11, indicating that financing or taking part in the construction of makeshift hospitals, sanitation operations or temporary infrastructures to fight the pandemic would amount to an unlawful provision of economic resources if the designated person or entity draws economic benefit from the humanitarian activity.

86 This would be the case, for instance, for material used in water and habitat projects such as pipes, chemicals and construction materials. Arms embargoes could also render more difficult the implementation of weapons decontamination activities.

criteria for designation include activities that “otherwise [support] acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof”,⁸⁷ which could be interpreted to include assistance or protection activities carried out by impartial humanitarian organizations.

Furthermore, sanctions regimes pose an increased risk of liability for impartial humanitarian organizations and their personnel, as the mental element required for a violation of sanctions is low. There is no requirement to *intend* to support the illegal activities of the listed entity.⁸⁸ Consequently, humanitarian actors may face civil and criminal prosecution, as some States have established sanctions violations as a criminal offence under their domestic laws.⁸⁹

In addition, the applicability of CT measures and sanctions regimes to the activities of impartial humanitarian organizations carried out in armed conflict has also triggered reverberating effects that impact humanitarian action.

Increasingly, donors are including increasingly strict and more onerous CT/sanctions clauses in funding agreements with humanitarian organizations. These clauses aim at ensuring that persons or entities designated as terrorist or listed under sanctions regimes do not receive funds or items directly or indirectly through humanitarian operations. In such clauses, compliance with CT measures and sanctions by the grantees and related due diligence requirements are preconditions for the disbursal of funds to impartial humanitarian organizations. These requirements, besides being cumbersome and time-consuming (thereby limiting flexibility and responsiveness), make it challenging for organizations to act in accordance with IHL and in a principled manner. Likewise, for fear of violating CT and sanctions legal frameworks, private actors such as banks, suppliers, transporters and insurers have developed over-compliance or “de-risking” policies. Consequently, several commercial actors have reduced or even stopped their lines of business with impartial humanitarian organizations, which are often considered to be “low-profit” and “high-risk” clients, further restricting the latter’s ability to operate in countries subject to restrictive measures.

The cumulative effects of CT measures and sanctions regimes have thus adversely impacted the scope, amount and quality of humanitarian activities delivered to victims of armed conflict.⁹⁰ Many affected activities relate to the core mandate of the ICRC: visits and material assistance to detainees, first-aid

87 UNSC Res. 2368, 20 July 2017, paras 2(c), 4.

88 E.-C. Gillard, above note 57, p. 28.

89 See, for instance, Council of the EU, *Sanction Guidelines – Update*, 5664/18, 4 May 2018, para. 89.

90 See Alice Debarre, *Safeguarding Humanitarian Action in Sanctions Regimes*, International Peace Institute, June 2019, available at: www.ipinst.org/wp-content/uploads/2019/06/1906_Sanctions-and-Humanitarian-Action.pdf; Norwegian Refugee Council, *Principles under Pressure: The Impact of Counter-Terrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, 2018, available at: www.nrc.no/resources/reports/principles-under-pressure/; Jessica S. Burniske and Naz K. Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, 2017, available at: <https://blogs.harvard.edu/pilac/files/2017/03/Pilot-Empirical-Survey-Study-2017.pdf>; Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, UN Office for the Coordination of Humanitarian Affairs (OCHA) and Norwegian Refugee Council, 2013, available at: www.unocha.org/sites/unocha/files/CounterTerrorism_Study_Full_Report.pdf.

training, war surgery seminars, IHL dissemination to weapons bearers, delivery of aid to meet the basic needs of the civilian population in “hard-to-reach” areas, rehabilitation of critical civilian infrastructure, and medical assistance to wounded and sick fighters, for instance.

As a result, the ICRC has underlined that, as a matter of law and policy, CT measures and sanctions regimes that States and international organizations adopt must not run counter to the principles they have supported and endorsed through IHL treaties, and must not challenge the ability of impartial humanitarian organizations to conduct their activities in a principled way.⁹¹

The IHL rules governing humanitarian action are at stake

In legal terms, CT measures and sanctions regimes impeding principled humanitarian action may be said to be incompatible with the letter and spirit of IHL. Particular scrutiny is warranted with regard to the relationship between CT and sanctions legal frameworks and three areas of IHL: the rules governing humanitarian operations; the rules protecting the wounded and sick, as well as those providing medical assistance; and the rules protecting humanitarian personnel.

IHL rules governing humanitarian activities

Under IHL, the parties to an armed conflict bear the primary obligation to meet the basic needs of the people under their control affected by the armed conflict. In parallel, notably when those basic needs remain unmet, IHL lays down the legal basis for humanitarian activities to be offered and provided by impartial humanitarian organizations. Common Articles 3 and 9/9/9/10 spell out the so-called “right of initiative”. This right of initiative is the legal entitlement given to impartial humanitarian organizations to offer their humanitarian activities to parties to international and non-international armed conflicts, regardless of how a conflict may be characterized under CT regulations or sanctions regimes. Usually, neither CT measures nor sanctions regimes prohibit mere engagement and interaction with designated persons and entities involved in armed conflict. However, the broad prohibition of support to them, as well as the possibility of qualifying certain humanitarian action as an unlawful provision of economic resources under sanctions regimes, inherently restricts the scope of the humanitarian activities that impartial humanitarian organizations can offer to parties to the armed conflict. As such, CT measures and sanctions may encroach on the right of initiative of impartial humanitarian organizations, while there is nothing in IHL that restrains that right.

This right to offer services does not translate into an unrestricted right of access given to humanitarian actors. In order to carry out their humanitarian

91 2011 Challenges Report, above note 20, pp. 51–53.

activities in situations of armed conflict, impartial humanitarian organizations must seek and obtain the consent of the parties concerned. In international armed conflicts, the relevant IHL provisions specify that consent only needs to be obtained from the States that are a party to the conflict and are “concerned” by virtue of the fact that the proposed humanitarian activities are to be undertaken in their territory or in the areas under their effective control. For NIACs, common Article 3 is silent on who needs to consent to humanitarian operations, but it is the ICRC’s view that as a matter of law, consent should be sought from the State (through its effective government) in whose territory the NIAC is taking place, including for humanitarian activities to be undertaken in areas over which the State has lost control.⁹² Under IHL, consent must not be unlawfully withheld, for instance when the concerned party is unwilling or unable to meet the basic needs of the population or intends to cause or perpetuate starvation in areas where designated persons or entities are in control or active.⁹³ Overall, under IHL, consent cannot be withheld by concerned States for the sole reason that humanitarian activities are to be delivered in areas where designated persons or entities are active or in control, nor can it be denied on the basis that the humanitarian activities are to be undertaken in favour of designated persons or members of designated entities if their situation makes them eligible for humanitarian assistance.

Once humanitarian activities are accepted, the State and non-State parties to an armed conflict are under an obligation to cooperate and to take positive action to facilitate humanitarian operations, subject to their right of control.⁹⁴ This includes simplifying administrative formalities as much as possible to facilitate visas or other immigration issues, financial/taxation requirements, import/export regulations, field-trip approvals, and possibly granting the privileges and immunities necessary for the organization’s work. In short, the parties must enable “all facilities” needed for an organization to carry out its agreed humanitarian functions appropriately.⁹⁵ The obligation to “allow and facilitate” is

92 In any case, for operational reasons, the ICRC would also seek the consent of the non-State party or parties to the NIAC before carrying out its humanitarian activities in areas under their control or where they are active.

93 For more details, see Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, OCHA, 2016. See also Tristan Ferraro, “Relief Schemes and the Delivery of Humanitarian Activities in Situations of Armed Conflict: the ICRC’s Perspective”, in Fausto Pocar (ed.), *Proceedings of the 40th Sanremo Round Table: The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, FrancoAngeli, 2018, available at: <https://iihl.org/full-list-congresses-international-conferences-round-tables-since-institutes-foundation/the-additional-protocols-40-years-later-new-conflicts-new-actors->.

94 See ICRC Customary Law Study, above note 32, Rule 55. The right of control foreseen under IHL should not be considered as extending beyond the parties to the armed conflict and non-belligerent States on the territory of which humanitarian operations must transit to reach countries in which armed conflict take place. Stakeholders not belonging to these categories cannot claim that restrictions contained in CT and sanctions frameworks fall within the right of control under IHL.

95 ICRC, “Q&A and Lexicon on Humanitarian Access”, June 2014, pp. 11–12, available at: www.icrc.org/en/doc/assets/files/2014/icrc-q-and-a-lexicon-on-humanitarian-access-06-2014.pdf.

expressly mentioned in IHL rules regulating humanitarian activities in situations of IAC (including occupation). Neither common Article 3(2) nor Article 18(2) of AP II address this aspect of humanitarian activities, but the rules applicable in IAC on this issue are considered customary and applicable in both international and non-international armed conflicts.

Under IHL governing IACs, the obligation to allow and facilitate relief operations applies not only to the parties to an armed conflict but to all States. This means that States not party to the conflict, such as those through territory of which impartial humanitarian organizations may need to pass in order to reach conflict zones, must authorize such transit, subject to their right of control, the objective of which is limited to ensuring that the humanitarian operations transiting through their territory are exclusively humanitarian in nature.⁹⁶

IHL governing NIACs does not expressly contain a similar obligation for third States, but there is nevertheless an expectation that States not party to such conflicts will not oppose transit through their territory and will not take measures so as to impede the work of impartial humanitarian organizations seeking to reach the victims of a NIAC. Should those States refuse to allow and facilitate humanitarian activities, they would in effect prevent the humanitarian needs of the victims of an armed conflict from being addressed and render the consent given by the parties to the conflict void. The humanitarian spirit underpinning IHL should encourage non-belligerent States to facilitate humanitarian action that has already been accepted by the parties to a NIAC. It could also be argued that this obligation incumbent upon third States could be inferred from the due diligence component enshrined in the obligation to ensure respect for IHL under common Article 1, as third States' refusal may, for instance, make it impossible for parties to the conflict to fulfil their primary obligation to meet the basic needs of the population.⁹⁷ The imposition by third States of CT and sanctions regimes obstructing humanitarian action may therefore be incompatible with their obligation to respect and ensure respect for certain IHL provisions governing humanitarian activities carried out by impartial humanitarian organizations.⁹⁸ In addition, based on their obligation to perform treaty obligations in good faith as reflected in Article 26 of the Vienna Convention on the Law of Treaties, third States—as high contracting parties to the Geneva Conventions—are expected not

96 IHL is silent on the consent of third countries in whose territory humanitarian operations must transit. However, this does not mean that impartial humanitarian organizations are exempted from seeking and obtaining their consent. Consent of third States must be sought and obtained as a matter of public international law—but as a matter of IHL, based on the obligation to allow and facilitate humanitarian activities, those States are obliged to give their consent. In addition, it is worth noting that IHL foresees specific rules requiring States to facilitate in every possible way the humanitarian activities carried out by the ICRC as well as those undertaken by National Red Cross or Red Crescent Societies: AP I, Art. 81(1–3).

97 2016 Commentary on GC I, above note 69, common Art. 3, para. 840.

98 Dustin A. Lewis and Naz K. Modirzadeh, *Taking into Account the Potential Effects of Counterterrorism Measures on Humanitarian Action: Elements of an Analytical Framework for States Grounded in Respect for International Law*, legal briefing, Harvard Law School Program on International Law and Armed Conflict (HLS PILAC), May 2021, p. 32.

to take any action or measures that would frustrate the operation of IHL rules, including those governing humanitarian access and action.⁹⁹

On this basis, it is submitted that CT measures and sanctions must be implemented such that they do not constitute unlawful denial/withholding of consent to humanitarian activities conducted by impartial humanitarian organizations in accordance with IHL. Therefore, States, including non-belligerent States, are expected not to design measures and sanctions regimes which conflict with their obligation to allow and facilitate humanitarian action.

IHL rules protecting the wounded and sick as well as those providing medical assistance

The right of wounded and sick civilians and fighters placed *hors de combat* to be respected and protected, to be treated humanely without any adverse distinction and to receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition, as well as to be searched for, collected and evacuated, is a foundational principle of IHL.¹⁰⁰ This obligation of means is first and foremost an obligation incumbent upon all parties to the conflict. However, “taking all possible measures” also encompasses permitting impartial humanitarian organizations such as the ICRC to assist with collecting and caring for the wounded and sick, even if they are designated persons under CT and/or sanctions frameworks. Protections afforded by IHL to the wounded and sick would often be meaningless without access to humanitarian personnel and supplies, so IHL also shields those engaged in medical care, be they medical personnel, humanitarian personnel or other civilians.¹⁰¹

Unfortunately, in certain contexts, humanitarian activities in favour of the wounded and sick have been denied because the latter have been labelled as terrorist or are suspected to be affiliated with terrorists. This illustrates a tendency of some CT policies to recast medical care as a form of illegitimate support. Furthermore, although the 1267 sanctions committee has never, to the best of our knowledge, listed an individual solely on the basis of the provision of medical or humanitarian assistance, it has nonetheless referred to medical activities as part of the basis for listing two individuals and two entities,¹⁰² implying that medical care and medical supplies are considered forms of impermissible support for

99 International Law Commission (ILC), *Draft Articles on the Law of Treaties, with Commentaries*, in *Yearbook of the International Law Commission*, Vol. 2, 1966, p. 211: “Some members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible.”

100 Articles 12 and 15 of Geneva Convention I, Articles 12 and 18 of Geneva Convention II, Article 16 of Geneva Convention IV, Articles 10 and 16 of AP I for IACs, and common Article 3 and Articles 7 and 8 of AP II for NIACs. See also ICRC Customary Law Study, above note 32, Rule 110.

101 See below.

102 Dustin A. Lewis, Naz K. Modirzadeh and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, legal briefing, HLS PILAC, 2015, pp. v, 110–111.

designated terrorist groups. Arguably, however, CT regulations and sanctions regimes that treat the provision of humanitarian activities for the benefit of wounded and sick designated persons as a form of prohibited support run against the letter and spirit of IHL.

IHL rules protecting humanitarian personnel

Complementary to the aforementioned IHL rules, a fundamental tenet of this body of law is that humanitarian personnel and objects used to undertake humanitarian activities must be respected and protected.¹⁰³ This rule is a necessary corollary of the rules providing for rapid and unimpeded access for humanitarian relief activities and freedom of movement of humanitarian relief personnel. The safety and security of humanitarian relief personnel is an indispensable condition for the delivery of humanitarian relief to civilian populations in need. This should include protection against practices such as harassment of humanitarian personnel and intimidation of such personnel aimed at disrupting their work, and more broadly should include freedom from undue interference, notably arrest, for carrying out their duties.

While the Additional Protocols expressly prohibit prosecuting those who provide medical assistance in international and non-international armed conflicts, no such express norm has been introduced in relation to humanitarian personnel. However, the absence of a similar express prohibition should in no way be interpreted as a blank cheque for States to prosecute humanitarian personnel for the delivery of humanitarian activities undertaken in accordance with IHL. Indeed, it is submitted that a prohibition against prosecuting humanitarian personnel for actions foreseen by IHL can be inferred from the obligation to “respect and protect” such personnel. This obligation is a term of art appearing in the Geneva Conventions and their Additional Protocols and is also considered a customary rule.¹⁰⁴ This requirement triggers obligations of a negative and positive nature. The “respect” prong demands compliance with duties of abstention, including obligations not to attack humanitarian personnel, harm them in any way, or subject them to arbitrary detention. The “protect” prong is a positive obligation to take steps to ensure that humanitarian personnel can carry out their activities without any undue interference with their tasks. The overarching objective of the obligation to respect and protect is to ensure that humanitarian personnel can reach victims of armed conflict, whether designated or not under CT regulations and sanctions. Unfortunately, in recent years, humanitarian personnel have been arrested and prosecuted under CT laws for carrying out their duties mandated by IHL. Similarly, sanctions regimes may also consider some humanitarian activities as a form of prohibited support. These approaches run counter to the IHL protections for humanitarian personnel and undermine swift, effective humanitarian action.

¹⁰³ ICRC Customary Law Study, above note 32, Rules 31 and 32 applicable in both IAC and NIAC.

¹⁰⁴ *Ibid.*, Rule 31.

Recent trends and solutions to address the challenges raised by CT/sanctions legal frameworks

The above reminds us that specific attention should be paid to the continued friction existing between CT and sanctions legal frameworks, on the one hand, and IHL, on the other. The current features of CT regulations and sanctions regimes do not take sufficient account of IHL rules. They do not permit impartial humanitarian organizations to carry out their mandates in a manner compliant with IHL, and so compromise the rights and dignity of victims of armed conflicts. It remains essential for States and international organizations to take specific action to ensure that their CT and sanctions frameworks are compliant with IHL.

In this regard, the current trend indicating an increasing – albeit still insufficient – effort at the international, regional and domestic levels by those designing and implementing CT and sanctions frameworks to better include IHL in their matrices, and to better protect principled humanitarian action, is welcomed.

CT frameworks and principled humanitarian action: Quivering hopes

In the CT realm, recent years have seen the emergence of a positive tendency towards progressively including IHL elements into the CT legal equation at the international level. This has been accompanied by a noticeable improvement at the domestic level, as States have begun to incorporate safeguards in their domestic legislation aimed at preserving principled humanitarian action.

Since 2005, UN Security Council resolutions in the CT domain have almost systematically included paragraphs on the necessity for States to comply with international law, including IHL, when taking or implementing CT measures.¹⁰⁵ More recently, the adoption of Security Council Resolution 2462 in March 2019¹⁰⁶ marked a major step forward. For the first time, the Council imposed on UN member States – using, in a Chapter VII resolution, mandatory “decides” and “demands” language – a requirement that,

¹⁰⁵ See, for example, UNSC Res. 1456, 20 January 2003, Annex, para. 6; UNSC Res. 1624, 14 September 2005, op. para. 4; UNSC Res. 2178, 24 September 2014, op. para. 5; UNSC Res. 2309, 22 September 2016, op. para. 2; UNSC Res. 2322, 12 December 2016, op. para. 2; UNSC Res. 2354, 24 May 2017, op. para. 2 (e); UNSC Res. 2396, 21 December 2017, op. paras 4, 18, 19, 34, 40; UNSC Res. 2482, 19 July 2019, op. para. 16. See also UNGA Res. 75/291, 30 June 2021, preambular paras 12, 26, op. paras 8, 9, 60, 89, 102, 109. In addition, the Counter-Terrorism Committee Executive Directorate (CTED), the subsidiary organ of the Security Council in charge of CT issues, explores ways to ensure that Security Council resolutions on counterterrorism are implemented in accordance with IHL. In this regard, CTED is implementing a dedicated project aimed at improving understanding of the interaction between CT measures and IHL. In the context of this project, CTED is preparing, in cooperation with OCHA and in consultation with other relevant stakeholders, including the ICRC, a thematic study on the interrelationship between CT frameworks and IHL. CTED has further stepped up its efforts to systematically mainstream IHL, as applicable, into its assessment tools and thematic analysis. CTED’s role in the IHL realm has been strongly challenged, however: see Dustin A. Lewis, Naz K. Modirzadeh and Jessica S. Burniske, *CTED and IHL: Preliminary Considerations for States*, legal briefing, HLS PILAC, March 2020; F. Ní Aoláin, above note 45, paras 27–29.

¹⁰⁶ UNSC Res. 2462, 28 March 2019.

in a manner consistent with their obligations under international law, including international humanitarian law, ... [they] ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense the willful provision or collection of funds, financial assets or economic resources or financial or other related services, directly or indirectly.¹⁰⁷

The Council also required that “all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with [States’] obligations under international law, including international humanitarian law”.¹⁰⁸ These operative paragraphs were complemented by another one (more of a hortatory nature) that

[u]rges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.¹⁰⁹

The broad material scope of application of the first two paragraphs is remarkable as it relates to *all* CT measures, indicating that States have no other choice than to adjust their CT measures to IHL requirements. In addition, the third paragraph delves further into the interrelationship between CT and IHL by addressing the impact of CT measures on humanitarian action and by urging States to take into account the potential effect of measures aimed at countering terrorism, including its financing, on principled humanitarian action foreseen by IHL.

Another important aspect of this resolution lies in the clarification it gives on whether the conditions to bring the “primacy clause” contained in Article 103 of UN Charter into operation would be met in order to regulate the interaction between IHL and CT frameworks in case of contradiction between these two bodies of law.¹¹⁰ Indeed, operative paragraphs 5 and 6 of Resolution 2462 can be interpreted as a decision under Article 25 of the UN Charter, by which the Security Council requires strict compliance by States with their IHL obligations when designing, implementing and interpreting CT measures.¹¹¹ As aptly put by Emanuela-Chiara Gillard, operative paragraphs 5 and 6 “[put] to rest any doubts that may have existed as to whether the Council had intended to override IHL”.¹¹² The requirement to act in conformity with IHL laid down in those paragraphs implies that it is CT regulations that must give way to IHL in the event of friction between the two legal frameworks. Therefore, the combined effects of operative paragraphs 5, 6 and 24 would permit interpreting the extensive

107 *Ibid.*, op. para. 5.

108 *Ibid.*, op. para. 6.

109 *Ibid.*, op. para. 24.

110 See also the above section on “Understanding How the CT Legal Framework Addresses Armed Conflicts”.

111 For a detailed analysis of the Security Council Resolution 2462, see D. A. Lewis and N. K. Modirzadeh, above note 98, pp. 18–39.

112 E.-C. Gillard, above note 57, p. 18.

CT obligations laid down in Resolution 2462 as excluding from their scope exclusively humanitarian activities carried out by impartial humanitarian organizations, regulated and authorized by IHL.

Even if it is difficult to determine the immediate influence that Resolution 2462 has had on domestic CT legislation, one can observe that the years 2019–20 have been quite prolific in terms of humanitarian exemptions included therein.¹¹³ The personal and material scope of these exemptions vary from one law to another,¹¹⁴ but overall, they illustrate that engaging State authorities on the importance of upholding their IHL obligations while implementing CT measures can be successful and can result in an effective protection of impartial humanitarian organizations and their personnel.

Sanctions and principled humanitarian action: Building hopes

In the sanctions domain, designers at both the international and regional levels have been less inclined to introduce humanitarian carve-outs into sanctions matrices. Indeed, since 2000, only two UN sanctions regimes out of the fourteen currently in force have foreseen explicit, legally binding humanitarian exemptions:¹¹⁵ the Taliban sanctions regime and the Somalia sanctions regime.

113 Some States, like Australia, already included before 2019 a humanitarian exemption for certain security-related crimes (for instance the crimes of treason, military-style training and associating with terrorist organizations: Criminal Code Act, 1995, Sections 80.1.AA.4, 83.3.4.A and 102.8.4.c respectively), excluding from the scope of the offences “the provision of aid or assistance of a humanitarian nature”. In 2019, Australia included a similar exemption for a new offence, the crime of entering or remaining in declared areas (*ibid.*, Section 119.2.3); the humanitarian exemption is extended to “performing an official duty for the ICRC” (*ibid.*, Section 119.2(3)(e)(ii)). Equivalent legislation was adopted in the UK in 2019 and equally includes a humanitarian exemption for activities whose purposes are “providing aid of a humanitarian nature” (Counter-Terrorism and Border Security Act, 2019, Section 58.B.1.5). In March 2020, Ethiopia passed its new Prevention and Suppression of Terrorism Crimes Proclamation No. 1176/2020, whose Article 9.5 excludes from the offence of “rendering support” directly or indirectly for the commission of a terrorist act or to a terrorist organization “humanitarian aid given by organizations engaged in humanitarian activities or a support made by a person who has [a] legal duty to support other[s]”. In April 2020 Chad adopted a new CT law, Law No. 003/PR/2020, excluding entirely from its scope “activities of an exclusively humanitarian and impartial nature carried out by neutral and impartial humanitarian organizations”. In July 2020, the Philippines adopted a new Anti-Terrorism Act No. 11479 preventing, prohibiting and penalizing terrorism. This law includes in its Section 13 a humanitarian exemption excluding from the offence of material support to terrorists “humanitarian activities undertaken by the ICRC, the Philippines Red Cross and other state-recognized impartial humanitarian partners of organizations in conformity with IHL”. In September 2020, Switzerland amended its Penal Code by including a new crime of providing support to the activities of a criminal and terrorist organization. Article 260ter(2), however, foresees a humanitarian exemption according to which the crime of support “does not apply to humanitarian services provided by an impartial humanitarian organization such as the ICRC, in accordance with common Article 3 to the Geneva Conventions of 12 August 1949”. A detailed analysis of the exemptions inserted into these CT legislations is beyond the scope of this article; for a more comprehensive study, see E.-C. Gillard, above note 57, pp. 21–24.

114 For more details on the constitutive elements of a humanitarian exemption in light of IHL, see below.

115 Understanding humanitarian carve-outs in sanctions first necessitates some understanding of terminology. What the ICRC and other humanitarian organizations request is for States to ensure that humanitarian activities carried out by impartial humanitarian action are excluded from the scope of CT and sanctions legal frameworks. The ICRC uses the expression “humanitarian exemption” in that respect, as do others such as the EU. On its end, the UN Security Council uses the term “exception” to

In December 2000 – and until 2002 – the UN Security Council imposed a ban on flights from or to Taliban-controlled areas but excluded “organizations and governmental relief agencies which are providing humanitarian assistance to Afghanistan, including the United Nations and its agencies, governmental relief agencies providing humanitarian assistance, the International Committee of the Red Cross and non-governmental organizations as appropriate,” as determined by the 1267 sanctions committee.¹¹⁶ This exemption is no longer in force. Recently, the UN Security Council introduced a new humanitarian exemption in the Taliban sanctions regime through Resolution 2615, adopted on 22 December 2021, deciding that

humanitarian assistance and other activities that support basic human needs in Afghanistan are not a violation of paragraph 1 (a) of resolution 2255 (2015), and that the processing and payment of funds, other financial assets or economic resources, and the provision of goods and services necessary to ensure the timely delivery of such assistance or to support such activities are permitted.¹¹⁷

Similarly, regarding Somalia in 2010, after the designation of Al-Shabaab as a terrorist group, UN Security Council members inserted a humanitarian exemption excluding from financial sanctions

the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners.¹¹⁸

At the European Union (EU) level, only one very specific and limited humanitarian exemption has been granted. In 2016 the EU excluded from the scope of its sanctions applicable to Syria the purchase of oil

by public bodies, or by legal persons or entities which receive public funding from the Union or Member States to provide humanitarian relief in Syria or to provide assistance to the civilian population in Syria, where such products

cover the same notion, while the US sanctioning authorities use the phrase “general licenses” (see, for instance, US Office of Foreign Assets Control (OFAC), General License No. 14, “Authorizing Humanitarian Activities in Afghanistan”, 24 September 2021, available at: https://home.treasury.gov/system/files/126/ct_gl14.pdf).

116 UNSC Res. 1333, 19 December 2000, op. paras 11, 12. The prohibition was not renewed when the sanctions were revised by UNSC Res. 1390, 16 January 2002.

117 UNSC Res. 2615, 22 December 2021, op. para 1. With regard to its material scope, this exemption is similar to the one included in the UN sanctions regime applicable to Somalia as it relates to financial sanctions only. However, the activities covered by the exemption are arguably broader: they would also include protection activities (“humanitarian assistance and *other activities* that support basic human needs in Afghanistan” (emphasis added)). The exemption’s personal scope of application is also broader insofar as it encompasses humanitarian assistance “providers” writ large. In addition, the exemption’s temporal scope of application is not limited.

118 UNSC Res. 1916, 19 March 2010, op. para. 5.

are purchased or transported for the sole purposes of providing humanitarian relief in Syria or to provide assistance to the civilian population in Syria.¹¹⁹

Referring to IHL in the sanctions architecture: The UN and the EU

Recently, on the occasion of the renewal of three UN sanctions regimes (the Democratic Republic of the Congo (DRC), Mali and the Central African Republic (CAR)), the UN Security Council has used in its resolutions new language aimed at introducing an IHL element, paving the way for more consideration on preserving humanitarian space. In these country-specific sanctions regimes, the Security Council has requested that implementation measures taken by States comply with international law, including with IHL. This is the first time that such language has been used in “non-counterterrorism” sanctions at the UN.

In the resolution renewing the UN sanctions applicable to the DRC, the Security Council first stressed in a preambular paragraph that “the measures imposed by this resolution are not intended to have adverse humanitarian consequences on the civilian population of DRC”. This “intention” clause¹²⁰ is then complemented by the insertion of a binding operative paragraph which “[d]emands that States ensure that all measures taken by them to implement this resolution comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, as applicable”.¹²¹ These paragraphs were replicated in two resolutions adopted a few weeks later, renewing the UN sanctions regimes applicable to the CAR and Mali.¹²²

Even if these paragraphs do not explicitly establish a humanitarian exemption for humanitarian activities carried out by impartial humanitarian organizations, they nonetheless constitute an important development, in particular operative paragraph 4 of Resolution 2582 introducing a requirement for all States to comply with IHL when implementing the UN sanctions regime at the domestic level. These “IHL clauses” clearly assist countries that want to include humanitarian carve-outs but feel otherwise prevented from doing so because they think they are required to stick to the text adopted by the Security Council. Having such IHL clauses in resolutions designing or renewing sanctions regimes will give comfort to States that they are complying with the resolutions when adopting such safeguards in their domestic legal orders. In particular, the fact that the operative paragraph contained in the resolution renewing the DRC sanctions uses “demands”

119 EU Council Decision (CFSP) 2016/2144, 6 December 2016, implemented by Council Regulation (EU) 2016/2137, 6 December 2016, Art. 6(a)(1).

120 The UN sanctions regime applicable to the Democratic People’s Republic of Korea also has such a clause: see UNSC Res. 2094, 7 March 2013, op. para. 31.

121 UNSC Res. 2582, 29 June 2021, op. para. 4.

122 On the CAR, UNSC Res. 2588, 29 July 2021, preambular paras 12, 13; on Mali, UNSC Res. 2590, 30 August 2021, preambular paras 9, 10. On this occasion, the “intention” and “IHL” clauses were both included as preambular paragraphs, but this does not mean that the Security Council meant to give lesser effect to these clauses. Their insertion as preambular paragraphs is due to divergences among Security Council members, forcing the penholder to limit the discussions on the operative paragraphs of the resolutions.

language¹²³ provides States with further comfort that the paragraph is imbued with an obligatory character based on Article 25 of the UN Charter.¹²⁴

Progress has also been made at the regional level, notably in the EU. In its recent EU Council conclusions, the EU clearly insisted on its intent to avoid negative impacts on principled humanitarian action and its commitment to comply with international law, especially IHL and humanitarian principles.¹²⁵ The Council conclusions on humanitarian assistance and IHL of November 2019 are particularly clear in this respect:

The Council welcomes UN Security Council Resolution 2462(2019) The Council, in line with the Security Council Resolution, reiterates that any EU measures including designing and applying restrictive measures and all counter-terrorism measures, must be in accordance with all obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law. The Council will seek to avoid any potential negative impact on humanitarian action and encourages Member States to ensure that domestic counterterrorism measures and restrictive measures are in accordance with international law.¹²⁶

More recently, the EU guidance on COVID and sanctions also adopted a principled position with regard to IHL. Indeed, the guidance seems to recognize the precedence of IHL over EU sanctions and thus the possibility of delivering humanitarian activities even if they would constitute, within EU sanctions, a prohibited provision of economic resources to listed persons or entities:

As a general rule, EU Counter-Terrorism Sanctions Regulations do not allow the making available of funds and economic resources to designated persons or entities, although a number of derogations exist However, in accordance with International Humanitarian Law, where no other options are available, the provision of humanitarian aid should not be prevented by EU sanctions.¹²⁷

123 As in UNSC Res. 2462, 28 March 2019.

124 In addition, the preambular paragraph indicating that the sanctions imposed are not aimed at triggering humanitarian consequences could be used in support of humanitarian safeguards to be inserted while domesticating the UN sanctions regime, as such carve-outs would constitute the most effective means to secure humanitarian activities and therefore to serve the humanitarian interests of the civilian population.

125 Council of the EU, *Humanitarian Assistance and International Humanitarian Law – Council Conclusions*, 14487/19, 25 November 2019, para. 8; Council of the EU, *Council Conclusions on EU External Action on Preventing and Countering Terrorism and Violent Extremism*, 8868/20, 16 June 2020, paras 15, 27; Council of the EU, *EU Priorities at the United Nations and the 75th United Nations General Assembly – Council Conclusions*, 9401/20, 13 July 2020, para. 12. Reference on compliance with international law and on the preservation of humanitarian activities can also be found in EU framework documents on sanctions: see Council of the EU, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 10198/1/04 REV 1, 2004, para. 6; Council of the EU, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, 11205/12, 2012, para. 9.

126 Council of the EU, *Humanitarian Assistance and IHL*, above note 125, para. 8.

127 European Commission, above note 85, p. 7.

Undoubtedly, the multiplication of IHL references in sanctions regimes is an important development toward a more effective protection of principled humanitarian action and an important incentive for the inclusion at the State level of humanitarian exemptions. However, so far, sanctions designers have stopped short of providing more concrete and effective humanitarian safeguards in the form of a humanitarian exemption, as has been requested for a long time by the humanitarian community. In this respect, sanctions designers have so far failed to fully factor IHL into sanctions regimes.

While sanctions increasingly include IHL violations as a sanction trigger, prohibitions set by sanctions regimes continue to impede humanitarian activities authorized and protected under IHL, for lack of effective humanitarian carve-outs. This paradox needs to be overcome, and sanctions designers should push the integration of IHL to its logical conclusion through the inclusion of humanitarian exemptions on a regime-by-regime basis.

Issues raised by derogations and the need to seek humanitarian exemptions

Sanctioning authorities have expressed some concerns about the inclusion of “blanket humanitarian exemptions” for fear that they could be abused.¹²⁸ In order to deal with the negative impact of sanctions on humanitarian actors, sanctioning authorities have almost exclusively resorted to the *ad hoc* inclusion of “derogations”, instead of exemptions, in their sanctions regimes. Derogations require humanitarian organizations to seek and obtain *ad hoc* authorizations from a specific sanctioning authority (such as the sanctions committees for UN sanctions or a “national competent authority” for EU sanctions) as a precondition before undertaking any humanitarian activities that could be interpreted as contrary to sanctions regimes.

Derogations raise several issues for humanitarian action. First, they are disconnected from the reality of humanitarian action and are complex, bureaucratic and time-consuming, with a significant negative impact on humanitarian organizations’ operational responsiveness and continuity. Second, derogations in sanctions regimes also share a troubling common feature: they are discretionary, therefore making humanitarian organizations dependent on sanctioning authorities’ will.

Third, there is little guidance available on how derogations procedures work across different sanctions regimes. Sanctioning authorities often have different opinions on the scope and modalities of derogations processing. For instance, humanitarian actors do not know whether derogations made available under a specific regime will cover the entirety of their operations for a given time frame or whether derogations should be requested for each and every activity to be undertaken. At the EU level, questions remain as to who qualifies as the “national competent authority” entitled to provide derogations. For impartial humanitarian organizations sitting outside the EU but receiving funds from the

128 D. A. Lewis and N. K. Modirzadeh, above note 98, p. 9.

EU or EU member States, determining from which authority the organization should seek a derogation can be even more confusing: when a specific activity is funded by various EU member States, who should be the addressee of the derogation request? The main donor? All EU donors? What if one donor answers positively but not another? What if one EU member State gives a one-year derogation covering all humanitarian activities in a given context while another member State authorizes only a one-off specific activity for a limited time span? Such a lack of predictability is detrimental to an effective humanitarian response and, in addition, is likely to perpetuate de-risking or over-compliance policies by the private sector.

Fourth, derogations are ineffective because, in practice, they often lead to disproportionate delays for the import of goods/materials necessary for humanitarian action, limiting the ability of humanitarian actors to be as responsive and agile as possible in situations of emergency such as armed conflicts. Therefore, they are very likely to be unworkable for large-scale humanitarian operations.

Fifth, derogations can affect the perception of a humanitarian organization as a truly neutral, impartial and independent organization and ultimately lead to increased security risks. Asking permission from a sanctioning authority belonging to a third State/international organization in order to deliver humanitarian activities already agreed upon by the belligerents is likely to associate the humanitarian organization concerned with the political agenda borne by sanctions, and would inevitably result in the shrinking of the humanitarian space.

Finally, derogation systems raise serious concerns in terms of compatibility with IHL. Under IHL rules governing humanitarian access, the ability to consent to humanitarian activities carried out by impartial humanitarian organizations lies exclusively with the belligerents concerned, not with non-belligerent States (with the exception of States of transit). In that regard, derogations add a layer of consent to impartial humanitarian action not foreseen by IHL. IHL foresees that these States have an obligation to facilitate the activities of impartial humanitarian organizations, a function that derogations do not fulfil.¹²⁹ Also, derogations significantly restrict the right to offer services to which impartial humanitarian organizations are entitled under IHL, as they introduce a precondition (getting authorization from sanctions enforcers before placing an offer of services) that has no legal basis under this body of law. Lastly, not making use of available derogations would increase the risk of violating a sanctions regime and therefore the risk of prosecution for humanitarian personnel involved in activities foreseen and protected by IHL. Derogation systems therefore put States and international

129 For a similar view, see UN Human Rights Special Procedures, *Position of the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on the Human Rights and Rule of Law Implications of the United Nations Security Council Counter-Terrorism Sanctions Regimes on Individuals and Entities*, October 2021, pp. 18–19.

organizations designing and enforcing sanctions in a position at odds with their legal obligations under IHL.

In light of the above, the inclusion of derogations in sanctions regimes does not appear to be an appropriate solution. Instead, the inclusion of standing and well-framed humanitarian exemptions¹³⁰ must be favoured in order to effectively mitigate the negative impact of sanctions regimes.

Designing sanctions regimes in accordance with IHL

While States are free to include humanitarian exemptions in their autonomous sanctions,¹³¹ they remain hesitant to include such measures in the domestic legislation incorporating international sanctions, including States usually championing principled humanitarian action. States often go beyond the measures prescribed by international sanctions regimes, but they are more reluctant to formulate carve-outs where the international sanctions regime does not expressly foresee them.

This reluctance is often based on the perception that, by operation of Articles 25 and 103 of the UN Charter, sanctions designed by the UN Security Council always prevail over any other international obligations—including IHL ones—binding upon the implementing States. As a result, States may consider that granting humanitarian safeguards would result in, or be perceived as, not complying with a decision of the Security Council.¹³²

This perception privileging sanctions at the expense of IHL can be overcome, as States are in fact able to insert effective humanitarian carve-outs when giving effect to international sanctions regimes. There are cogent legal reasons to consider that States can introduce humanitarian exemptions when implementing international sanctions, as the latter's operation does not annihilate States' obligations under IHL.

Indeed, under Article 24 of the UN Charter, secondary UN law such as Security Council resolutions must be interpreted in line with the "Purposes and Principles" laid down in the Charter's Articles 1 and 2. In this regard, when discharging its duties regarding the maintenance of international peace and security (including through sanctions as foreseen by Article 41 of the Charter), the Security Council is expected to act in "conformity with international law" as required by the combined operation of Articles 1(1) and 24(2) of the Charter, and therefore to design sanctions in compliance with IHL. On this basis, there must be a presumption that the Security Council does not intend to impose any obligation on States to breach fundamental IHL rules when implementing UN sanctions regimes.¹³³ In light of the important role played by the UN in

130 See below.

131 See, for instance, Canada, Special Economic Measures (Burma) Regulations, SOR/2007-285, 13 December 2007, Section 18.

132 See the article by Kosuke Onishi in this issue of the *Review*.

133 For an approach using the same reasoning and requiring States to implement UN sanctions regimes in light of international law and indicating that States have some latitude to implement Security Council

promoting and calling for respect of IHL, very clear language would need to be used were the Security Council to intend States to take measures inconsistent with IHL when implementing UN sanctions. Therefore, if not clearly provided in a Security Council resolution under Chapter VII of the Charter, IHL cannot be derogated or suspended by the Security Council when establishing sanctions. Current Security Council resolutions establishing sanctions do not indicate any intention to impose obligations that would violate IHL rules governing humanitarian activities. Rather, violations of IHL rules concerning humanitarian access and activities are often the basis for the designation of an individual or entity under sanctions lists. It is therefore to be expected that Security Council resolutions establishing or renewing sanctions regimes be interpreted in harmony with IHL, as reflected recently in the resolutions renewing sanctions applicable to the DRC, CAR and Mali.

Similarly, EU autonomous “restrictive measures”, which are the equivalent at EU level of international sanctions, would also allow EU member States to provide humanitarian exemptions. Indeed, from an international law viewpoint, EU sanctions generally constitute countermeasures¹³⁴ even if regional organizations typically refrain from explicitly qualifying their sanctions as such. In order to be considered lawful under international law, countermeasures must satisfy certain conditions as highlighted by the International Law Commission (ILC) in its Draft Articles on Responsibility of States for Internationally Wrongful Acts and Draft Articles on the Responsibility of International Organizations.¹³⁵ Notably, countermeasures must not affect “obligations for the protection of human rights, ... obligations of a humanitarian character prohibiting reprisals and other obligations under peremptory norms of general international law”.¹³⁶ In addition, EU treaty law underlines the EU’s commitment to a “strict observance of international law” in its relations with the wider world,¹³⁷ and that “the Union’s action on the international scene shall be guided by ... respect for the principles of ... international law”.¹³⁸

resolutions, see European Court of Human Rights (ECtHR), *Nada v. Switzerland*, Appl. No. 10593/08, Judgment (Grand Chamber), 12 September 2012, paras 171, 175, 180. On the presumption that the Security Council does not intend to impose obligations on States to violate fundamental rights, see ECtHR, *Al-Jedda v. The United Kingdom*, Appl. No. 27021/08, Judgment (Grand Chamber), 7 July 2011, para. 102.

134 Tom Ruys, “Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework”, in Larissa J. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar, Northampton, MA, 2017; Denis Alland, “The Definition of Countermeasures”, in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, pp. 1134–1135; Federica Paddeu, “Countermeasures”, *Max Planck Encyclopedia of Public International Law*, September 2015.

135 See text and commentary to ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10, 2001 (Draft Articles on States), Arts 22, 49–54. Largely identical rules are set out in ILC, *Draft Articles on the Responsibility of International Organizations*, UN Doc. A/66/10, 2011 (Draft Articles on International Organizations), Arts 22, 51–57.

136 See Draft Articles on States, above note 135, Art. 50(1)(b–d); Draft Articles on International Organizations, above note 135, Art. 53(b–d).

137 Treaty on the European Union, *Official Journal of the European Union*, C 326/13, 26 October 2012, Art. 3 (5).

138 *Ibid.*, Art. 21.

Since EU restrictive measures are an essential tool in the EU's common foreign and security policy,¹³⁹ they must therefore comply with IHL as an integral part of the EU's obligations to comply with international law. In addition, the EU Council has affirmed on various occasions that EU restrictive measures must be designed in accordance with IHL.¹⁴⁰

Certain States, including Slovakia and Switzerland, have already taken action in this regard and have introduced in their domestic legislation a humanitarian exemption, including for international sanctions regimes not expressly foreseeing such caveats.¹⁴¹

The way forward: Inclusion of humanitarian exemptions based on IHL language

As noted above, sanctioning authorities often express the concern that carve-outs introduced into sanctions regimes, in the form of humanitarian exemptions, could be abused. They emphasize the uncertainty surrounding the notion of "humanitarian organization" as the reason for identifying which organizations may rely on such exemptions. In parallel, humanitarian actors have sometimes considered humanitarian exemptions with suspicion, arguing that they would not be necessary¹⁴² and could be used as a pretext to deny humanitarian action in situations where there were no exemptions, implying that exemptions would always be necessary for humanitarian organizations to operate in contexts subject to sanctions.¹⁴³

The call for a well-framed and standing exemption

To be effective and accepted, humanitarian exemptions must address these two opposing concerns. IHL can address these concerns and provides clear indicative criteria for determining the organizations and activities that qualify for the humanitarian exemptions introduced into sanctions regimes.

¹³⁹ *Ibid.*, Art. 29.

¹⁴⁰ See above.

¹⁴¹ See, for instance, Slovakia, Law No. 289, 2016, Section 13(1)(a), which excludes humanitarian aid from the scope of the legislation; Switzerland, Federal Act on the Implementation of International Sanctions, 2002, Art. 2(1); OFAC, above note 115; OFAC, General License No. 15, "Transactions Related to the Exportation or Reexportation of Agricultural Commodities, Medicine, Medical Devices, Replacement Parts and Components, or Software Updates in Afghanistan", 24 September 2021. Canada seems also to open the door to such an approach with the Special Economic Measures (South Sudan) Regulations, SOR/2014-235, 24 October 2014, Section 4, which excludes for the scope of financial restriction "any transaction to international organizations with diplomatic status, a United Nations agency, the International Red Cross and Red Crescent Movement, or Canadian non-governmental organizations that have entered into a grant or contribution agreement with the Department of Foreign Affairs, Trade and Development".

¹⁴² Insofar as sanctions regimes would already include built-in humanitarian exemptions, based on the fact that these regimes are established in compliance with international law, including IHL.

¹⁴³ Katie King, Naz K. Modirzadeh and Dustin A. Lewis, *Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action*, Working Group Briefing Memorandum, HLS PILAC, April 2016, pp. 9, 14.

On the basis of the IHL rules addressing humanitarian activities and actors in armed conflicts, one can see that “blanket” exemptions covering each and every – more or less – organized structure claiming a humanitarian status would be off the table. Instead, based on IHL-related language, a narrower approach in terms of the personal and material scope of application of the humanitarian exemption should be considered. This approach would allow CT and sanctions authorities to identify clearly appropriate beneficiaries of the exemption. Structures that do not comply with a principled humanitarian approach, or loose associations of individuals styling themselves as humanitarian organizations, would thus not be covered by such a humanitarian exemption.

Therefore, the inclusion of “well-framed and standing humanitarian exemptions” whose objective is to exclude from the scope of CT measures and sanctions regimes the exclusively humanitarian activities carried out by impartial humanitarian organizations in accordance with IHL is to be advocated.¹⁴⁴

What would make an exemption “well-framed and standing”?

The material scope of the humanitarian exemptions needs to accurately reflect the action protected under IHL. IHL regulates and protects “humanitarian activities” undertaken by “impartial humanitarian organizations” such as the ICRC.¹⁴⁵ This material scope is broader than that recently included in CT criminal legislation, which is often limited to “humanitarian assistance” or to “humanitarian aid”. These notions are generally not defined in these laws and appear to be too narrow in light of IHL.

What activities must the exemption protect?

When drafting the Geneva Conventions and their Additional Protocols, the High Contracting Parties deliberately did not specify which activities may qualify as humanitarian. This is due not only to the difficulty of anticipating the humanitarian needs that might arise as a result of a particular armed conflict, but also because the nature of armed conflict may change and so too may the humanitarian needs arising, and hence the activities that may be offered by impartial humanitarian organizations. However, an indication of what qualifies as “humanitarian” can be found in the definition of the Fundamental Principle of “humanity”. This is the first of the seven Fundamental Principles of the International Red Cross and Red Crescent Movement (the Movement) to which the ICRC belongs. From the definition, it can be inferred that humanitarian activities are all activities that “prevent and alleviate human suffering wherever it

¹⁴⁴ CTED, *The Interrelationship between Counter-Terrorism Frameworks and International Humanitarian Law*, January 2022, p. 34: “Tailored and well-defined exemptions can enhance the clarity and foreseeability of the domestic legal and policy framework. Such measures would also help address the shortcomings caused by de facto ‘don’t ask, don’t tell’ approaches and provide much-needed legal certainty for humanitarian actors and their operations.”

¹⁴⁵ 2016 Commentary on GC I, above note 69, common Art. 3, paras 807–821, and Art. 9, paras 1135–1147.

may be found” and the purpose of which is to “protect life and health and to ensure respect for the human being”.

Under IHL applicable to international armed conflict, common Article 9/9/9/10 allows the ICRC or another impartial humanitarian organization to offer to undertake “humanitarian activities” for the “protection” and “relief” of certain categories of persons affected by armed conflict. In terms of terminology, it has become accepted that “humanitarian relief” is synonymous with “humanitarian assistance” and “humanitarian aid”.

Common Article 3, applicable in NIACs, states concisely that an impartial humanitarian body may offer “its services”. The notion of “services” is not defined in common Article 3, but the humanitarian needs engendered by an armed conflict are likely to be very much the same regardless of the conflict’s legal qualification. Thus, absent any indication to the contrary, the term “services” in common Article 3 should be interpreted broadly, encompassing all types of humanitarian activities required to meet the needs of all persons affected by the armed conflict.

Therefore, while IHL does not specifically define the notion of “humanitarian activities”, these should be interpreted as an umbrella notion encompassing both an assistance and a protection dimension. This has been made clear notably by Article 81 of Additional Protocol I, which requires the parties to an armed conflict to “grant all facilities to the ICRC to carry out its humanitarian functions in order to ensure protection and assistance to victims of armed conflict”.

Concerning *protection activities*, IHL does not provide specific guidance on which activities impartial humanitarian organizations may deploy to ensure that the parties to an armed conflict “protect” people by complying with the applicable legal framework. For the ICRC and the Inter-Agency Standing Committee, the concept of “protection” encompasses all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law, including IHL, international human rights and refugee law. Accordingly, in the context of IHL, “protection activities” refer to all activities that seek to ensure that the authorities and other relevant actors fulfil their obligations to uphold the rights of individuals.

In this regard, the notion of “protection activities” includes activities which seek to put an end to or prevent the (re)occurrence of violations of IHL (for example, by making representations to the authorities, or by making the law better known through dissemination of IHL to all the parties to the armed conflict) and activities which seek to ensure that the authorities cease or put a stop to any violations of the norms applicable to them.

Concerning *assistance/relief activities*, the term refers to all activities and services which seek to ensure that persons caught up in an armed conflict can survive and live in dignity, including the delivery of goods to that end. Such activities are carried out primarily in the fields of health care, water, habitat (i.e., all that relates to the creation of a sustainable living environment) and economic security (defined by the ICRC as “the condition of an individual, household or community that is able to cover its essential needs and unavoidable expenditures in a sustainable manner, according to its cultural standards”).

In practice, the type of relief activities will differ depending on who the beneficiaries are and the nature of their needs. Relief activities for persons wounded on the battlefield, for example, will not be the same as those undertaken for persons deprived of their liberty, and will also differ from those delivered in favour of the civilian population. It is one of the core principles of IHL that whatever the relief activity for persons not or no longer taking a direct part in hostilities, such activities should never be considered as being of a nature to reinforce the enemy's military capabilities – for example, the provision of medical aid to wounded fighters.

Thus, to fully comply with IHL, States must ensure that all their domestic CT measures and sanctions regimes are designed and interpreted in a way which does not restrict, impede, delay or criminalize the delivery of humanitarian activities as foreseen under IHL. Humanitarian exemptions should be formulated in a way that encompasses all activities of protection and assistance, and interpreted as such, even when the language only refers to the provision of humanitarian aid or humanitarian relief.

Lastly, the adverb “exclusively” indicates that the only objective pursued by the beneficiary of the exemption must be humanitarian in nature. If the presence and operations of the organization in question are motivated by other objectives, irrespective of their nature (for instance political, financial, military and *a fortiori* criminal), they would not be covered by the humanitarian exemption suggested.

What actors must the exemption protect?

For the purposes of the proposed humanitarian exemption, the aforementioned activities must also be carried out by an “impartial humanitarian organization”. To qualify as such, three conditions must be fulfilled.

First, the aim pursued by the organization eligible for the humanitarian exemption must be humanitarian. Even if self-explanatory, this indicates that the organization must follow exclusively humanitarian objectives and must act for the survival, well-being and dignity of all those affected by armed conflict.

Second, IHL, in particular the Geneva Conventions, requires a humanitarian organization wishing to operate in armed conflict to be “impartial”. Impartiality¹⁴⁶ refers to the attitude to be adopted vis-à-vis the persons affected by the armed conflict when planning and implementing the proposed humanitarian activities. As one of the Movement's Fundamental Principles, impartiality is the requirement not to make any “discrimination as to nationality,

¹⁴⁶ The concept of impartiality is distinct from neutrality. Even though, in reality, neutrality is often essential as an attitude in order to be able to work impartially, IHL does not require organizations wishing to qualify on the basis of this provision to be “neutral”. In other words, neutrality is not a legal precondition to qualify as an impartial humanitarian organization under IHL. In the context of humanitarian activities, “neutrality” refers to the attitude to be adopted towards the parties to the armed conflict. Neutrality is also one of the Movement's Fundamental Principles, described as follows: “In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.”

race, religious beliefs, class or political opinions” or any other similar criteria. Further, the principle of impartiality, which has been endorsed by the International Court of Justice,¹⁴⁷ requires the components of the Movement to “endeavor to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress”.¹⁴⁸ As a matter of good practice, this definition is followed not only by the components of the Movement but also by actors outside the Movement.

For an organization to qualify as an “impartial humanitarian body”, it does not suffice for it to claim unilaterally that it qualifies as such: it needs to operate impartially at all times. In operational reality, it matters that the authorities to whom an offer of services is made perceive the organization to be both impartial and humanitarian in nature, and that they trust that the organization will behave accordingly.

The principle of impartiality applies to any humanitarian activity: only the needs of the persons affected by the conflict may inspire the proposals, priorities and decisions of humanitarian organizations when determining which activities to undertake and where and how to implement them (for example, who receives medical assistance first).

It should be noted that while humanitarian activities may also be performed by actors that do not qualify as impartial humanitarian organizations, and such activities may alleviate human suffering, they would nevertheless not be covered by the humanitarian exemption suggested.

Furthermore, the beneficiary of the humanitarian exemption must be an impartial humanitarian “organization” as required by IHL. Thus, a loose association of individuals, while their activities may alleviate human suffering, would not qualify on the basis of this provision, nor would a private person wishing to engage in charitable activities. A minimum structure is required for the “body” to be able to function as a humanitarian organization. In addition, at all times the organization ought to be capable of complying with professional standards for humanitarian activities.¹⁴⁹ Otherwise, in practice there is a risk that the authorities to whom the offer of services is made may doubt the impartial and humanitarian nature of the organization.

147 International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 1986, para. 242.

148 See also Sphere Project, *Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response*, 3rd ed., 2011, p. 22, which states that humanitarian assistance “must be provided according to the principle of impartiality, which requires that it be provided solely on the basis of need and in proportion to need. This reflects the wider principle of non-discrimination: that no one should be discriminated against on any grounds of status, including age, gender, race, colour, ethnicity, sexual orientation, language, religion, disability, health status, political or other opinion, [or] national or social origin.”

149 See for instance, ICRC, *Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence*, 2nd ed., Geneva, 2013. These standards, adopted through an ICRC-led consultation process, reflect shared thinking and common agreement among humanitarian and human rights agencies (UN agencies, components of the Movement, and non-governmental organizations).

Finally, in order to enable impartial humanitarian organizations to deliver their activities in the most effective way without being concerned with interference by sanctions and CT measures, the humanitarian exemption should be designed to apply for a long time. Impartial humanitarian organizations need to operate in a stable and predictable legal environment. In this regard, in order to fulfil their function, humanitarian exemptions must be standing. This is a prerequisite in order to eradicate legal risks emanating from CT and sanctions legal frameworks. The durability of humanitarian exemptions guarantees legal security for impartial humanitarian organizations.

Interim mitigating approaches

While humanitarian exemptions represent the best tool for effectively protecting principled humanitarian action, humanitarian actors remain conscious of the fact that the inclusion of humanitarian exemptions across sanctions regimes will take time and concerted action/engagement. In the meantime, and with a view to ensuring protection for impartial humanitarian organizations, interim mitigating approaches could be considered by sanctioning authorities (even if they would never fulfil the function of effective humanitarian exemptions).

For instance, sanctioning authorities could consider the exclusion of liability for staff of impartial humanitarian organizations undertaking exclusively humanitarian activities in accordance with IHL. Alternatively, sanctions stakeholders could renounce or not prioritize enforcement against actions undertaken in the course of humanitarian activities by impartial humanitarian organizations which could otherwise be considered a violation of sanctions regimes.

Further, sanctioning authorities could draft clear guidance or interpretive guidance clarifying certain elements of the prohibitions established under sanctions regimes. They could, in particular, put forward an interpretation of the prohibition against making funds and economic resources available to listed individuals or entities that is in line with IHL and protective of impartial humanitarian organizations, and affirm that the diversion of humanitarian assistance is not an indirect provision of funds and economic resources to listed persons or entities in the context of sanctions regulations.

Sanctioning authorities could also underline in guidance documents that sanctions regimes must not impede exclusively humanitarian activities that are carried out by impartial humanitarian organizations in accordance with IHL, or indicate that sanctions are not intended to have adverse humanitarian consequences for the civilian population. Such guidance could also emphasize that for the purpose of carrying out humanitarian activities, the provision of funds, financial assets or economic resources to non-listed individuals or entities, such as line ministries, that act on behalf of, at the direction of or under the command or control of a listed individual or entity does not constitute prohibited activity under sanctions regimes.

Conclusion

The importance of upholding IHL and finding the balance between CT, sanctions and preserving principled humanitarian action cannot be overstated. What is at stake is the integrity of IHL and the interpretation and application of its most fundamental rules. Also at stake is the ability of humanitarian organizations to cross front lines and to carry out their activities in areas controlled by armed groups and individuals designated as terrorist. The ability of humanitarian actors to carry out their mandate is increasingly being hampered, and as a consequence, people suffer at the very moment when IHL should protect them. As this piece has tried to demonstrate, balanced solutions addressing the objectives of both sets of actors can be found. Humanitarian organizations and States/international organizations are currently experiencing a positive momentum and must seize this occasion to establish appropriate arrangements to ensure that effective humanitarian safeguards are lastingly introduced in CT and sanctions frameworks. We know it can be done, and we know it must be done.

From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law

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Abstract

This article clarifies the ongoing confusion in doctrine and practice about both the actual and optimal interaction between international counterterrorism law (CTL) and international humanitarian law (IHL) in armed conflict. It discusses the advantages and disadvantages of the co-application of CTL with IHL, before considering a variety of techniques for mutually accommodating the interests of both regimes, particularly through partial exclusion clauses in counterterrorism instruments or laws. It concludes by identifying the optimal approach to the relationship between CTL and IHL, which recognizes the legitimate interests of both fields of law while minimizing the adverse impacts of each on the other.

Keywords: international humanitarian law, counterterrorism law, *lex specialis*, armed forces, UN Security Council, humanitarian relief, medical activities, exclusion clauses.

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Introduction

International counterterrorism law (CTL) frequently applies to conduct in armed conflict regulated by international humanitarian law (IHL). Depending on one's perspective, this brings advantages or disadvantages. On the one hand, CTL can play a valuable role in complementing IHL in the suppression of undesirable violence, while avoiding the political difficulties of amending IHL itself. On the other hand, the co-application of CTL has the potential to conflict with long-standing and sometimes sensitive IHL rules or undermine IHL policy interests.

Neither CTL nor IHL purports to be *lex specialis* or self-contained at the *regime level* so as to wholly exclude the other; CTL applies in armed conflict just as do international human rights law, international criminal law, international environmental law and so on. Nor does CTL clearly, explicitly and uniformly spell out the legal relationships where specific rules of the two branches interact. Rather, some international counter-terrorism conventions (ICTCs)¹ since 1963 exclude certain conduct, actors or targets in armed conflict from their scope, while otherwise co-applying with IHL. Other ICTCs are silent on the relationship but raise potential conflicts with IHL. So too does decentralized national implementation of binding United Nations (UN) Security Council counterterrorism resolutions since 2001, some of which vaguely affirm that national CTL measures must comply with IHL but do not identify all specific relevant IHL rules which must be respected.

This article aims to clarify the conceptual, policy and interpretive debates² about the interaction of CTL and IHL. It considers firstly the potential advantages of co-applying CTL, and secondly the key disadvantages of CTL intruding on IHL's domain. Whether the interests of each regime can be adequately accommodated through co-application largely depends on the scope of particular CTL and IHL rules, including the existence and extent of any CTL provisions deferring to IHL. The subsequent part of the article accordingly explores how IHL is diversely addressed in the ICTCs (from implicit and explicit partial exclusions to silence). This is followed by consideration of the Security Council's limited, albeit growing, attention to IHL, and the potentially adverse impacts on IHL of national implementation of CTL measures.

The issues discussed in this article are pressing not only because the UN General Assembly's Draft Convention for the Prevention and Suppression of International Terrorism (Draft UN Convention), formally under negotiation since 1999, is still struggling to demarcate its approach to IHL, but also because (by

1 For a full list, see: www.un.org/counterterrorism/international-legal-instruments (all internet references were accessed in August 2021).

2 See, for example, Daniel O'Donnell, "International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces", *International Review of the Red Cross*, Vol. 88, No. 864, 2006; Alejandro Sanchez Frias, "Bringing Terrorists to Justice in the Context of Armed Conflict: Interaction between International Humanitarian Law and the UN Conventions against Terrorism", *Israel Law Review*, Vol. 53, No. 1, 2020; Ben Saul, "Terrorism, Counter-Terrorism, and International Humanitarian Law", in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford and New York, 2020, p. 403; Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism*, Hart, Oxford, 2011.

virtue of Security Council CTL obligations) all States are already required to suppress terrorist acts—in the absence of a universal definition of them or any agreed approach to their interaction with IHL. Even if a State is not involved in armed conflict (as most States are not), it must still cooperate in the prevention and suppression of terrorism affecting another State. States can thus be required to assist foreign States in suppressing non-State organized armed groups (OAGs) in non-international armed conflict (NIAC), including by criminalizing insurgent fighting in foreign civil wars and removing the “political offence exception” to extradition. CTL and IHL may co-apply in many contemporary conflicts, including Afghanistan, Colombia, Iraq, Mali, Nigeria, Palestine, Somalia, Syria and Yemen,³ as well as in relation to “foreign fighters” from other States. These developments have not only produced legal incoherence—due to the divergence in national approaches—but also discourage compliance with IHL by OAGs, undermine prospects for peace and reconciliation, and may displace accountability for war crimes—and justice for victims—through an emphasis on prosecuting less grave national terrorism offences.

The article concludes by proposing the optimal approach to the CTL–IHL interface, reconciling IHL and counterterrorism imperatives as far as possible and minimizing one field playing “trumps” at the expense of the other. It makes two concrete suggestions. Firstly, the Draft UN Convention, Security Council resolutions, and regional and national laws should exempt from CTL all activities of armed forces during armed conflict which are not unlawful under IHL, following the “best practice” approach in Canadian and New Zealand law. Secondly, the Security Council should require all of its CTL measures to be implemented in conformity with relevant, specific IHL rules, including on medical and humanitarian activities.

Advantages of co-application

It is well known that much terrorist conduct—namely, violence against civilians designed to intimidate a population or compel a government⁴—is already addressed by IHL. This foremost includes the numerous IHL rules (some of which entail criminal responsibility) prohibiting deliberate, indiscriminate or disproportionate attacks on civilians and civilian objects (including medical and humanitarian relief personnel, transports and objects, as well as cultural property and religious places), hostage-taking, perfidy, the use of certain weapons, and reprisals against civilians. In addition, there are specific IHL prohibitions on terrorism (and the related war crime of intending to spread terror amongst civilians). An overarching policy question is whether these are enough to

3 Dustin A. Lewis, “‘Criminalization’ of Humanitarian Action under Counterterrorism Frameworks: Key Elements and Concerns”, *Proceedings of the ASIL Annual Meeting*, Vol. 112, 2018, p. 269.

4 See, for example, International Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 107, 9 December 1999 (entered into force 10 April 2002) (Terrorist Financing Convention), Art. 2(1)(b).

suppress terrorist-type violence in armed conflict, or whether CTL adds different and valuable tools. A number of potential contributions of CTL may be identified from a counterterrorism standpoint.⁵

First, CTL substantively criminalizes certain undesirable conduct which is not prohibited by IHL. Numerous examples may briefly be given, though most are highly specialized and are not common in armed conflicts. For example, IHL does not address the nuclear material offences of embezzling or fraudulently obtaining nuclear material, demanding nuclear material by force or intimidation, unlawfully dealing with nuclear material, or nuclear smuggling;⁶ nor does it address the nuclear terrorism offences of unlawful possession of radioactive material, or making a radioactive device, with intent to harm.⁷ Further, there are no comparable IHL prohibitions or war crimes in relation to various aviation and maritime safety offences, such as communicating false information and thereby endangering aircraft safety,⁸ or unlawfully transporting explosives or biological, chemical or nuclear weapons⁹ (although weapons treaties more narrowly prohibit and criminalize the “transfer” of some of these weapons¹⁰).

As regards more general terrorism offences, the Draft UN Convention would criminalize attacks on communication systems which are likely to result in major economic loss, but under IHL, if civilian data is not an “object” which can be kinetically “attacked”,¹¹ IHL does not prohibit attacks upon it, let alone criminalize them. More controversially, national CTL offences may criminalize civilian direct participation in hostilities (DPH) (whether by members of OAGs performing a continuous combat function (CCF), or more sporadic participation), for instance by resort to offences such as membership of a terrorist organization or foreign fighter offences. In international armed conflict (IAC), such persons are simply not entitled to the combatant’s immunity from national criminal prosecution for hostile acts that are in conformity with IHL. Further, in

5 See also Fionnuala Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/75/337, 3 September 2020, para. 22 (accepting the author’s submissions on some of the following points).

6 Convention on the Physical Protection of Nuclear Material, 1456 UNTS 101, 3 March 1980 (entered into force 8 February 1987) as amended by the Amendment to the Convention on the Physical Protection of Nuclear Material 1980, 8 July 2005 (entered into force 8 May 2016) (Amended Nuclear Material Convention), Art. 7(1).

7 International Convention for the Suppression of Acts of Nuclear Terrorism, 2445 UNTS 89, 13 April 2005 (entered into force 7 July 2007) (Nuclear Terrorism Convention), Art. 2(1).

8 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 UNTS 178, 23 September 1971 (entered into force 26 January 1973) (Montreal Convention), Art. 1(e).

9 Convention on the Suppression of Unlawful Acts relating to International Civil Aviation, 10 September 2010 (entered into force 1 July 2018) (Beijing Convention), Art. 1(1)(i).

10 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1015 UNTS 163, 10 April 1972 (entered into force 26 March 1975), Art. 3 (prohibition only); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1975 UNTS 45, 3 September 1992 (entered into force 29 April 1997), Arts 1(a), 7(1)(a), 7(1)(c); Treaty on the Prohibition of Nuclear Weapons, UN Reg. No. 56487, 7 July 2017 (entered into force 22 January 2022), Art. 1(b)–(c), 5(2).

11 See, for example, Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., Cambridge University Press, Cambridge, 2017, Rules 92, 100.

both IAC and NIAC such persons may be targeted for the duration of their participation, detained on security grounds, and prosecuted for any national offences (including terrorism) as well as for any consequential harm constituting war crimes (such as perfidy or physical injury).

Secondly, CTL may criminalize conduct which is prohibited under IHL but not a war crime. For example, a failure to take adequate precautions in targeting is not a war crime in any conflict, whereas national terrorism offences may make it an offence to recklessly endanger life or the public, thus enhancing civilian protection. In NIAC—at least under the Rome Statute of the International Criminal Court (ICC)—there is also no crime of launching an attack on civilian objects (as opposed to persons), an indiscriminate attack, an attack which would cause disproportionate civilian casualties, illegal detention, or using human shields. CTL may criminalize these. CTL may also criminalize attacks on the environment,¹² whereas IHL only does so in IAC and then only under the Rome Statute and if very high thresholds are met.¹³ Even where such conduct already constitutes ordinary national crimes, CTL liability can enable wider international cooperation and bring additional investigative tools.

Thirdly, where CTL and war crimes apply to the same conduct, elements of CTL offences may be more specific. Examples include the CTL offences of aircraft hijacking¹⁴ and emplacing a bomb on an aircraft,¹⁵ compared with the more general IHL rules against attacking or attempting to attack a civilian object or hostage-taking. CTL can thus expand the armoury of charges available and more accurately reflect what is precisely wrongful about an act.

Fourthly, CTL often criminalizes early preparatory conduct which is not covered by war crimes or IHL prohibitions. On the one hand, the extended modes of criminal responsibility under the ICTCs¹⁶ and IHL¹⁷ are not dissimilar. But in implementing UN Security Council Resolution 1373, many States have

12 Organization of African Unity Convention on the Prevention and Combating of Terrorism, 2219 UNTS 179, 1 July 1999 (entered into force 6 December 2002) (OAU Convention), Art. 1(3)(a).

13 Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 8(2)(b)(iv) (“widespread, long-term, and severe damage to the natural environment which would be clearly excessive” to the military advantage anticipated, reflecting the test in Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 35(3)). Attacks on the environment are not crimes under the four 1949 Geneva Conventions, AP I, Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), or the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151, 10 December 1976 (entered into force 5 October 1978).

14 Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105, 16 December 1970 (entered into force 14 October 1971) (Hague Convention), Art. 1(a).

15 Montreal Convention, Art. 1(c).

16 The latest ICTCs require States to criminalize commission, attempt, complicity, conspiracy, and organizing or directing; a few also address threats and concealment.

17 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 195 (commission, attempt, assistance, facilitating, aiding or abetting, and planning or instigating), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

enacted more precautionary offences which criminalize preparatory conduct well before criminal intent has crystallized into an attempt, or conduct where a person acts alone and there is thus no (group) conspiracy prior to the attempt. Such offences include the mere possession of a weapon, explosive, vehicle, document or object which could be used in a future attack, before any overt act is initiated. They also include offences of providing or receiving terrorist training (for instance, on weapons, tactics or targets) and inciting, advocating, praising or glorifying terrorism (including to radicalize or recruit others). There are also numerous offences relating to various forms of support to terrorist organizations, such as acts of finance, recruitment, membership, association, support or training.

In contrast, IHL does not prohibit groups from, or criminalize their members for, direct or indirect participation in hostilities, but focuses on unlawfully harmful conduct (such as wilful killing or perfidy). It also limits modes of liability to more traditional ones whereby an act must bear a more proximate relationship to the eventual commission of a crime in order to attract criminal liability. For instance, whereas financing a specific attack on civilians could constitute the *accessorial* offence of aiding and abetting a war crime, the stand-alone, *principal* CTL offence of giving funds to a person involved in terrorism or a terrorist organization – for purposes other than a contemplated terrorist act – would not constitute complicity in a war crime.

Even where a terrorist act is also a war crime, prosecution for a terrorism offence may be tactically easier and more fruitful for law enforcement, particularly for group-based offences with low bars of membership, association, or indirect or peripheral support for the group, proved by self-incriminating social media records. It may avoid the technical complexities, security challenges and resource burdens (particularly in weak, fragile or developing States affected by conflict) of forensically collecting battlefield evidence of war crimes in remote, dangerous conflict zones, while still achieving the criminological goal of incapacitating the offender through equally lengthy (if not lengthier) terms of imprisonment for terrorism offences. In Europe and the United States, for example, most prosecutions of returning “terrorist fighters”, or foreign immigrant fighters, from Syria and Iraq have involved either terrorist or ordinary criminal offences, not international crimes.¹⁸ As discussed below, however, some support or organization-based offences may conflict with IHL guarantees for medical and humanitarian personnel and their activities, while some have also raised international human rights law issues, such as by infringing on the principle of legality.¹⁹

18 See, for example, Beth Van Schaack, *Imagining Justice for Syria*, Oxford University Press, Oxford, 2019, Ch. 7; Emma Broches and Julia Solomon-Strauss, “International Terrorism Prosecutions during Winter 2019”, *Lawfare*, 21 March 2019.

19 UN Counter-Terrorism Implementation Task Force (Working Group on Protecting Human Rights while Countering Terrorism), *Basic Human Rights Reference Guide: Conformity of National Counter-Terrorism Legislation with International Human Rights Law*, October 2014, Principles and Guidelines 3 and paras 39–44.

Fifthly, CTL imposes distinctive obligations on States concerning jurisdiction and cooperation. On the one hand, all war crimes (in IAC or NIAC) are subject to a *right* of universal jurisdiction under customary IHL, and an implied *duty* under the Geneva Conventions of 1949 to establish such jurisdiction over “grave breaches” in IAC²⁰ (but there is no treaty or customary law duty to establish universal jurisdiction over war crimes in NIAC). The jurisdictional picture is similarly both fragmented yet fairly extensive for terrorism offences. The ICTCs specify various grounds of jurisdiction (such as territoriality and nationality) but also residually require a State to establish quasi-universal jurisdiction where a (non-national) suspect who has committed an offence abroad is present in the State’s territory.²¹ Such jurisdiction is more limited than under the Geneva Conventions, which do not require the presence of an offender,²² but more expansive in that jurisdiction *must* be established over offences, including in NIAC (unlike in IHL, which confers a customary right but imposes no duty).

Some specific CTL offences under Security Council resolutions are, however, subject only to territoriality or nationality jurisdiction (as for certain financing and foreign terrorist fighter offences,²³ and this also implicitly the position for more extensive suite of general CTL offences in paragraph 2(e) of Resolution 1373.²⁴ In practice, jurisdictional grounds in disparate national laws are often limited rather than asserting universal jurisdiction, thereby reducing the potential for accountability (although national war crimes jurisdiction can be similarly limited in practice).

Another difference between IHL and CTL concerns the exercise of jurisdiction and cooperation. Only “grave breaches” in IAC are subject to a treaty duty to investigate offences, “extradite or prosecute” and provide mutual legal assistance, but not other violations of the laws and customs of war (in IAC or NIAC) or violations of Article 3 common to the Geneva Conventions in NIAC. In contrast, States must extradite or prosecute, and provide mutual assistance, in relation to all ICTC offences, as well as in relation to all terrorist acts (including preparatory offences) under Resolution 1373.²⁵ Such obligations of transnational cooperation are essential to combating impunity where fugitives cross borders.

20 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), Art. 49, para. 2846.

21 See, for example, International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256, 15 December 1997 (entered into force 23 May 2001) (Terrorist Bombings Convention), Art. 6(4).

22 ICRC Commentary on GC I, above note 20, Art. 49, para. 2866.

23 See, for example, UNSC Res. 1373, 28 September 2001, paras 1(b), 1(d) (financing); UNSC Res. 2178, 24 September 2014, paras 6(a)–(c) (foreign terrorist fighters). See also David McKeever, “International Humanitarian Law and Counter-terrorism: Fundamental Values, Conflicting Obligations”, *International and Comparative Law Quarterly*, Vol. 69, No. 1, 2020, p. 51.

24 Counter-Terrorism Executive Directorate (CTED), *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions*, 2019, para. 274 (jurisdiction based on nationality and territoriality, and quasi-universal custody-based jurisdiction only if the act is an ICTC offence; para. 2(e) itself is silent on jurisdiction but requires States to “bring to justice” all offenders, which in turn requires the State to “prosecute or extradite”: UNSC Res. 1456, 20 January 2003, para. 3; UNSC Res. 1566, 8 October 2004, para. 2).

25 See above note 24 on para. 2(e).

However, there is arguably a customary IHL duty to investigate, “prosecute or extradite”, and cooperate (including mutual assistance in investigations, arrests and prosecutions, and through extradition).²⁶

Sixthly, CTL imposes its own specific duties to prevent offences which differ from those in IHL, although IHL contains its own preventive measures covering some of the same ground. Under the ICTCs, States must take all practicable measures to prevent, and counter preparations in their territories for, the commission of offences within or outside their territories, including “measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of” offences.²⁷ In addition, States must cooperate by exchanging information and coordinating administrative and other measures to prevent offences,²⁸ including those prepared abroad and directed against other States. Detailed preventive obligations are also set out in Resolution 1373²⁹ and in other resolutions on preventing related threats such as foreign fighters. A national and inter-State machinery of prevention is thus in motion to address terrorist offences.

IHL’s measures of prevention are both narrower and more comprehensive than CTL’s. Many are limited to a party’s own conduct (unlike CTL), for instance through measures to execute obligations; orders and instructions; repression of breaches; command responsibility; commanders’ duties; dissemination; and legal advisers.³⁰ More generally, the national criminalization of war crimes—like terrorist offences—aims to deter and thus prevent crimes by any person. The obligation in Article 1 common to the Geneva Conventions to “ensure respect” for IHL requires a duty not only to stop violations but also “to prevent violations where there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred”.³¹ It applies not only to a party’s own forces but also to populations under its control;³² in this respect it covers similar ground to the CTL measures targeting terrorist preparations in the State’s territory. Common Article 1 arguably also extends to the ensuring of respect by other parties to a conflict,³³ in which case it partly coincides with the CTL duty to exchange information and coordinate measures where, for instance, a State suspects that a crime is being prepared abroad against another State.

Seventhly, CTL may entail stronger or special investigative or other law enforcement powers compared with IHL. The presumed extraordinary menace of terrorism is frequently invoked to justify exceptional powers for police and intelligence agencies in relation to surveillance; stop, search and seizure;

26 ICRC Customary Law Study, above note 17, Rules 158, 161.

27 See, for example, Terrorist Bombings Convention, Art. 15(a); Terrorist Financing Convention, Art. 18(1).

28 See, for example, Terrorist Financing Convention, Art. 18(3).

29 UNSC Res. 1373, 28 September 2001, paras 2(a) (refrain from supporting terrorism), 2(b) (prevent terrorist acts), 2(c) (deny safe haven), 2(d) (prevent use of territory for terrorism), 2(g) (prevent movement of terrorists).

30 See, for example, AP I, Arts 80, 82, 83, 86, 87.

31 ICRC Commentary on GC I, above note 20, Art. 1, para. 164.

32 *Ibid.*, paras 130–152.

33 *Ibid.*, para. 153.

preventive freezing and confiscation of assets; lesser judicial controls (such as warrants); extended periods of pre-charge detention; modifications to bail procedures; preventive security detention; restrictive “control orders”; or lower standards of proof. At trial, suspects may face modified procedures to accommodate security concerns, such as closure of courts or limited disclosure of classified information. Upon conviction, terrorists may receive unusually lengthy sentences of imprisonment due to sentencing policies. All of this may make CTL more attractive than IHL as a way of dealing with offenders, assuming such laws and procedures are consistent with human rights law. Violations of human rights may undermine accountability for terrorism if, for example, evidence is tainted or trials are unfair.

Finally, there may be an important expressive dimension to labelling conduct as terrorist rather than as a (mere) IHL violation or even a war crime. The term “terrorism” has a powerful stigmatizing and denunciatory effect of its own. It conjures up a particular kind of grave criminality – not necessarily worse than a war crime, but reflecting different injured interests that justify distinctive suppression. The UN General Assembly and Security Council have routinely condemned terrorism as a threat to international security, human rights and stable governance³⁴ (interests which war crimes can also threaten). They have frequently condemned terrorist acts by OAGs in armed conflict (whether in NIAC or IAC involving occupation), for example in Afghanistan, Iraq, Syria, Nigeria, Mali, Yemen and Israel/Palestine. They have sometimes called for the prosecution of those involved in terrorist acts in conflicts,³⁵ albeit without indicating which acts should be prosecuted specifically as terrorism, international crimes or ordinary crimes. While States are not required (either by most of the ICTCs or by Security Council resolutions) to explicitly qualify terrorist acts as specifically terrorist offences in national law³⁶ (the same is strictly true of war crimes under IHL³⁷), this is the predominant approach.

Separately, one pragmatic reason for pursuing terrorism charges is that some States simply lack relevant war crimes legislation. In Syria, for example, there is no such law applicable to NIACs;³⁸ Afghanistan only implemented international crimes into domestic law in 2018;³⁹ and proposed international crimes laws in Iraq (including the Kurdistan Region) and Nigeria are yet to be adopted (as of mid-2021). In these States, terrorism prosecutions have

34 See Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006, Ch. 2.

35 Especially in relation to “foreign terrorist fighters”: see UNSC Res. 2178, 24 September 2014, para. 4; UNSC Res. 2396, 21 December 2017, paras 19 (“Reaffirms that those responsible for committing or otherwise responsible for terrorist acts, and violations of international humanitarian law or violations or abuses of human rights in this context, must be held accountable”), 29–41.

36 D. McKeever, above note 23, p. 51.

37 ICRC Commentary on GC I, above note 20, Art. 49, paras 2847–2851 (discussing options for criminalizing grave breaches, from the use of ordinary offences to specific war crimes laws).

38 War crimes are not recognized under either the Syrian Penal Code, Legislative Decree No. 148, 22 June 1949; or the Military Penal Code, Legislative Decree No. 61, 27 February 1950.

39 Afghanistan Penal Code 2017, Official Gazette No. 1260, 15 May 2017 (entered into force 14 February 2018).

predominated by default (including prosecutions by some OAGs⁴⁰). Other States, meanwhile, lack both CTL and war crimes offences. Somalia has relied on military law offences and courts (as well as detention, disarmament, demobilization and reintegration) to deal with Al-Shabaab;⁴¹ a CTL bill endorsed by the cabinet in 2013 is yet to be passed, after its sponsor was killed in the conflict, and there is no bill at all on international crimes.

Disadvantages of co-application

What are the disadvantages of the co-application of CTL? There are legal and policy considerations. Firstly, where CTL and war crimes prohibit the same conduct, CTL may seem unobjectionable because it simply reinforces IHL, as where both criminalize attacks on civilians. Even in this best case, however, war crimes may be a preferable paradigm precisely because they are crimes under customary international law. They are universally and well defined,⁴² and much longer and more firmly established, than newer, more divergent national terrorism offences (particularly those arising from Security Council standards which do not define terrorist acts, and which often raise human rights concerns). Labelling conduct as a war crime has a unique denunciatory power of its own – it is more universal and less political than terrorism, and widely understood as entailing the gravest international criminality. Certainly where a war crime has an element additional to a terrorist offence, and there is sufficient evidence to prosecute, it should be prosecuted as a war crime in order to recognize the full nature and scope of the criminality involved and to do justice to victims of international crimes.⁴³ Where the elements of crimes differ, attention should be given to cumulative charging.

Further, war crimes attract universal jurisdiction, unlike the possibly more limited extraterritorial ambit of some States' terrorism offences implementing Security Council resolutions (in contrast to ICTC offences, which require quasi-universal jurisdiction). There are long-established modalities of cooperation (such as extradition and mutual assistance) between many States in relation to war crimes. There is also a rich body of international jurisprudence on war crimes,⁴⁴ unlike the much more jurisdiction-specific case law and parochial national and regional practices on terrorism. Unlike terrorism, allegations of war crimes also potentially engage international jurisdiction (of the ICC),⁴⁵ special IHL

40 Anti-Terrorism Act, Legislative Council Decree No. 20, 27 September 2014, under the Charter of the Social Contract, 29 January 2019 (the interim constitution of the then Democratic Autonomous Regions of Afrin, Jazira and Kobane).

41 See, for example, Bahame Tom Nyanduga, *Report of the Independent Expert on the Situation of Human Rights in Somalia*, UN Doc. A/HRC/30/57, 29 September 2015, paras 28–32.

42 D. McKeever, above note 23, p. 51.

43 See also F. Ní Aoláin, above note 5, para. 21. On cumulative charging, see Genocide Network, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-related Offences*, May 2020.

44 See also D. McKeever, above note 23, p. 51.

45 *Ibid.*

mechanisms (such as the International Fact-Finding Commission) and international human rights mechanisms (such as commissions of inquiry) with a mandate to investigate IHL or international criminal law violations (but not normally “terrorism” offences).

Secondly, IHL was developed as a (largely) self-contained regime based on the best attainable (albeit not necessarily the best) compromises between military necessity and humanitarian protection. Interposing extraneous bodies of law, without due regard for the carefully negotiated balancing within IHL, has the potential to undermine the essential interests of the belligerents and thus compliance with IHL (including protection of civilians and fighters alike).

For example, CTL would directly collide with IHL if it criminalized lawful attacks by State forces in IAC, overriding combatant immunity. Likewise, there would be a conflict if CTL offences such as terrorist financing or providing “support” criminalized or impeded the impartial provision of medical or humanitarian relief.⁴⁶ If CTL offences *prime facie* apply to such conduct, some means is needed to resolve the conflict, whether through (1) harmonious interpretation of the two rules, (2) regarding one rule as *lex specialis* to “trump” the other, (3) incorporating an exception into the CTL norm, or (4) relying on informal means such as prosecutorial discretion (an undesirable option⁴⁷). These techniques are considered below.

Indirect or implicit conflicts are more difficult: to use earlier examples, do CTL offences interfere in IHL if IHL deliberately chooses – for reasons of military exigency or otherwise – not to criminalize attacks on the environment, or a failure to take precautions, in IAC; or to prohibit, but not criminalize, indiscriminate or disproportionate attacks in NIAC; or not to prohibit or criminalize direct participation in hostilities in NIAC? Such acts may be criminal under CTL in NIAC, or even in IAC to the extent that combatant immunity only covers acts that are lawful under IHL, not war crimes or other violations of IHL prohibitions⁴⁸ (such as the failure to take precautions, or attacking the environment).

Thirdly then, even where there is no direct, formal legal conflict between CTL and IHL rules, CTL measures may undermine policy interests inherent in IHL. The risk is particularly acute in the following area. IHL neither authorizes nor prohibits civilian DPH (including CCF by members of OAGs), but regulates its consequences. CTL may, however, criminalize such conduct regardless of

46 See, for example, US Supreme Court, *Holder v. Humanitarian Law Project*, 561 US (2010), Nos 08-1498, 09-89, 21 June 2010 (concerning the expansive scope of the US material support for terrorism offence in 18 USC §2339A, which has an exception for medicines and religious materials but not for medical care or humanitarian relief); Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, 2018.

47 UK Supreme Court (UKSC), *R v. Gul*, [2013] UKSC 64, 23 October 2013, para. 36 (undermines rule of law, separation of powers, and legality where wide discretion is left to prosecutors as to whether lawful hostilities under IHL are criminal under domestic law).

48 See, for example, US Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, 2007, para. 5.4.1.1 (“cannot be prosecuted for their lawful military actions”).

whether it otherwise complies with IHL on the conduct of hostilities, as where OAGs attack only military objectives, avoid excessive civilian casualties, and use lawful means and methods of war. Such CTL offences cannot technically conflict with IHL, since the conduct is not authorized under IHL. To the contrary, IHL permits States Parties to criminalize civilian DPH, for instance under the occupier's security laws in occupied territory;⁴⁹ while national law may criminalize it in a State's own territory in IAC or NIAC.

At most, IHL encourages States to confer the widest possible amnesty at the end of a NIAC (under Additional Protocol II (AP II) only, not also under common Article 3) for acts which did not violate IHL.⁵⁰ In this sense, the incentives for OAGs to comply with IHL have always been very limited, resulting from States' concerns to protect their sovereign right to restore law and order in their territories.

The question, then, is not whether such conduct cannot be criminalized at all, so much as whether it is appropriate to *transnationally* criminalize it as *terrorism*—that is, to establish extraterritorial criminal jurisdiction over such conduct in a foreign State's territory, and to either prosecute fugitive offenders or extradite them back to the territory of the conflict. There is certainly no general international law rule prohibiting this, as long as the definition of terrorist offences complies with international human rights law, for instance as regards the principle of legality (precision and foreseeability in offences) or of non-discrimination. Moreover, on numerous occasions the Security Council and General Assembly (and through them, States collectively) have clearly depicted certain OAGs in armed conflicts as terrorist—such as Al-Qaeda, the so-called Islamic State (IS), Al-Nusra and Boko Haram—because of the nature of the acts committed by their members. Such identification has not only been for the purpose of imposing sanctions but also to encourage States to bring to justice the perpetrators. Both Security Council resolutions addressing terrorism and the ICTCs thus envisage at least some co-application of CTL and IHL.

A number of policy counter-arguments may nonetheless be made. The International Committee of the Red Cross (ICRC) warns precisely against criminalizing “any act of violence” by an OAG as unlawful terrorism when it is not unlawful under IHL, since doing so “is likely to diminish any incentive to comply with IHL”.⁵¹ It makes a similar point in relation to labelling groups as terrorist (which often triggers the criminal liability of members), since this too “carries the risk that the OAG loses an incentive to abide by that body of law”, particularly the duty to distinguish between civilians and military objectives.⁵²

49 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 64–67.

50 AP II, Art. 6(5).

51 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, p. 58 (ICRC 2019 Challenges Report). See also F. Ní Aoláin, above note 5, para. 26; ICRC, *Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law*, Geneva, 2002; Marco Sassòli, “Terrorism and War”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 970.

52 ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017

Clearly, if one will be criminalized as a terrorist – whether because of one’s conduct, or for membership or support of a terrorist group – regardless of whether one respects IHL, the perceived advantages of complying with IHL may be reduced.

The ICRC’s claims are intuitive and common-sense, rather than being empirically substantiated by whether the application of CTL does, in fact, push OAGs to be less IHL-compliant, but they are nonetheless grounded in the ICRC’s operational experience in conflicts. This is not to say that labelling individuals or groups as terrorist decimates *all* incentives to comply, since there are many other reasons why groups in particular may still wish to comply: their moral identity or religious values; appealing to civilian hearts and minds; gaining support from diasporas or foreign State sponsors; political legitimacy; facilitating humanitarian relief to “their” people; demonstrating that they are not war criminals, unlike State forces; or to show that they are not, in truth, terrorists.⁵³ This is also not to say that all OAGs are amenable to IHL socialization or responsive to its faint incentives for compliance. Violating IHL is the mission or core business of some “terrorist” groups (such as IS, Al-Qaeda, Boko Haram and Abu Sayyaf), which are not deterred by war crimes law, let alone the nuance that IHL does them the favour of neither prohibiting nor authorizing combat, and leaves the issue of whether they are criminals to national law.

Nonetheless, given that legal incentives for OAGs to comply with IHL in NIAC are already so tenuous, the intrusive transnational criminalization of terrorism further weakens them. This may not seem like much, but when the stakes are so high – more violence against civilians, against an already high background level – minimizing intrusion is worth it. This is true even of many “terrorist” groups, whether Al-Shabaab, Hamas, the Taliban, the Kurdistan Workers’ Party (Partiya Karkerên Kurdistanê, PKK) or the Liberation Tigers of Tamil Eelam (LTTE) (or even exterminatory groups such as the Khmer Rouge), since experience suggests that, at some point in a conflict, some group members may be willing to engage directly or through back-channels with external interlocutors and values,⁵⁴ and group behaviour may eventually respond.

A second, related reason to be cautious about criminalizing OAG hostilities as terrorism relates to the relationship between sovereignty and IHL in NIAC. As mentioned, in NIAC the affected State has long enjoyed the sovereign right under national law to criminalize members of OAGs for offences against national security or other interests, whether labelled as terrorism or otherwise. However, the transnational criminalization of terrorism in conflict is distinguishable from prior practice. NIACs were traditionally civil wars fought by citizens in a State’s

(ICRC Commentary on GC II), Art. 3, para. 895. See also ICRC, *The Applicability of IHL to Terrorism and Counterterrorism*, Geneva, 2015; Jelena Pejic, “Armed Conflict and Terrorism”, in Ana María Salinas de Frias, Katja Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2012, p. 177; Tristan Ferraro, “Interaction and Overlap between Counter-Terrorism Legislation and International Humanitarian Law”, in *Terrorism, Counter-Terrorism and International Humanitarian Law*, Proceedings of the Bruges Colloquium, 20–21 October 2016.

53 See, generally, Ben Saul, “Enhancing Civilian Protection by Engaging Non-State Armed Groups under International Humanitarian Law”, *Journal of Conflict and Security Law*, Vol. 22, No. 1, 2017.

54 *Ibid.*, pp. 25–26.

own territory, not the more complex transnational NIACs of today. The right to criminalize conduct was thus closely linked to the State's sovereign territorial jurisdiction over its own territory and population. The exercise of extraterritorial criminal jurisdiction by one State over the conduct of OAGs in another State was a rarity, limited by the necessity of identifying an acceptable basis for extraterritorial prescriptive jurisdiction under international law. One such basis was universal jurisdiction over war crimes under IHL treaties and customary IHL. In the absence of a jurisdictional basis, States generally did not criminalize foreign civil wars, and they refused to cooperate with the territorial State in suppressing its domestic political opponents (by upholding the political offence exception to extradition for classic civil war "crimes" such as rebellion, revolution and sedition). Foreign civil wars will usually not affect a State's own security or involve its nationals as perpetrators or victims, so as to attract other jurisdictional grounds.

The expansive jurisdiction now asserted over terrorism offences has broken the historical nexus with a sovereign's presumptively territorial rights.⁵⁵ It has also been accompanied by the depoliticization of terrorism offences in extradition, prompted by the later ICTCs and UN standard-setting since the late 1990s. Under the ICTCs, this is less problematic, because their carefully defined offences are limited in subject matter (they largely do not criminalize conduct not already prohibited by IHL, and do not criminalize civilian DPH or "material support" to terrorist groups), and because they are often subject to armed conflict exclusion clauses (discussed below). Treaty-making processes, open to all States, ensured that IHL was taken into account.

In contrast, more general terrorism offences under Resolution 1373 are not guided by any agreed international definition but are creatures of unilateral national implementation; they do not accommodate IHL through any exclusion formula at all; and they are imposed on all States by a fifteen-member-State Security Council (the Permanent Five of whom matter), without the opportunity for all States to participate or to ventilate their concerns about IHL. For these reasons, States should be very cautious before defining terrorism to encompass participation in hostilities in foreign NIACs. Even where a State's own forces are involved in the foreign conflict, that State is not the territorial sovereign with a general competence to prescribe the criminal law applicable there, and it does not enjoy any equivalent of the powers of an occupier in IAC, which would allow it to enact security offences in foreign territory.⁵⁶ At most, it may potentially (and controversially) assert expansive security/protective jurisdiction.

It is one thing for a State to suppress non-State violence which challenges its own political authority in its own territory, but quite a different proposition for it to suppress – by choice, or even by obligation – political violence (not violating IHL) in another State's territory. The latter would interfere, on the side of the foreign government, in foreign domestic political struggles – this was historically avoided

⁵⁵ See also F. Ní Aoláin, above note 5, para. 26 (accepting the author's position on this point).

⁵⁶ GC IV, Art. 64.

by applying the political offence exception in extradition law and treaties (itself now increasingly eliminated), and was even celebrated, as in the case of foreign volunteers in the Spanish Civil War. Foreign suppression of non-State violence abroad further undermines incentives for OAGs to comply with IHL, who are painted into a corner as “terrorists” everywhere. This does not, of course, detract from the right of States to criminalize “foreign recruitment” or enlistment offences – now recast as “foreign fighter” travel offences – in order to prevent their own nationals or residents from travelling to participate in conflict abroad.

A third broad reason to be circumspect about CTL is that it may impede other IHL-related interests during a conflict. In extreme cases, some States may deny that IHL applies at all to “terrorists”, whether because they do not wish to legitimize “terrorist” groups by admitting the existence of an armed conflict,⁵⁷ or because they claim that IHL rules in conflicts they do recognize do not apply to individual “terrorists”, or apply in “overly permissive” ways.⁵⁸ The legal and political polarization of relations with “terrorist” groups may also make such groups suspicious of engaging with humanitarian actors, particularly if the latter are seen as part of the international community’s counterterrorism apparatus – this may be because of their perceived closeness to major counterterrorism powers (including through co-option in the service of militarized stabilization, or development-oriented civilian “hearts and minds” campaigns); because of their contractual or other legal requirements to report suspicious behaviour to governments; or because UN agencies are part of the “whole of UN” approach to counterterrorism under the UN Global Counter-Terrorism Coordination Compact of 2018 and its Coordinating Committee, and under the sweeping “Pillars” of the UN Global Counter-Terrorism Strategy of 2006.

A fourth broad reason for caution about overlaying CTL onto IHL relates to cessation of conflict. The “extreme vilification” of classifying OAGs as terrorists can seriously hinder the political willingness or legal ability of governments to enter into peace negotiations in order to end conflicts, as occurred with the FARC-EP in Colombia.⁵⁹ These hurdles to “negotiating with terrorists” can add to the usual barriers encountered in armed conflicts. They can also affect the scope of negotiations and the nature of the post-conflict settlement or reconciliation,⁶⁰ particularly regarding the treatment of “terrorist” fighters. IHL encourages States to confer the widest possible amnesty for (IHL-compliant) acts during conflict.⁶¹ If an OAG has been labelled or its members criminalized as terrorist, it may complicate the willingness of governments to issue amnesties, as well as the acceptability of such amnesties to socially divided populations that have been hardened to fear “terrorists”.

57 ICRC 2019 Challenges Report, above note 51, p. 58.

58 *Ibid.*, p. 59.

59 Sophie Haspeslagh, “The ‘Linguistic Ceasefire’: Negotiating in an Age of Proscription”, *Security Dialogue*, Vol. 52, No. 4, 2021.

60 ICRC, *The Applicability of IHL*, above note 52; J. Pejic, above note 52; ICRC, *Terrorism and International Law*, above note 51. See also F. Ní Aoláin, above note 5, para. 26.

61 AP II, Art. 6(5); ICRC Customary Law Study, above note 17, Rule 159.

Relatedly, CTL can complicate or frustrate the eligibility of persons for disarmament, demobilization and reintegration (DDR),⁶² which may be necessary for a lasting peace. UN DDR standards emphasize that neither those suspected of terrorist acts nor individuals or groups listed by the Security Council can be eligible for DDR, as is the case for those suspected of international crimes.⁶³ However, the standards operate by *renvoi* to the definition of terrorism not only in the ICTCs but also in Security Council resolutions, which do not define terrorism and allow States to decide the issue, including whether to criminalize mere membership in or support for an OAG, or participation in hostilities, even when not prohibited by IHL. Exclusion from DDR can thus be over-broad: terrorist offences in national law are not necessarily of equivalent gravity to international crimes warranting exclusion from DDR. The same is true of excluding anyone associated with a Security Council listed group, which in itself does not reveal anything about any harmful conduct of individuals. The UN standards note, however, that DDR knowledge may be relevant to implementing the “prosecution, rehabilitation and reintegration” measures which the Security Council has indicated should be used in relation to foreign terrorist fighters.⁶⁴

Whether, and the extent to which, CTL adversely impacts on IHL in armed conflict depends on the definition and scope of particular CTL rules, including any exceptions for IHL. The next section reviews the pros and cons of various exceptions and considers which approaches are capable of optimally balancing CTL and IHL interests.

International counterterrorism conventions, 1963–2020

Of the nineteen ICTCs adopted since 1963, only one (on hostage-taking) prior to 1997 expressly addressed IHL, whereas since 1997 IHL has been addressed in all instruments: a limited exception in the Terrorist Financing Convention of 1999, and a common exclusion of armed forces in armed conflict in six other instruments (discussed below). The latter exclusion is also the basis of negotiations for the Draft UN Convention since 1999.

Most ICTCs only apply where an offence has a transnational element, thereby excluding purely domestic acts in a NIAC. However, the transnational element under most ICTCs includes situations where an offender is present in another State or, depending on the instrument, where victims or perpetrators are nationals of States other than the place of commission, a foreign aircraft or ship is affected, or another State is subject to compulsion. As such, conduct in an otherwise localized NIAC may still come within the ICTCs.

62 ICRC, *The Applicability of IHL*, above note 52; J. Pejic, above note 52; ICRC, *Terrorism and International Law*, above note 51.

63 UN, *Integrated Disarmament, Demobilization and Reintegration Standards*, 2020, Module 2.11, Sec. 4.2.6.

64 *Ibid.* See, for example, UNSC Res. 2178, 24 September 2014, para. 4; UNSC Res. 2396, 21 December 2017, paras 18, 29–30 (“prosecution, rehabilitation, and reintegration” measures for “foreign terrorist fighters”).

Silence on IHL

The earlier ICTCs do not address armed conflict but often have implications for IHL. Six ICTCs adopted between 1963 and 1988 addressing aviation and maritime safety do not apply to aircraft or ships used for military, customs or police services,⁶⁵ military air bases,⁶⁶ or (by implication) military maritime platforms.⁶⁷ The Nuclear Material Convention of 1980 likewise applies only to peaceful uses of civilian material, thus excluding attacks on military nuclear material. The exceptions were not designed to accommodate IHL but reflect the civilian mandates of the fora within which they were negotiated (the International Civil Aviation Organization, International Maritime Organization, and International Atomic Energy Agency).⁶⁸

The effect of the exceptions is that attacks on military aircraft, ships, airports, platforms or nuclear material during armed conflict are not covered by the ICTCs and are instead regulated by IHL. Such acts are excluded regardless of the status of the attacker (whether State forces or OAGs, or civilian DPH) and whatever the means or methods used (whether IHL-compliant or not). Conversely, attacks on civilian objects are co-regulated by the ICTCs and IHL (including any war crimes). Where attacks are unlawful under both regimes (as where a civilian aircraft is deliberately targeted), conflict of laws is negligible.

In contrast, there may be a *prima facie* conflict of obligations where an act is lawful under IHL but unlawful under an ICTC. For example, it could be lawful to target a civilian cargo vessel also carrying military munitions or personnel for a party to a conflict, whereas it is an ICTC offence to destroy a ship or damage it or its cargo if likely to endanger the ship's safe navigation. Similarly, it could be lawful under IHL to target military aircraft parked at a civilian airport where proportionate damage to a nearby civilian aircraft may be expected, whereas it is an ICTC offence to intentionally destroy a civilian aircraft or damage it and thereby render it incapable of flight.⁶⁹ Collateral damage to the civilian aircraft is still "intentional" in that the military aircraft was attacked with knowledge or

65 Convention on Offences and Certain Other Acts Committed on Board Aircraft, 704 UNTS 219, 14 September 1963 (entered into force 4 December 1969) (Tokyo Convention), Art. 1(4); Hague Convention, Art. 3(2); Montreal Convention, Art. 4; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 UNTS 221, 10 March 1988 (entered into force 1 March 1992) (Maritime Safety Convention), Art. 2.

66 Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 974 UNTS 177, 24 February 1988 (entered into force 6 August 1989) (Airports Protocol), Art. II.

67 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 UNTS 304, 10 March 1988 (entered into force 1 March 1992) (Fixed Platforms Protocol), Art. 1(3) (fixed platforms on the continental shelf are defined as those for resource-related or economic purposes).

68 See, for example, Convention on International Civil Aviation, 15 UNTS 295, 7 December 1944 (entered into force 4 April 1947) (Chicago Convention), Art. 3, which applies the Convention only to "civil" aircraft and excludes "state aircraft" (defined to include those used for military, customs and police services).

69 Montreal Convention, Art. 1(b).

awareness that the civilian aircraft would be damaged and the attacker also meant to bring about that result.

The two regimes thus impose potentially incompatible obligations. One answer is to invoke one or the other regime as the “hard” *lex specialis* to trump the other. The difficulty is that “it is often hard to distinguish what is [relatively] ‘general’ and what is ‘particular’”:⁷⁰ the particular IHL rules because they are adapted to armed conflict, or the aviation or maritime safety convention offences because they are tailored to protect civilian aircraft or ships?

A possible solution to this question is found in the ICTCs themselves. The aviation and maritime safety conventions, like many ICTCs, define conduct as offences where the conduct is not only “intentional” but also “unlawful”. During the drafting, “unlawful” was intended to refer to grounds under national law which could justify or excuse offences, such as in legitimate law enforcement operations or personal self-defence. There was little attention to whether international law, including IHL, could also be used as a standard; it certainly could be if incorporated into national law. It is arguable that the ICTCs should be harmoniously interpreted with IHL by applying the IHL rules to define whether an act is “unlawful” under the ICTC; if not, no CTL offence is committed. This approach applies the “soft” version of *lex specialis*, as in the Nuclear Weapons Advisory Opinion (where a flexible human rights standard – the meaning of an “arbitrary” deprivation of life – was interpreted in light of an IHL rule). Such an approach is also preferable because the drafters of the aviation and maritime safety conventions did not intend to displace IHL; they simply did not consider it (whereas later revisions of those instruments explicitly defer in part to IHL).

The Protected Persons Convention of 1973 does not address armed conflict and is the one ICTC which potentially raises a direct and irreconcilable conflict with IHL. It requires States to criminalize the murder, kidnapping, or “other attack” on the person or liberty of an internationally protected person (such as a diplomat), as well as any “violent attack” on their official premises, private accommodation or means of transport.⁷¹ The Convention deliberately corresponds with the strict inviolability of diplomats and diplomatic premises under the Vienna Convention on Diplomatic Relations (VCDR) of 1961.⁷²

In most situations, there will be no conflict under the Protected Persons Convention. In principle, diplomats are civilians, not combatants or fighters, and diplomatic premises and vehicles are civilian objects, and are all immune from attack under IHL. There are examples in practice where breaches of inviolability

70 International Law Commission Study Group, *Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, para. 58; see also para. 111.

71 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 UNTS 167, 14 December 1973 (entered into force 20 February 1977) (Protected Persons Convention), Art. 2(1).

72 Vienna Convention on Diplomatic Relations, 500 UNTS 95, 18 April 1961 (entered into force 24 April 1964), Arts 29 and 22 respectively.

were also likely IHL violations.⁷³ Problems arise, however, if a diplomat takes a direct part in hostilities; or an embassy becomes a military objective by hosting combatants or persons taking a direct part in hostilities; or an embassy suffers proportionate collateral damage from a strike on a nearby military objective. All such intentional attacks would be offences which States Parties must prosecute under the Convention, whereas IHL may permit targeting (and confer combatant immunity in IAC). Unlike the aviation and maritime conventions, the 1973 Convention does not refer to “unlawful” acts and thus provides no avenue to harmoniously apply IHL rules. In addition, the difficulty with taking a hard *lex specialis* approach is again deciding which regime is special: IHL, as adapted to armed conflict, or the 1973 Convention, because it is tailored to protect diplomats and embassies?

Under international law, the inviolability of diplomats and embassies is strict, admitting no exceptions even for serious violations of local law, abuses of diplomatic functions⁷⁴ (including espionage or political interference), or emergencies.⁷⁵ The appropriate remedy within the purposefully self-contained regime of diplomatic relations law is a declaration of *persona non-grata*, expulsion of the mission, or suspension/termination of diplomatic relations in general.⁷⁶ There is no clear authority that even personal or national self-defence would excuse a breach of inviolability. There is thus little room to accommodate IHL. IHL equally signals its own comprehensiveness. Even where IHL accords special protection to certain persons or objects (medical, humanitarian, cultural or religious; works containing dangerous forces; or objects indispensable to civilian survival), it never accords *absolute* immunity from attack or precludes proportionate casualties. There is thus no room in IHL for absolute diplomatic inviolability.

73 As where the US failed to take necessary precautions and mistakenly targeted the Chinese embassy in Belgrade in 1999: see UN Security Council, *Agenda: Letter Dated 7 May 1999 from China to the Security Council President (S/1999/523)*, UN Doc. S/PV.4000, 8 May 1999 (China argued that a mistaken attack by NATO forces on its Yugoslav embassy violated the Protected Persons Convention, in addition to being a war crime, and the United States paid *ex gratia* compensation to China and voluntary humanitarian payments to victims; since payments were without admission of liability, this is not evidence, as suggested by the commentary to the ICRC Customary Law Study, above note 17, Rule 150, of a duty to compensate for IHL violations). See also A. Sanchez Frias, above note 2, p. 74 (US extradition under the Protected Persons Convention of a suspected murderer of a US diplomat in an armed conflict in Mali); US District Court for the District of Columbia, *Von Dardel v. Union of Soviet Socialist Republics*, 623 F Supp 246, 15 October 1985, para. 262 (US awarded damages in an alien tort claim to for the kidnapping and possible murder of the Swedish diplomat Raoul Wallenberg by Soviet forces in occupied Hungary in 1945, in contravention of a domestic statute implementing the Protected Persons Convention).

74 The Protected Persons Convention applies to State officials who are entitled to special protection from attack under international law (that is, particularly under the VCDR) at the time of the crime; as per the VCDR, a person abusing their diplomatic functions is still entitled to inviolability. It is unsettled whether personal self-defence (or defence of others) may justify interference: Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th ed., Oxford University Press, Oxford, 2016, p. 123.

75 International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, 1980, ICJ Reports 3, paras 83–87.

76 E. Denza, above note 74, p. 123.

Thus far the sparse State practice has not provided an answer on resolving conflicts, although some practice suggests that inviolability prevails over IHL,⁷⁷ consistent with its absolute character in other areas. Israel defended attacks on inviolable UN Relief and Works Agency premises in Gaza (for instance, in 2008–09 and 2014) on IHL grounds (either as military objectives used by Palestinian fighters, or as proportionate casualties of strikes on nearby military objectives). In response, UN Boards of Inquiry insisted on the inviolability of UN premises,⁷⁸ which “could not be overridden by demands of military expediency”,⁷⁹ while emphasizing that IHL co-applies to protect civilians inside UN premises.⁸⁰ The Eritrea-Ethiopia Claims Commission likewise upheld the absolute inviolability of an embassy, even if it had been used to “criminally” stockpile weapons for the war effort;⁸¹ while it did not specifically address IHL, its reference to “absolute” inviolability was emphatic, in a context where it was mandated to apply IHL in an IAC between two States and was thus aware of IHL’s possible relevance. While the Convention on the Safety of United Nations and Associated Personnel of 1994 excludes certain UN “combatants” from its offences concerning attacks on UN personnel, this does not imply an IHL exception to inviolability since only very senior UN personnel (equivalent to diplomats or above), not UN peacekeepers, are entitled to inviolability in the first place.⁸²

Whether such an approach is desirable, from a policy standpoint, is debateable. A strict approach minimizes the risks of States abusing IHL (or other legal) rights and thereby endangering not only the person or premises of diplomats or other protected persons but, through them, the all-important channels—especially in war—of inter-State diplomatic communication. On the other hand, it is precisely in conflict that States could be tempted to abuse inviolability in order to further their war aims (for instance, to relay military information or coordinate local subversives)—although an embassy in the adversary’s territory makes an easy target for a military response, rendering such misuse both unwise and unlikely. The remedies of diplomatic relations law—*persona non grata*, expulsion of a mission, or suspension/termination of relations—may not be timely against threats which necessitate an immediate

77 Cf. Laurie R. Blank, “The Limits of Inviolability: The Parameters for Protection of United Nations Facilities during Armed Conflict”, *International Legal Studies*, Vol. 93, No. 1, 2017, p. 62.

78 Under the Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, 13 February 1946 (entered into force 17 September 1946) (Convention on UN Privileges and Immunities). See UN Security Council, *Summary by the Secretary-General of the Report of the UN Headquarters Board of Inquiry into Certain Incidents that Occurred in the Gaza Strip between 8 July 2014 and 26 August 2014*, UN Doc. S/2015/286, 27 April 2015, Annex, para. 13; UN General Assembly and Security Council, *Summary by the Secretary-General of the Report of the UN Headquarters Board of Inquiry into Certain Incidents in the Gaza Strip between 27 December 2008 and 19 January 2009*, UN Doc. A/63/855–S/2009/250, 15 May 2009, para. 16.

79 UN General Assembly and Security Council, above note 78, para. 16.

80 *Ibid.*, para. 92.

81 See, for example, Eritrea-Ethiopia Claims Commission, *Partial Award: Diplomatic Claim – Eritrea’s Claim 20*, XXVI RIAA 381, 19 December 2005, paras 45–46.

82 Convention on UN Privileges and Immunities, Art. 5(19); Convention on Privileges and Immunities of the Specialized Agencies, 33 UNTS 261, 21 November 1947 (entered into force 2 December 1948), Art. 6(21).

military response (although a law enforcement approach may often suffice). Clarity could be provided by an amendment to the Protected Persons Convention (whether prioritizing inviolability over IHL or vice versa), but this is unlikely precisely because the Convention is predicated on diplomatic relations law and seeking an amendment would reopen controversies over exceptions to inviolability in general.

ICTCs addressing IHL

The Hostages Convention of 1979 was the first convention to address IHL. It does not apply to hostage-taking where it is a grave breach in IAC⁸³ and States are obliged to “extradite or prosecute” the suspect under the Geneva Conventions or Additional Protocol I (AP I).⁸⁴ It still applies in IAC where hostages are not protected under those instruments,⁸⁵ and to all hostage-taking in NIAC (where there is no “extradite or prosecute” obligation, even though hostage-taking in NIAC is prohibited by treaty and is a war crime under customary law⁸⁶).

Accordingly, in IAC the Hostages Convention largely, but not exclusively, accords priority to IHL as the *lex specialis*, whereas it fully co-applies with IHL in NIAC. The drafters rejected proposals for a stricter separation, whereby IHL would exclusively apply to armed conflict and the Hostages Convention would exclusively govern peacetime.⁸⁷ The deference to IHL was a compromise solution to calls by some States during the drafting to exclude self-determination movements,⁸⁸ and was facilitated by the adoption of AP I in 1977 and its relative depoliticization of the issue. The issue also arose because the Hostages Convention was negotiated through the General Assembly (not the more technical, apolitical, specialized agencies, as for many earlier ICTCs), which had recently concluded a bitter debate (from 1973 to 1979) about the definition of and response to terrorism. The Convention does not, however, imply that hostage-taking by liberation movements is permitted, but only that it is dealt with by IHL (and war crimes law) in IAC rather than the Convention. Where AP I does not apply, hostage-taking by self-determination movements is still a Convention offence.

The Terrorist Financing Convention of 1999 also addresses IHL. It prohibits the financing of terrorist acts against “a civilian, or ... any other person

83 GC IV, Arts 34, 146–147.

84 International Convention against the Taking of Hostages, 1316 UNTS 205, 17 December 1979 (entered into force 3 June 1983) (Hostages Convention), Art. 12.

85 Specifically, where a hostage is not (1) a protected person under GC IV Article 4, including nationals of the State party, a co-belligerent State or a neutral State, or (2) within the expanded categories protected by AP I Article 85(2), including prisoners of war, other captured persons who took part in hostilities, stateless persons and refugees, and the wounded, sick and shipwrecked of the other party.

86 Common Art. 3(1)(b); AP II, Art. 4(2)(c); Rome Statute, Art. 8(2)(c)(iii) (NIAC); ICRC Customary Law Study, above note 17, Rule 96.

87 Wil Verwey, “The International Hostages Convention and National Liberation Movements”, *American Journal of International Law*, Vol. 75, No. 1 1981, p. 85.

88 See, generally, *ibid.*; Joseph Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979*, Grotius, Cambridge, 1990, pp. 266–273.

not taking an active part in the hostilities in a situation of armed conflict”.⁸⁹ In addition to civilians, the latter include prisoners of war, captured fighters in NIAC, and military personnel who are sick or wounded. It is thus an offence to finance attacks by State or non-State armed forces on non-combatants, but not an offence to finance attacks (even by OAGs) on combatants, fighters, or civilians taking a direct part in hostilities. The Convention may still apply, however, where an attack is directed against a military objective but civilians are knowingly harmed contrary to IHL.⁹⁰

The Terrorist Financing Convention addresses the financing both of offences from other listed ICTCs and of more generally defined “terrorist acts”.⁹¹ Where a financing offence is predicated on an ICTC offence, it necessarily imports the latter’s exceptions. For example, it is not an offence to finance acts endangering the safety of *military* aircraft or ships under the aviation and maritime safety conventions, or to finance the hostage-taking of protected persons in IAC.

A common exclusion: Activities of armed forces during armed conflict

Apart from the Terrorist Financing Convention, since 1997 (starting with the Terrorist Bombings Convention) an increasingly common IHL exclusion clause has emerged. As mentioned above, six ICTCs (addressing terrorist bombings, nuclear terrorism, radioactive material, and aviation and maritime safety) identically exclude the “activities of armed forces during armed conflict, as those terms are understood under international humanitarian law, which are governed by that law”.⁹² Whereas the Terrorist Financing Convention excludes only attacks *on* fighters, these other ICTCs more broadly exclude all activities of armed forces – whether attacks on fighters or civilians – regardless of whether they comply with IHL. This approach pays more deference to IHL as the governing regime,⁹³ but there are still areas of co-application (discussed below).

The scope of the exclusion is exclusively defined by *renvoi* to IHL, which necessarily means customary IHL and IHL treaties binding on States party to the ICTCs. In brief, “armed conflict” means IACs (of all types, including occupation, and self-determination conflicts where AP I applies) and NIACs (under common

⁸⁹ Terrorist Financing Convention, Art. 2(1)(b).

⁹⁰ Italian Court of Cassation (Penal Section), *Bouyahia Maher Ben Abdelaziz et al.*, No. 1072, 17 January 2007.

⁹¹ Terrorist Financing Convention, Arts 2(1)(a) and 2(1)(b) respectively.

⁹² Terrorist Bombings Convention, Art. 19(2); Nuclear Terrorism Convention, Art. 4(2); Amended Nuclear Material Convention, Art. 2(4)(b); Hague Convention (as amended by the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, Beijing, 10 September 2010 (entered into force 1 January 2018)), Art. 3*bis*; Maritime Safety Convention, as amended by the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 14 October 2005 (entered into force 28 July 2010) (Maritime Safety Protocol), Art. 2*bis* (2); Beijing Convention, Art. 6(2).

⁹³ As under the Canadian Criminal Code, Sec. 83.01(1): see Supreme Court of Canada, *R v. Khawaja*, [2012] 3 SCR 555, 14 December 2012 (“since the armed conflict exception functions as a defence, the accused must raise it and make a *prima facie* case that it applies”).

Article 3 and, where it applies, AP II). In IAC, “armed forces” include (depending on the applicable treaties) regular State forces;⁹⁴ irregular forces belonging to a State;⁹⁵ paramilitary or law enforcement agencies incorporated into the armed forces;⁹⁶ “guerrilla” resistance forces;⁹⁷ and self-determination forces.⁹⁸ While they are not strictly “armed forces”, a purposive interpretation would also include civilians taking part in a *levée en masse*.⁹⁹ In IAC, State forces already enjoy combatant immunity under IHL; while stating the obvious,¹⁰⁰ this clause is nonetheless vital to affirm that CTL treaties do not intend to override IHL.

There was some ambiguity during the drafting of the six ICTCs containing the exclusion clause—and there remains controversy—over whether the term “armed forces” includes OAGs in NIAC. Some authors suggest that the “majority” or even universal view is that it means only State forces.¹⁰¹ The better view is that—“as understood under” IHL, and in light of the drafting—it includes both State and non-State forces, a position supported by most jurists.¹⁰² In NIAC, the single term “armed forces” is used in common Article 3(1)¹⁰³ to refer to both State forces and (what are also known in the jurisprudence and practice as) OAGs;¹⁰⁴ otherwise common Article 3 would (self-defeatingly) apply asymmetrically by protecting only State forces. Common Article 3 does not refer to “the” armed forces so as to be impliedly limited to those of the State party alone.¹⁰⁵

94 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 4(A)(1).

95 *Ibid.*, Art. 4(A)(2); AP I, Art. 43(1).

96 AP I, Art. 43(3).

97 *Ibid.*, Art. 44(3).

98 *Ibid.*, Art. 1(4).

99 GC III, Art 4(A)(6). Such persons are neither regular nor irregular forces under GC III, and do not qualify as armed forces under AP I because they are neither under a command responsible to the State nor subject to an internal disciplinary system. They are, however, “belligerents” under the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, USTS 539, 18 October 1907 (entered into force 26 January 1910), Art. 2.

100 Hanne Cuyckens and Christophe Paulussen, “The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship between Counter-Terrorism and International Humanitarian Law”, *Journal of Conflict and Security Law*, Vol. 24, No. 3, 2019, p. 553.

101 See, respectively, Marten Zwanenburg, “Foreign Terrorist Fighters in Syria: Challenges of the Sending State”, *International Legal Studies*, Vol. 92, No. 1, 2016, pp. 216–217; Mahmoud Hmoud, “Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 1036.

102 See, for example, Samuel Witten, “The International Convention for the Suppression of Terrorist Bombings”, *American Journal of International Law*, Vol. 92, No. 4, 1998, p. 780; J. Pejic, above note 52, p. 189; D. O’Donnell, above note 2, p. 866; M. Sassòli, above note 51, p. 977; Commonwealth Secretariat, *Implementation Kits for the International Counter-terrorism Conventions*, 2002, p. 243; Antonio Coco, “The Mark of Cain: The Crime of Terrorism in Times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in *R v Mohammed Gul*”, *Journal of International Criminal Justice*, Vol. 11, No. 2, 2013, p. 434.

103 J. Pejic, above note 52, p. 189.

104 ICRC Commentary on GC II, above note 52, Art. 3, para. 552; D. O’Donnell, above note 2, p. 866; M. Sassòli, above note 51, p. 977. The ICRC Commentary on GC I, above note 20, para. 429, also refers to the “organized armed forces” of non-State parties.

105 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), Art. 3, para. 564.

Admittedly, AP II refers to (State) “armed forces”, “dissident armed forces” and “other organized armed groups”,¹⁰⁶ implying that the only non-State “armed forces” are dissident (that is, former) State forces. A Dutch court invoked AP II in finding that a comparable exclusion clause in EU terrorism offences is confined to State forces, also because armed groups are “usually” referred to as OAGs.¹⁰⁷ This approach is erroneous. The Geneva Conventions have been universally ratified and all States are bound by the established, more extensive meaning of “armed forces” under common Article 3, which also reflects customary IHL. In contrast, AP II has fewer ratifications, and its territorial control requirement limits it to a narrower range of NIACs. As such, common Article 3 must be preferred as being determinative of the baseline meaning of “armed forces” for NIACs under IHL. The fact that such forces may *also* be described as “OAGs”—whether under AP II or in jurisprudence—does not limit common Article 3 (and the customary IHL that it reflects). Under AP I, “armed forces” include non-State self-determination movements, further indicating that “armed forces” are not exclusively State forces.¹⁰⁸

The drafting of the ICTCs supports this approach. The original French draft of the Terrorist Bombings Convention—where the clause was born—excluded only bombings by the organized military forces of a State¹⁰⁹ (implicitly in peace or war). The negotiations produced two separate exceptions in the six ICTCs: one for armed forces in armed conflict, and another for “activities undertaken by the military forces of a State in the exercise of their official duties” (that is, implicitly in situations other than conflict, including lesser situations of violence and peacetime). Unlike the French draft, and the eventual second exception for peacetime, the first exception deliberately does not qualify “armed forces” with the adjective “State”. The original exclusion clause was divided into two on the United States’ initiative¹¹⁰ precisely to differentiate between the two situations (peace and war) and thereby to accommodate IHL concerns. The clause also does not limit “armed conflict” to “international” conflict (between State forces) but was clearly understood to include NIACs.¹¹¹

Furthermore, there is no explicit evidence in the drafting record that the exception was intended to asymmetrically privilege State forces by excluding only them in NIACs. Tellingly, the exception for armed forces in armed conflict would serve no purpose in the ICTCs if it were limited to State forces, because the

¹⁰⁶ AP II, Art. 1.

¹⁰⁷ District Court of The Hague, *Prosecutor v. Imane B et al.*, Judgment, 10 December 2015 (*Context Case*), paras 7.38, 7.40.

¹⁰⁸ AP I, Art. 43; A. Coco, above note 102, p. 434.

¹⁰⁹ UN General Assembly, *Preliminary Working Document Submitted by France on behalf of the Group of Seven Major Industrialized Countries and the Russian Federation*, UN Doc. A/AC.252/L.2, 11 February 1997, Art. 3(1).

¹¹⁰ Carlos Díaz-Paniagua, *Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997–2005*, City University of New York, 2008, pp. 317, 323.

¹¹¹ See, for example, the US understandings to the ICTCs indicating, influenced by AP II, that the term “armed conflict” does not include internal disturbances and tensions such as riots, isolated and sporadic acts of violence, and other acts of a similar nature: *Suppression of Terrorist Bombings Implementation Act*, 2002, in 18 USC §2332f(e)(11).

second exception for “military forces of a State” exercising their official duties would already cover it, since that clause is not explicitly limited to peacetime. While that clause was certainly intended to be confined to peacetime, this was precisely to differentiate it from the wider scope of the first clause excluding all, not only “State”, forces in armed conflict. It was not intended to implicitly import the “State” forces limitation from the second clause into the first, contrary to what a Dutch court, accepting the view of the Dutch foreign minister, later suggested.¹¹²

No State has lodged declarations or reservations to any of the six ICTCs to the effect that “armed forces” means only State forces. To the contrary, in presenting the Terrorist Bombings Convention and the 2005 Protocol to the Maritime Safety Convention of 1988 to the US Senate for ratification, the US president explained that armed forces “include both armed forces of States *and subnational armed forces*”.¹¹³ The US approach to the Nuclear Terrorism Convention of 2005 is arguably similar.¹¹⁴ US law duly implements the exclusion clauses in full,¹¹⁵ as do some other States.¹¹⁶ In implementing the ICTCs, some States have excluded only State forces from, for example, the Terrorist Bombings Convention,¹¹⁷ but that does not necessarily reflect the State’s view on the scope of the treaty exclusion clause itself so much as a (permissible) choice to narrow it in domestic implementation.

In practice, national courts implementing a comparable “armed forces in armed conflict” exception under regional law (as in the EU, influenced by the ICTCs) have interpreted them as extending to non-State forces.¹¹⁸ Even where the Dutch courts departed from this approach (partly on policy grounds), they acknowledged the Dutch government’s view that there is “ambiguity” in the term

112 District Court of The Hague, *Context Case*, above note 107, para. 7.40.

113 US President, letter of transmittal of the Terrorist Bombings Convention to the US Senate, 8 September 1999, IX–X (emphasis added); see, similarly, US President, message transmitting Protocols of 2005 to the Convention concerning Safety of Maritime Navigation and to the Protocol concerning Safety of Fixed Platforms on the Continental Shelf, 17 February 2006. Cf. the contradicting statement of William Taft IV, US State Department Legal Adviser, on anti-terrorism conventions to the US Senate, 27 November 2001 (only regular State forces are excluded from the Bombings Convention, not irregular non-State groups). This statement was relied upon in part to deny the benefit of the “armed forces” clause in the Terrorist Bombings Convention to an Al-Qaeda militant in Afghanistan after 9/11: US District Court for the Eastern District of New York, *US v. Hausa*, 258 F.Supp.3d 265, 27 June 2017, pp. 272–276. However, *Hausa* does not interpret the clause foremost by reference to IHL (as the US statute requires (“law of war”)), but instead by US law on statutory interpretation, the pre-9/11 context of the Terrorist Bombings Convention’s adoption (when there was no armed conflict with Al-Qaeda and IHL did not apply), post-9/11 views of the US government, and the incorrect view that “armed forces” is coterminous with scope of combatant immunity (that is, solely available in international conflict).

114 While the point was not expressly reiterated when the US president presented the Nuclear Terrorism Convention (explained as containing an “identical” exclusion clause) to the Senate in 2007, nor was there any departure from the earlier position—despite the preceding seven years of debate over its meaning in the Draft UN Convention (discussed below), and the US being a leading State engaged in counter-terrorism in armed conflict: US President, letter of transmittal of the Nuclear Terrorism Convention to the US Senate, 12 July 2007.

115 18 USC § 2332f(d) (terrorist bombings); 18 USC § 2332i(d) (nuclear terrorism).

116 See, for example, Criminal Justice (Terrorist Offences) Act, 2005, Revised (Ireland), Sec. 10(6)(a) (bombings).

117 Australian Criminal Code, Sec. 72.2.

118 See the section entitled “Variants of Accommodation of IHL” below.

“armed forces” which could produce “different interpretations”, and that the clause “will be interpreted in a manner that may best serve the interest of the state in question”.¹¹⁹ As treaties establishing criminal liability and facilitating cooperation, however, it is obvious that “armed forces” “under IHL” must bear the same meaning for all States Parties, at least in respect of its meaning under the universally ratified common Article 3 and customary IHL.

The Dutch courts also relied on other IHL principles to confine the EU law exclusion clause to State forces. The undoubted lack of combatant immunity in NIAC, and the right of States to domestically criminalize any insurgent violence, was said to show that there is no inconsistency between IHL and criminalizing terrorism by members of OAGs.¹²⁰ However, this misses the point: the exclusion clause delimits the scope of crimes in an international or regional instrument – and thence in implementation in domestic law – as well as for transnational cooperation purposes (jurisdiction, “prosecute or extradite”, cooperation, and prevention). The clause does not purport to prohibit “gold-plating”¹²¹ – that is, adopting national legislation going further than the international instrument, whether to criminalize purely domestic terrorism, or to criminalize terrorism extraterritorially under some other jurisdictional basis (that is, other than the CTL treaty in question) under international law (such as the protective, nationality or passive personality principles).¹²² Even so, the exclusion clause may signal that there are good policy reasons – even when gold-plating – for clearly differentiating IHL from CTL and leaving hostilities to be regulated by IHL as the *lex specialis* (as discussed above).

The Dutch courts further suggested that excluding non-State violence would undermine the objectives of international counterterrorism instruments in bringing terrorists to justice, and perversely enable the same acts in peace but not war to be prosecuted.¹²³ However, those claims are nonsensical in respect of the six ICTCs which deliberately exclude such violence. Admittedly, Security Council resolutions do not exclude “armed forces in armed conflict” – but nor do they define terrorism, such that they cannot be interpreted as requiring States to criminalize all insurgent violence as terrorism. Finally, the Dutch court indicated that its view is consistent with the EU’s lack of exceptions in its terrorist asset freezing laws,¹²⁴ but those laws do not have any exclusion clause at all, so the comparison is false and unhelpful.

In the negotiations on the Draft UN Convention (discussed below), some States appeared to interpret an identical proposed “armed forces” exclusion as confined to State forces, so as to enable the prosecution or extradition of members of OAGs for terrorist offences in NIAC. The new context was conflict

119 District Court of The Hague, *Context Case*, above note 107, para. 7.40.

120 *Ibid.*, para. 7.41.

121 UKSC, *Gul*, above note 47, para. 53.

122 An issue left undecided in *ibid.*, paras 56–58.

123 District Court of The Hague, *Context Case*, above note 107, para. 7.42.

124 *Ibid.*, para. 7.43.

with Al-Qaeda after 9/11¹²⁵ and IS in Syria and Iraq from 2011,¹²⁶ and the desire to prosecute foreign insurgents as terrorists. Such views are not evident in the written *travaux* (nor in the records of the five other ICTCs containing the exception since 2001), but have been expressed largely in informal, unrecorded negotiations. Some authors present at the negotiations recall that Such states included, for example, the United States and the EU¹²⁷ (which would be a repudiation of their earlier positions, and be at odds with US and EU legislation and case law), plus France and Russia,¹²⁸ whereas others recall that the United States and EU reiterated that the exclusion covers non-State forces,¹²⁹ as did other States.¹³⁰

An ICRC proposal was not accepted to expressly define “armed forces” to cover both State forces and those of OAGs,¹³¹ perhaps signalling that some States prefer deliberate ambiguity.¹³² Claims that “armed forces” do not include non-State forces cannot, however, affect the objective scope of the term “armed forces” under IHL outlined above, even if in practice certain States might interpret and apply it differently; other States would not be required to cooperate with them under the ICTCs. The ambiguity nonetheless raises the real prospect of different interpretations of the same ICTC, or the same clause in different ICTCs, as well as some States changing their earlier interpretation of the clause.

On the basis that “armed forces” include OAGs, under the six ICTCs in force, both IHL and the ICTCs accordingly *co-apply* to the activities of: (1) irregular forces not belonging to the State (that is, not under its overall control¹³³) but acting in support of it in IAC; (2) civilians taking a direct part in hostilities, whether in IAC or NIAC (who are not members of OAGs with a CCF, and including members of disorganized armed groups); and (3) civilians who support hostilities by any State or non-State party in IAC or NIAC (without taking a “direct” part therein). Such persons may thus be liable for offences under any of the six ICTCs (addressing terrorist bombings, certain aviation and maritime safety offences, radioactive material, and nuclear terrorism). Proposals to exclude all activities or situations of armed conflict, regardless of the actor, were not accepted.¹³⁴ In addition, the clause does not exclude activities of persons in States which are not parties to the conflict who sympathize with one party to the conflict and commit terrorist acts in support

125 J. Pejic, above note 52, pp. 191–192.

126 Author interview with a former coordinator of informal discussions on the Draft UN Convention, December 2019.

127 J. Pejic, above note 52, p. 192.

128 Author interview, above note 126.

129 C. Díaz-Paniagua, above note 110, p. 599 (delegate for Costa Rica, based on contemporaneous notes).

130 *Ibid.*, p. 600 (Belgium).

131 ICRC, *Terrorism and International Law*, above note 51, p. 5.

132 See also M. Hmoud, above note 101, p. 1038.

133 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Tadić*, Case No. IT-94-1-AR72, Appeal Chamber Decision (Interlocutory Appeal on Jurisdiction), 2 October 1995, paras 115–145.

134 UN General Assembly, *Report of the Ad Hoc Committee Established by UNGA Res. 51/210 of 17 December 1996*, UN Doc. A/60/37, 28 March–1 April 2005, p. 28; C. Díaz-Paniagua, above note 110, p. 661 (Tunisia).

of that party.¹³⁵ Such persons are neither part of the “armed forces” nor present in territories to which IHL applies.

Even though the ICTCs largely protect civilians, the exclusion clauses are necessary, for example, to prevent the criminalization of military bombings (under the Terrorist Bombings Convention) of public places, State facilities, or public transport or infrastructure where those normally civilian objects are military objectives at the time of targeting, civilian casualties would not be excessive, and the means and methods comply with IHL. “Activities” of armed forces excluded from the ICTCs are not, however, limited to military “attacks” (whether offensive or defensive) under IHL, or to acts against the adversary’s armed forces. Excluded activities could also include preparations for attacks, which would otherwise constitute offences such as attempt, conspiracy or threats under the ICTCs. Further, certain principal offences under the ICTCs, which would not be attacks under IHL, are also excluded “activities”, such as unlawful dealings with nuclear material,¹³⁶ possession of a radioactive material with intent to harm,¹³⁷ nuclear smuggling,¹³⁸ and unlawful transport on aircraft or ships of radioactive or nuclear material.¹³⁹

The exclusion applies to all activities even if they are not in conformity with IHL,¹⁴⁰ international law or national law. It thus also excludes even deliberate attacks on civilians by armed forces, which are left to IHL, international criminal law, international human rights law and the law on the use of force. Drafting proposals to limit the exclusion to activities in accordance with IHL were not accepted.¹⁴¹ In serious cases, terrorist-type conduct excluded under the ICTCs will constitute war crimes, such as the intentional bombing of civilians in IAC or NIAC, so the exclusive application of IHL will still ensure criminal accountability. As mentioned earlier, however, there may be gaps where ICTC offences are not war crimes, or CTL offers other law enforcement advantages.

135 See, for example, Antwerp Court of First Instance, *Prosecutor v. BF et al.*, FD35.98.47-12, AN35.F1.1809-12, Matter I, Judgment, 11 February 2015 (*Sharia4Belgium*), pp. 31, 33 (affirmed by the Antwerp Court of Appeal, 2015/FP/1-7, FD35.98.47-12, Judgment, 26 January 2016, and by the Belgian Court of Cassation, P.16.0244.N, Judgment, 24 May 2016); Brussels Court of Appeal (Chamber of Indictment), *Prosecutor v. U and 40 Others*, Case No. 2017/2911, 14 December 2017 (regarding the PKK).

136 Amended Nuclear Material Convention, Art. 7(1).

137 Nuclear Terrorism Convention, Art. 2(1)(a).

138 Amended Nuclear Material Convention, Art. 7(1)(d).

139 Maritime Safety Protocol, Art. 3bis (1)(b)(i)–(ii); Beijing Convention, Art. 1(1)(i)(1)–(4).

140 J. Pejic, above note 52, p. 189.

141 As in the drafting of the Terrorist Bombings Convention (see UN General Assembly, *Report of the Ad Hoc Committee Established by UNGA Res. 51/210 of 17 December 1996*, UN Doc. A/52/37, 1997, pp. 32 (Netherlands), 43 (Switzerland), 53; UN General Assembly, *Measures to Eliminate International Terrorism: Report of the Working Group*, UN Doc. A/C.6/52/L.3, 10 October 1997, pp. 31, 40 (Belgium)) and the Beijing Protocol and Beijing Convention (see Damien van der Toorn, “September 11 Inspired Aviation Counter-Terrorism Convention and Protocol Adopted”, *American Society of International Law Insights*, Vol. 15, No. 3, 2010). Belgium proposed a bifurcated approach by which State armed forces would be excluded but other (non-State) forces would only be excluded if “acting in accordance with” IHL: *ibid.*, p. 31. Jordan proposed not to exclude attacks by armed forces against protected civilians: UN General Assembly, “Letter Dated 3 August 2005 from the Chairman of the Sixth Committee Addressed to the President of the General Assembly”, UN Doc. A/59/894, 12 August 2005, p. 5; C. Díaz-Paniagua, above note 111, p. 664 (Pakistan).

Two further qualifications are arguably implied by the exclusion clause. One is that it applies to the “activities of armed forces” *as such*—that is, in the exercise of their military functions and not to purely private activities of off-duty military personnel. Another, related qualification is that since the exclusion applies to activities “during” armed conflict, such activities must have a nexus to the conflict, meaning that they are “closely related”¹⁴² to it—for example, by engaging in or preparing for hostilities, or where an act serves the ultimate goals of a party’s campaign.¹⁴³ This could include cases where private, off-duty soldiers secretly aid the enemy or engage in “blue-on-blue” attacks. In contrast, the work of some on-duty soldiers of a party to a conflict may not be considered activity “during” that conflict where it is unrelated to the conflict. An example is where some forces are deployed in a limited foreign conflict but others remain stationed at home, performing ordinary peacetime duties. Since IHL also applies to the territory of the home State, however, activities at home with a nexus to the foreign conflict would be excluded.

The 2005 Nuclear Terrorism Convention and the 2010 Beijing Convention (on aviation safety) augment the exclusion clause in the four other ICTCs by adding a “no prejudice” clause, providing that these instruments “shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws”.¹⁴⁴ A provision to that effect had been unsuccessfully proposed during the drafting of the Terrorist Bombings Convention,¹⁴⁵ as a compromise to avoid conditioning the exclusion of military activities on conformity with international law. Strictly, the provision is unnecessary given that the exclusion of armed forces in armed conflict does not in any way confer on those forces any positive authority to commit (for example) nuclear terrorism or endangerment of civilian aircraft, or any immunity from any other applicable law, including IHL, the law on the use of force, human rights law, or national law. Its sole effect is to preclude the application of the ICTCs to such acts. Politically, however, the “no prejudice” clause reflects the sensitivity of some States to excluding armed forces, lest this be perceived as condoning “terrorism” by State militaries.

The Draft UN Convention

Despite being agreed in the six ICTCs in 1997, 2005 and 2010, the exclusion clause has remained controversial during the negotiations for the Draft UN Convention since 1999. The Organisation of Islamic Cooperation (OIC) proposed excluding the activities of the “parties”—rather than “armed forces”—during armed

142 ICTY, *Tadić*, above note 133, para. 70.

143 ICTY, *Prosecutor v Kunarac*, Case Nos IT-96-23, IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 59.

144 Nuclear Terrorism Convention, Art. 4(3); Beijing Convention, Art. 6(3).

145 C. Díaz-Paniagua, above note 110, p. 320 (South Korea).

conflict, “including in situations of foreign occupation”.¹⁴⁶ This proposal is partly the result a technical difference over the proper terminology – “parties” aims to include OAGs, given the disagreement over the meaning of “armed forces” – but it also stems from a political disagreement about the desirable scope of the exception.

Both “armed forces” and “parties” are IHL terms of art. Only States are referred to as (high contracting) “parties” to IHL treaties,¹⁴⁷ which not only regulate their “armed forces”¹⁴⁸ but also impose obligations on the wider entity of the State (to legislate, disseminate, prosecute, cooperate and so forth). In NIAC, common Article 3 separately refers to “each Party to the conflict” in order to denote State and non-State parties; the latter are not also High Contracting Parties, however, since only States are parties to treaties.¹⁴⁹ Common Article 3 then guarantees protections for, *inter alia*, “members of armed forces” no longer taking an active part in hostilities, necessarily meaning both State and non-State forces. To the extent that the OIC’s reference to “parties” aims to counter those States which narrowly interpret “armed forces” as only State militaries,¹⁵⁰ it is redundant on a proper interpretation of “armed forces” under common Article 3.

However, the OIC also intends the term “parties” to exclude actors other than members of OAGs. These could conceivably include disorganized armed groups,¹⁵¹ sporadic civilian DPH (without performing a CCF and thereby being members of an OAG), or civilians supporting hostilities without taking a direct part therein. Self-determination movements and OAGs, for example, typically comprise not only armed wings but also wider (and often larger) political and social organizations, some of which may also engage in violence with a nexus to the conflict. In practical terms, reference to the “parties” is aimed at exempting entities such as the Palestine Liberation Organisation, Hamas, Islamic Jihad and Hezbollah.¹⁵² The EU was concerned about the implications of excluding activities of the “parties” in Northern Ireland and Basque Spain,¹⁵³ mirroring concerns that India had about Kashmir, although some of these concerns presuppose an expansive understanding of self-determination beyond colonial situations and to which AP I may not extend.

It is highly doubtful, however, that replacing “armed forces” with “parties” would make any difference (unless “armed forces” are limited to those of the State,

146 UN General Assembly, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN Doc. A/57/37, 2002, Annex IV, p. 17, and UN Doc. A/58/37, 2003, pp. 11–12.

147 See, for example, the Hague Regulations of 1907, the four Geneva Conventions, AP I and AP II.

148 See, for example, GC III, Art. 4(2); AP I, Art. 43.

149 In contrast, AP II refers only to (State) High Contracting Parties, not also to parties to the conflict; Article 1 then refers to conflicts between (State) “armed forces” and “dissident armed forces” or “other organized armed groups”.

150 J. Pejic, above note 52, p. 192.

151 *Ibid.*, p. 193.

152 See, for example, Christian Walter, “Defining Terrorism in National and International Law”, in Christian Walter, Silja Vöneky, Volker Röben and Frank Schorkopf (eds), *Terrorism as a Challenge for National and International Law*, Springer, Berlin, 2003, pp. 39–40.

153 C. Díaz-Paniagua, above note 110, p. 605.

as Jordan believed¹⁵⁴). A non-State “party” to a NIAC is exclusively constituted by an OAG. There is no equivalent recognition under IHL of any other components of a non-State party, such as the political, civil or administrative arms of a wider anti-government movement. In contrast, as mentioned, “States Parties” mean not only their armed forces (including irregular forces) but also other State organs (such as police and intelligence agencies) and other persons or entities attributable to States under the law of State responsibility. The OIC proposal makes a distinction without a difference because a non-State “party” to a NIAC is the same entity as an OAG – that is, the non-State “armed forces”.

The more difficult question – pertinent also to the six prior ICTCs with the exclusion clause – is who or what comes within the scope of the non-State “party”/OAG/“armed forces”. There was little discussion of the precise scope of non-State “armed forces” during the drafting of the ICTCs, largely because the meaning of this term was left to IHL. Yet the concept defining who comprises such forces (OAGs), under IHL itself, is open to debate. On a narrow view, the category includes only members of the group performing a CCF. On a middle view, it includes any member of the group, whether performing a CCF, persons otherwise (sporadically) taking a direct part in hostilities, or persons taking an indirect part in hostilities via support for the group (such as “police” or intelligence elements which may facilitate military operations without taking a direct part in them). On the widest view, it includes all of the preceding actors as well as others associated with the group who neither take a direct part in hostilities nor otherwise support hostilities (without taking a direct part therein). These could include the purely civil or administrative components of an armed movement which controls territory and governs a population, such as birth registrars, bureaucrats, police or judges. A narrow focus on fighters evidently does not account for the complex totality of certain non-State movements.

The dominant (and correct) approach is that “in respect of armed groups with multiple wings and/or divisions, reference to the armed group is usually to the military wing of the armed group”¹⁵⁵ (even if there may be humanitarian costs to this approach¹⁵⁶). This means that any exclusion of the activities of non-State “armed forces”/“parties” would only exclude fighters (CCF) or, on a slightly wider approach, other members integrated into the OAG and supporting hostilities but without taking a direct part therein.

IHL already stipulates consequences for such conduct, including targeting and security detention, and does not preclude liability for national crimes. The exclusion debate is thus partly a political struggle over what should be labelled as terrorism or not, rather than an attempt to confer impunity on “terrorists”. However, to the extent that ICTC offences differ from IHL or international

154 *Ibid.*, p. 600.

155 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 180.

156 For example, persons detained by the separate civil components of an armed group, or treated in its hospitals, or prosecuted in its courts, may not be protected by common Article 3.

criminal law in establishing additional liabilities, conferring wider powers or requiring distinctive international cooperation, the disagreement is also a legal one.

Civilians sporadically taking a direct part in hostilities, or who otherwise support hostilities (without taking a direct part therein), are still covered by ICTC offences, even if they are associated with the wider civil or administrative structures of a non-State movement. Importantly, these could include civilian policing or intelligence elements which use violence with a nexus to the conflict, without being members of the OAG.

The OIC's further proposed exclusion of "foreign occupation" is legally redundant in that an occupation is, by definition, an IAC under Article 2 common to the four Geneva Conventions, regardless of whether there are also hostilities between State forces.¹⁵⁷ The wording of the OIC's proposal (conflict "including" occupation) recognizes as much. OAGs involved in concurrent hostilities in occupied territory, and which do not "belong" to the occupied State, may separately be "armed forces" in a NIAC and also be excluded from the ICTCs. Since the OIC formulation is limited to "armed conflict, *including* ... foreign occupation", strictly speaking the provision does not appear to address a wider, non-IHL notion of "occupation", for instance relating to non-self-governing territories or incomplete or contested decolonization.

Security Council obligations on States to criminalize terrorist acts

Beyond the ICTCs, Security Council Resolution 1373 requires all States to criminalize "terrorist acts" and various preparatory acts (including terrorist financing), while subsequent resolutions have required criminalization of other conduct relating to, for example, so-called "foreign terrorist fighters".¹⁵⁸ The Council has not, however, provided a common international definition of such acts, and nor has it unequivocally prescribed the relationship of offences to IHL (such as through exclusion clauses, as in the ICTCs). Although its non-binding 2004 "working definition" addresses IHL in limited ways (by *renvoi* to predicate ICTC offences, and applying only to acts against "civilians", thus excluding acts against fighters),¹⁵⁹ it has had little influence on State practice. The Council's CTL monitoring bodies (the Counter-Terrorism Committee and Counter-Terrorism Executive Directorate) have also not publicly disclosed any clear position.

The risk is that national implementation of the Security Council's CTL offences (as well as terrorist financing measures) may violate IHL (particularly by undue restriction, prohibition or criminalization of medical and humanitarian activities, including contact or dialogue with OAGs) or infringe on IHL policy

¹⁵⁷ J. Pejic, above note 52, pp. 189, 193.

¹⁵⁸ UNSC Res. 2178, 24 September 2014, para. 6.

¹⁵⁹ UNSC Res. 1566, 8 October 2004, para. 3 is predicated on ICTC offences combined with additional general elements but it does not deal with conduct beyond ICTC offences.

values (by criminalizing direct participation in hostilities or membership of OAGs). While the Council has not expressly required States to criminalize such activities, the risk of States doing so is heightened by factors such as¹⁶⁰ the Council's lack of definition of terrorist acts, the potentially wide ambit of offences such as "support" for terrorist acts, and direction from the Council to criminalize the financing of "terrorist" individuals or groups "for any purpose"¹⁶¹ (not only for the commission of terrorism, as under the Terrorist Financing Convention), in conjunction with a vague definition of "funds" as "any assets" (tangible or intangible, moveable or non-moveable, and thus not limited to pecuniary funds).¹⁶² A further risk lies in the requirement to criminalize the travel of "foreign fighters", which, while limited to travel *for the purpose of participating in terrorist acts* (not merely to participate in hostilities), was nonetheless adopted in the context of armed conflicts¹⁶³ in Syria and Iraq and in the absence of any limiting definition of terrorism.

Positively, the Security Council has gradually become more attuned to IHL. In Resolution 1373, the Council did not insist on State compliance with international law when implementing CTL obligations, other than in the context of refugees.¹⁶⁴ However, since 2005 the Council has routinely reminded States of their duty to comply with all of their obligations under international law, specifically including (among others) IHL, when implementing CTL obligations.¹⁶⁵ Admittedly, many references have been preambular, or in operative but non-binding paragraphs, or confined to measures in a particular resolution.¹⁶⁶ Since 2019 one resolution has made IHL compliance binding ("decides"),¹⁶⁷ following a trend pioneered in respect of human rights in 2017.¹⁶⁸

These limitations should not, however, be understood as indicating that the Council's binding CTL measures may override IHL *unless IHL consistency is expressly affirmed*, whether in relation to the criminalization of terrorist acts or asset freezing under Resolution 1373 (where IHL is not mentioned). There is a presumption against normative conflict under international law, including in the context of the Security Council's power under Article 103 of the UN Charter to "override" inconsistent international agreements¹⁶⁹ (and there is doubt as to

160 See D. McKeever, above note 23, p. 61.

161 UNSC Res. 2253, 17 December 2015, para. 19.

162 Following the Terrorist Financing Convention, Art. 1(1).

163 UNSC Res. 2178, 24 September 2014, para. 1 ("demands that all foreign terrorist fighters disarm and cease all terrorist acts *and participation in armed conflicts*") (emphasis added).

164 UNSC Res. 1371, 26 September 2001, paras 3(f)–(g) (conformity with international law, including human rights).

165 See, for example, UNSC Res. 1624, 14 September 2005, para. 4; UNSC Res. 2178, 24 September 2014, para. 5; UNSC Res. 2253, 17 December 2015, Preamble; UNSC Res. 2368, 20 July 2017, Preamble; UNSC Res. 2396, 21 December 2017, Preamble and paras 4, 18, 34, 40; UNSC Res. 2462, 28 March 2019, para. 5.

166 UNSC Res. 2462, 28 March 2019, para. 5. See D. McKeever, above note 23, p. 61.

167 UNSC Res. 2462, 28 March 2019, paras 5 (financing offences), 6 (all counterterrorism measures).

168 UNSC Res. 2396, 21 December 2017, paras 11–13; D. McKeever, above note 23, p. 63.

169 Johann Ruben Leïæ and Andreas Paulus, "Article 103", in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary*, Vol. 2, 3rd ed., Oxford University Press, Oxford, 2012, para. 17.

whether Article 103 can override custom at all¹⁷⁰). In an analogous human rights context, in *Al-Jedda v. UK* (2011), the European Court of Human Rights held that, in interpreting Security Council resolutions, there is “a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights”; the interpretation must be chosen “which is most in harmony with the requirements of the [other obligation] and which avoids any conflict of obligations”; and the Council must use “clear and explicit language” to override another obligation.¹⁷¹ The same applies to IHL,¹⁷² which also comes within the UN’s purpose of respect for “human rights” (writ large) under Article 1(3) of the UN Charter.¹⁷³

The Security Council has not indicated a clear intention to override IHL.¹⁷⁴ To consider pertinent examples, when criminalizing “support” for or “financing” of terrorist acts under Resolution 1373, the Council did not specify that this must encompass medical or humanitarian personnel, or activities or assets protected by IHL (including medical care for injured “terrorists”) – just as the Council’s authorization of security detention in *Al-Jedda* did not indicate that due process need not be observed. Indeed, the IHL implications of Resolution 1373 simply did not occur to the Council at the time. The Council has not criminalized contact, engagement, dialogue or association with terrorist groups for humanitarian, IHL, human rights or peace-making purposes. When later criminalizing financing “for any purpose”, the Security Council resolution expressly “decided” that IHL must be respected. Criminalization of foreign terrorist fighters focuses on their travel to participate in terrorist acts, but the Council did not criminalize mere participation in hostilities, let alone humanitarian or medical activities.

The listing of two persons and two entities by the Security Council under the Resolution 1267 regime seemingly (in part) for medical activities¹⁷⁵ also does not indicate a clear intent to override IHL¹⁷⁶ (in that context of terrorist financing sanctions). Those listings were based mainly on serious terrorist activity: for example, Redendo Cain Dellosa led the *SuperFerry 14* attack by Abu

170 Article 103 applies only to inconsistent “agreements” and, on its ordinary meaning, it would not permit the Council to override customary IHL. This is confirmed by the *travaux*: see *ibid.*, para. 66. While the same source concludes that “the prevailing view” subsequently supports a broader view extending to custom (*ibid.*, para. 68), such certainty is not supported by the authorities cited, nor do the post-1945 authorities constitute (under the principles of treaty interpretation) a subsequent agreement amongst the parties which could alter the ordinary meaning confirmed by the *travaux*. See also F. Ní Aoláin, above note 5, para. 24.

171 European Court of Human Rights, *Al-Jedda v. United Kingdom*, Appl. No. 27021/08 (Grand Chamber), 7 July 2011, para. 102.

172 The reasoning in *Al-Jedda* was based on the special position of human rights as “purposes” of the UN under Article 2 of the UN Charter.

173 See, for example, UNGA Res. 2444 (XXIII), 19 December 1968; Hans-Peter Gasser, “The United Nations and International Humanitarian Law”, International Symposium on the 50th Anniversary of the United Nations, 19–21 October 1995 (“there is no doubt that the Charter’s notion of ‘human rights ...’ also includes ... ‘international humanitarian law’”).

174 Cf. D. McKeever, above note 23, pp. 68–71.

175 See, for example, F. Ní Aoláin, above note 5, para. 31.

176 Cf. D. McKeever, above note 23, p. 71.

Sayyaf in the Philippines which killed 100 people; Zafar Iqbal was a senior leader and co-founder of Lashkar-e-Tayyiba; and the Global Relief Foundation raised large sums for Al-Qaeda operations. No conclusions can be drawn from the reasons for listing as to whether the very briefly mentioned medical activities were, on the facts, of a kind even protected by IHL; and there is no evidence that the sanctions committee considered, and chose to override, IHL before mentioning those activities. Further, as discussed in the next section, the omission of an express medical or humanitarian relief exception to CTL measures also does not support an implication that the Council clearly intended to override IHL.

The better view is that States must implement CTL obligations in conformity with IHL, which the Security Council increasingly appears to recognize as the *lex specialis*—and not vice versa. Moreover, as the next section indicates, IHL itself accommodates many of the security-related concerns which CTL seeks to address, further reducing any potential for conflicts. It is, rather, the legislative choices made by States, often with purported reliance on Security Council resolutions, which collide with IHL, rather than the measures adopted by the Council itself.

Relation to medical and humanitarian activities

The Council's CTL measures cannot be interpreted as overriding IHL obligations concerning medical¹⁷⁷ and humanitarian¹⁷⁸ assistance in particular (discussed in detail in other articles in this issue of the *Review*). Such assistance is also “the sine qua non ... for the exercise of essential social and economic rights”;¹⁷⁹ in that respect, too, it is not evident that the Council intends to override human rights.

Crucially, close attention to IHL indicates that it can harmoniously apply with *strictly necessary* CTL measures precisely because IHL, and related practitioner norms, already safeguard against the abuse of medical or humanitarian assistance. First, not being protected civilians or *hors de combat*, active members of terrorist OAGs are not entitled to humanitarian relief and, by definition (not being *hors de combat*), will not normally need medical care/medicines; if they are wounded but still in combat, they are not entitled to the latter.

Overbroad CTL offences would, however, conflict with IHL if they criminalized the provision of medical¹⁸⁰ or humanitarian assistance to detained terrorists, wounded terrorists *hors de combat*, “terrorists” who previously participated directly in hostilities but are no longer so involved (whether because their participation was sporadic or they have disengaged from performing a CCF

177 See ICRC Customary Law Study, above note 17, Rules 25–30, 110; AP I, Arts 8–31; AP II, Arts 7–12.

178 See ICRC Customary Law Study, above note 17, Rules 31–32, 55–56; Oxford Institute for Ethics, Law and Armed Conflict, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, 2016 (Oxford Guidance), paras 11–15, 21–24.

179 F. Ní Aoláin, above note 5, para. 26.

180 For examples, see Dustin A. Lewis, Naz K. Modirzadeh and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, Harvard Law School, September 2015, p. iii.

in an OAG), sympathizers or supporters of a terrorist OAG who are not directly participating in hostilities, or members of a “terrorist organization” which is present in a conflict area but is not a party to the conflict and whose members’ activities do not otherwise involve DPH with a nexus to the conflict. Assistance to such persons is legitimate under IHL, even if it inevitably entails helping individual “terrorists” directly, and may risk diversion of aid to terrorist OAGs intermingled with civilians. It is not a sufficient answer for some States to suggest that humanitarian actors would rarely be prosecuted in practice:¹⁸¹ their conduct is still “criminal”, they face indefinite uncertainty as to enforcement, and they are likely to avoid engaging in humanitarian activities that are protected under IHL and are essential, on an impartial basis, to beneficiaries in need.

Secondly, once a State has agreed to relief operations, both sides must allow and facilitate their passage, but importantly, both sides are also entitled to impose technical control measures, such as inspections or prescribed routes, or distribution under the supervision of an impartial organization, to ensure that relief is exclusively humanitarian or that it reaches its intended beneficiaries and is not diverted.¹⁸² IHL thus already allows for security measures to prevent assistance to OAGs.

Thirdly, the parties themselves (including terrorist OAGs) have a duty not to divert medical or humanitarian supplies.¹⁸³ Additionally, pillage is a war crime, although this only covers appropriation for private or personal use. Further, unless aid is the property of the adverse party (as opposed to a humanitarian actor or neutral State), it is not a war crime for an OAG to seize it. Such seizure is nonetheless prohibited by IHL¹⁸⁴ and would almost certainly constitute the ordinary domestic crime of theft.

Fourthly, in policy and practice humanitarian actors are diligent about the risks of diversion and take extensive measures to avoid it, including because of their international and domestic obligations, their humanitarian professional ethics, and their goals of maximizing scarce resources for genuine beneficiaries and maintaining the confidence of the parties in their neutrality and impartiality. If unintended diversion occurs—as is inevitable in some conflicts—humanitarian actors should not be criminally liable (whether strictly, or based on a lower fault standard of recklessness), except if assistance is intentionally given to benefit active fighters.

In good humanitarian practice, actors normally deliver medical and humanitarian relief directly to beneficiaries, thereby precluding liability for directly supporting “terrorist” fighters. It is rare to help an OAG (including its civil administration) to itself deliver humanitarian or medical aid to populations under its control (by providing it with food, medicines, skills, services,

181 Naz K. Modirzadeh, “Comment”, in Jessica Burniske and Naz K. Modirzadeh (eds.), *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, Harvard Law School, March 2017, p. 74.

182 Oxford Guidance, above note 178, paras 66–67, 70. See, for example, AP I, Art. 70(3)(b).

183 Oxford Guidance, above note 178, paras 82, 87–88. See, for example, GC IV, Art. 60; AP I, Art. 70(3)(c).

184 ICRC Customary Law Study, above note 17, Rule 32. See also GC IV, Art. 59; AP I, Arts 48, 70(4) (duty to protect).

infrastructure or funds), but instances exceptionally arise – and humanitarian actors should not be criminalized for justifiable activities. The ICRC, for example, indicates that humanitarian “protection” – inextricable from assistance¹⁸⁵ – includes first-aid training and war surgery seminars for OAGs.¹⁸⁶ (A related example is where a humanitarian actor pays (through a third party) for the travel or accommodation expenses of fighters to attend IHL training,¹⁸⁷ which could constitute “indirectly” financing or supporting a “terrorist” individual or group.) Material assistance intended for detainees in OAG custody, and which may need to be distributed by the OAG, is another example.¹⁸⁸ International actors could also be involved in supporting public health or sanitation infrastructure operated by a *de facto* State authority.

More common examples include where a humanitarian actor pays, to an OAG in control of territory, a border “entry fee” (as one must to enter Gaza), or an import or transport fee (whether a “facilitation fee”, “port charge”, “road toll”, “customs levy”, tax or the like) to secure the passage of relief (as occurred in Somalia). Paying such fees may “finance terrorism”, stimulate demand for more fees, reward domestic crimes of extortion, and be perceived as legitimating OAG governance functions (regulation and taxation). But such payments also acknowledge realities on the ground, including that some OAGs are *de facto* State authorities and that, like States, they need to charge for administrative services in order to facilitate the proper functioning of civilian life. By analogy, while IHL discourages States from taxing humanitarian relief, it is not absolutely prohibited.¹⁸⁹

Finally, IHL protects “impartial” humanitarian relief but not sympathizers of a terrorist OAG who provide funds or services to it, which may constitute terrorist offences. However, it must be emphasized that *medical* personnel or activities are protected even when partisan, as where a doctor sympathetic to an OAG volunteers to treat wounded fighters. Moreover, some terrorism offences excessively criminalizing humanitarian activities of sympathizers could still be unnecessary or disproportionate restrictions on donors’ freedoms of association and expression, and impair the socio-economic rights of the intended beneficiaries.

Indeterminacy of the Security Council’s approach to IHL

Two other problems remain with the Security Council’s approach to IHL. First, as a UN Special Rapporteur has observed with regard to Security Council resolutions, mirroring her earlier concerns in the context of human rights compliance in

185 ICRC Commentary on GC III, above note 105, Art. 3, para. 847.

186 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, p. 52.

187 See, for example, ICRC Commentary on GC III, above note 105, Art. 3, paras 853–854 (ICRC protection activities).

188 *Ibid.*

189 GC IV, Art. 61 (in occupation, exemption from all charges, taxes or customs unless these are necessary in the interests of the economy). The same principle is arguably encouraged for the parties in other situations (including NIAC): Oxford Guidance, above note 178, pp. 27, 44.

CTL,¹⁹⁰ “most references to the [IHL] legal regimes are generic and lack the specificity required to ensure their observance”.¹⁹¹ This stands in stark contrast to the detailed specificity of many CTL measures. On the one hand, it may be seen as unnecessary for the Council to more specifically address IHL precisely because IHL already supplies the (right) answers, and it may be undesirable for the Council to “rule” on IHL questions¹⁹² and to potentially get them wrong, controversially resolve ambiguities in IHL, or feel emboldened to override IHL. On the other hand, it could be beneficial for the Council to affirm the applicability of settled, specific IHL rules (by reference to authoritative IHL sources and bodies such as the ICRC) in relation to particular CTL measures, in order to remove doubts sown by States whose laws contest their applicability.

Only in one particular area has the Council, in Resolution 2462, more specifically urged (but not required) States to “take into account” the effect of CTL *financing* measures on “exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with” IHL.¹⁹³ Resolution 2482 extended the same language to all CTL measures.¹⁹⁴ Both clauses are, however, non-binding and merely suggest that States procedurally “take into account” humanitarian impacts, rather than also substantively respecting IHL rules. In principle this limitation is offset by Resolution 2462 requiring States to comply with IHL generally in all CTL measures,¹⁹⁵ but this resolution does not specifically emphasize humanitarian and medical activities.

It does not, however, indicate a clear intention to override IHL that the Security Council has explicitly provided for automatic humanitarian assistance exceptions to Somalia country sanctions,¹⁹⁶ but has only indicated that humanitarian activities should be “taken into account” in a CTL context, and has made no mention of these issues at all in Resolution 1267 (for Al-Qaeda *et al.* listings, apart from a different “basic expenses” exception) or Resolution 1373 (whether for national asset freezing regimes or terrorism offences).¹⁹⁷ Such omissions could alternatively suggest that political dynamics in the Council have made explicit exceptions more difficult in relation to terrorism than to individual countries; or that a “global” exception—for all actors, conflicts and contexts—is harder to craft than a targeted one for a single country, with a particular

190 Fiona Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/73/45453, 3 September 2018, para. 37.

191 F. Ní Aoláin, above note 5, para. 24.

192 For an overview of some of these issues, see Dustin A. Lewis, Naz K. Modirzadeh and Jessica Burniske, *The Counter-Terrorism Committee Executive Directorate and International Humanitarian Law*, Harvard Law School, March 2020.

193 UNSC Res. 2462, 28 March 2019, para. 24 (financing measures).

194 UNSC Res. 2482, 19 July 2019, para. 16.

195 UNSC Res. 2462, 28 March 2019, para. 6. UNSC Res. 2482, 19 July 2019, para. 16 only “urges” States to do so.

196 Starting with UNSC Res. 1916, 19 March 2010, para. 5; the current exemption is in UNSC Res. 2551, 12 November 2020, para. 22. A more limited approach is a procedure for applying for the grant of humanitarian exemptions: see, for example, UNSC Res. 2397, 22 December 2017, para. 25 (North Korea).

197 Cf. D. McKeever, above note 23, pp. 69–71.

vulnerable population or looming famine in mind; or that the Council believes reiterating the need for IHL compliance in general is sufficient to prevent CTL undermining humanitarian assistance. It does not follow that the Council intended to override IHL by implication from such omissions. The recent CTL resolutions (and a thematic debate on IHL¹⁹⁸) suggest that, over time, the Council has become more sensitized to the adverse impacts of its CTL measures on IHL and the need to explicitly affirm IHL and humanitarian exceptions. Given the Council's starting point – complete inattention to IHL (far from trumping it) – that “learning curve” may be expected to continue.

It is desirable that the Security Council should unambiguously affirm, in a binding paragraph, that States must comply with IHL obligations concerning medical and humanitarian assistance.¹⁹⁹ Outside a CTL context, the Council has already demanded that all parties to an armed conflict respect and protect “all medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport, and equipment, as well as hospitals and other medical facilities”.²⁰⁰ While a new clause cannot immediately cure two decades of inattention to IHL since Resolution 1373,²⁰¹ it could certainly require States to conform all CTL measures adopted under past resolutions to it, just as the Council has often “amended” earlier CTL resolutions on, for example, terrorist financing offences or foreign terrorist fighters. It is also not sufficient to devolve the drafting of such clauses to the regional²⁰² or national level: universal CTL measures require universal IHL red lines, and sufficient specificity is possible as long as the Council takes sufficient care, and involves the appropriate expertise, in the drafting.

A second issue unresolved by the Council, even if IHL compliance is expected, is the treatment of acts which are not unlawful under IHL. As discussed earlier, criminalizing direct participation in hostilities, or support for hostilities, is not unlawful under IHL, but it arguably undermines important IHL policy interests concerning compliance by OAGs, incentives for peace, and prospects for reconciliation. It would consequently be beneficial for the Council to formulate an explicit “armed forces in armed conflict” exclusion of the kind found in the six recent ICTCs (or an enhanced version thereof, discussed below), and to clarify that “armed forces” definitely include OAGs.

198 UN Security Council, *Agenda: The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security*, UN Doc. S/PV.8499, 1 April 2019.

199 F. Ní Aoláin, above note 5, para. 34. D. McKeever, above note 23, pp. 74–75, emphasizes the need for any clauses to acknowledge the differentiated contours of protection for different forms of medical and humanitarian assistance under IHL. The Security Council could even, of course, impose higher levels of protection for medical or humanitarian activities in relation to its CTL measures than IHL provides – for instance, by explicitly requiring non-punishment of humanitarian activities in NIAC, although that could upset the balance agreed under IHL; or by ensuring that non-parties to a conflict also respect medical and humanitarian personnel and do not extraterritorially criminalize them in foreign conflicts.

200 UNSC Res. 2286, 3 May 2016, para. 3.

201 A problem identified by D. McKeever, above note 23, p. 76.

202 Cf. *ibid.*, p. 76.

Relationships between CTL and IHL in national practice

Given the decentralized nature of implementation of Security Council CTL obligations, which are both undefined and not subject to unambiguous IHL clauses, it is no surprise that national and regional practice is highly variable as regards the relationship between CTL and IHL.

Variants of accommodation of IHL

First, some laws apply to terrorism offences *generally* a version of the armed forces exclusion clause applying more narrowly under the six later ICTCs. Among all explicit relationships with IHL in national practice, this is the predominant approach, evident, for example, in the regional counterterrorism laws of the twenty-seven-member European Union²⁰³ and the forty-seven-member Council of Europe²⁰⁴ – almost a quarter of all States – and in some corresponding national laws.²⁰⁵ (EU law also only excludes armed forces in armed conflict from terrorism offences, but not asset freezing measures.²⁰⁶) The regional conventions of the OIC and the Organisation of African Unity more narrowly exclude “armed struggle” only by self-determination movements.²⁰⁷

The EU’s exclusion clause is, however, located in a non-binding preambular “recital”,²⁰⁸ producing divergence in national implementation. An EU review of implementation drew no attention to the recital,²⁰⁹ despite its frequent omission in implementation. As mentioned earlier, in applying the recital in interpretation (in the absence of legislation implementation), the Dutch courts have interpreted “armed forces” as being confined to State forces. Where the clause has been directly applied, it has not necessarily produced decisions which

203 Directive (EU) 2017/541 of the European Parliament and of the Council on Combating Terrorism, 15 March 2017, Recital 37, replacing Council Framework Decision 2002/475/JHA, 13 June 2002, Recital 11.

204 Council of Europe Convention on the Prevention of Terrorism, 2005, Art. 26(5). This convention’s 2015 Additional Protocol on foreign terrorist fighters is qualified by *renvoi* to the same provision: D. McKeever, above note 23, p. 60.

205 See, for example, Criminal Justice (Terrorist Offences) Act, 2005, Revised (Ireland), Sec. 6(4)(a); Belgian Criminal Code, Art. 141*bis*, applied in Brussels Court of Appeal (Chamber of Indictment), *Prosecutor v. U and 40 Others*, Decision No. 2019/939, 8 March 2019 (acquitting PKK members on the basis that the PKK are armed forces in a NIAC and were not engaged in terrorist offences outside of it). Earlier, see Brussels Court of Appeal (Chamber of Indictment), *Prosecutor v. U and 40 Others*, 3 November 2016 and 14 September 2017; Antwerp Court of First Instance, *Sharia4Belgium*, above note 135 (Al-Nusra and IS in Syria); see also Court of Naples (Judge for Preliminary Investigations), *Republic of Italy v. TJ (aka Kumar) and 29 Others*, 23 June 2011; District Court of The Hague, *Prosecutor v. Selliaha*, Case No. BU7200 (09/748801-09), Judgment, 21 October 2011.

206 EU, Council Common Position on the Application of Specific Measures to Combat Terrorism, 2001/931/CFSP, 27 December 2001; EU, Council Regulation (EC) 2580/2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism, 27 December 2001.

207 OIC Convention on Combating International Terrorism, 1 July 1999 (entered into force 7 November 2002), Art. 2(a); OAU Convention, Art. 3(1).

208 District Court of The Hague, *Context Case*, above note 107, para. 7.35.

209 European Commission, *Report from the Commission to the European Parliament and the Council Based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism*, COM(2020) 619 final, 30 September 2020.

accurately apply IHL, as where a Belgian court restrictively found that Jabhat Al-Nusra and another group were not armed forces in a NIAC in Syria because they were both insufficiently “organized” and were unwilling *and* unable to comply with IHL;²¹⁰ the Court also seemed adversely influenced by the groups’ extremist motives.²¹¹

Italian law, on the other hand, has widened the application of IHL exclusions. It incorporates EU terrorism offences, including the armed forces exception. However, the Italian courts have also held that Italian law encompasses other terrorist offences under customary international law as reflected in the Terrorist Financing Convention of 1999.²¹² The Convention excludes attacks on persons taking a direct part in hostilities, but the Italian courts have further excluded the acts of armed forces, based separately on a “no prejudice” clause in the Convention which precludes it from affecting other international law rights, including IHL.²¹³ Acts by the LTTE in the NIAC in Sri Lanka were thus excluded from terrorist offences.

In principle, narrower versions of the armed forces exclusion are possible. As mentioned earlier, narrower variants were considered in the negotiations for the UN Draft Convention, by excluding only IHL-compliant activities; activities of the *parties* rather than armed forces; and activities of State armed forces, not also non-State forces. However, none of these options has seemingly influenced national laws.

Secondly, it was unsuccessfully proposed to exclude any acts committed in and/or governed by armed conflict during the drafting of the Terrorist Bombings Convention²¹⁴ and Terrorist Financing Convention.²¹⁵ This approach maintains the strictest separation between IHL and CTL, since it excludes any act (lawful or unlawful) against any target (civilian or military), or by any actor (armed forces or otherwise), regardless of IHL conformity, as long as the act is *governed* by IHL. In addition, by excluding any “acts”, not only those by armed forces, this approach would also prevent the criminalization of humanitarian funding or relief.²¹⁶ One disadvantage is that it precludes the application of CTL (including its preparatory offences and machinery of prevention and cooperation) to persons who are not members of State or non-State armed forces (such as disorganized armed groups or sporadic civilian DPH), and even conduct that is a war crime or

210 Antwerp Court of First Instance, *Sharia4Belgium*, above note 135, p. 33.

211 See Rogier Bartels, “When Do Terrorist Organisations Qualify as ‘Parties to an Armed Conflict’ under International Humanitarian Law?”, *Military Law and Law of War Review*, Vol. 56, No. 2, 2018; H. Cuyckens and C. Paulussen, above note 100, p. 556.

212 Court of Naples, *TJ*, above note 205.

213 Terrorist Financing Convention, Art. 21; see, similarly, Terrorist Bombings Convention, Art. 19(1); Nuclear Terrorism Convention, Art. 4(3); Maritime Safety Protocol, Art. 3; Beijing Protocol, Art. 6; Beijing Convention, Art. 6(1).

214 UN General Assembly, *Report of the Working Group*, above note 142, p. 31 (South Africa and Switzerland).

215 UN General Assembly, *Report of the Ad Hoc Committee Established by UNGA Res. 51/210 of 17 December 1996*, UN Doc. A/54/37, 1999, pp. 15, 42, 47 (France, Lebanon, Belgium).

216 UN General Assembly, *Measures to Eliminate International Terrorism: Report of the Working Group*, UN Doc. A/C.6/54/L.2, 26 October 1999, p. 54 (Kuwait).

other violation of IHL. This approach does not appear to have influenced national practice.

Thirdly, a narrower approach, found in Canadian (and similarly New Zealand) law, excludes from terrorist offences “an act or omission that is committed during an armed conflict” *and in accordance with* international law.²¹⁷ In a more limited fashion, Swiss law excludes terrorist financing that “is intended to support acts that do not violate” IHL.²¹⁸ One advantage is that mere participation in hostilities, without harm to civilians or use of unlawful means or methods, is not criminalized, thereby respecting IHL’s equilibrium; IHL itself does not regard civilian DPH (including CCF) as unlawful, but leaves its legality to national law.

Further, CTL offences will still apply to conduct that violates IHL (whether a war crime or not), thereby reinforcing IHL’s protection of civilians (and combatants, for instance with regard to the use of prohibited weapons or means of war) – just as crimes against humanity and genocide co-apply in conflict. In the Canadian case of *Khawaja*, for instance, the exclusion clause did not apply to conduct that involved the war crime of spreading terror and suicide attacks against civilians in a NIAC in Afghanistan.²¹⁹ A disadvantage is that, in practice, CTL offences are only likely to be used (by State authorities) to prosecute members of OAGs who violate IHL, accentuating the asymmetrical treatment of the belligerents in NIAC and the drawbacks (mentioned earlier) of transnationally stigmatizing such groups as “terrorist”.

A fourth approach in some national laws is a narrower exclusion for humanitarian activities from terrorism offences generally,²²⁰ or from specific offences;²²¹ some of these are very limited, however, such as the exclusion of “medicine” but not medical care, food, or humanitarian relief generally.²²² In the separate context of terrorist asset freezing, EU law exempts certain activities for “humanitarian purposes, such as ... delivering or facilitating the delivery of assistance, including medical supplies, food, or the transfer of humanitarian workers and related assistance or for evacuations”.²²³ More tangentially, a few

217 Canadian Criminal Code, Sec. 83.01(1); see also New Zealand Terrorism Suppression Act, 2002, Sec. 5(4).

218 Swiss Criminal Code, 1937, Art. 260^{quinquies}1(4).

219 Supreme Court of Canada, *R v. Khawaja*, [2012] 3 SCR 555, 2012, paras 100–103.

220 Directive (EU) 2017/541, above note 203, Recital 38 (in implementation, see laws in Austria, Belgium, Italy and Lithuania: European Commission, above note 209, pp. 6–7); Republic of Chad, Law No. 3 on the Repression of Acts of Terrorism in the Republic of Chad, 28 April 2020, Art. 1(4) (this law also includes a general clause on “no prejudice” to IHL or human rights: Art. 1(3)); Ethiopia, Proclamation No. 1176/2020 on Prevention and Suppression of Terrorist Crimes, 25 March 2020, Art. 9(5).

221 Such as being present in a prohibited terrorist area (see UK Counter-Terrorism and Border Security Act, 2009, Sec. 4; Australian Criminal Code, Sec. 119.2(3)(a)); Denmark Criminal Code, Sec. 114(j)); associating with a terrorist organization, treasonously aiding the enemy, hostile foreign incursions, or foreign military training (Australian Criminal Code, Secs 102.8, 83.3, 80.1AA(1) and 119.5 respectively); and providing material support (Philippines Anti-Terrorism Act, 2020, Art. 13).

222 18 USC §2339A(b)(1) (material support for terrorism, excluding medicine or religious materials; medicine is interpreted as substances only: US Court of Appeals for the Second Circuit, *United States v. Farhane*, 634 F.3d 127, 143 (2d Cir 2011), 4 February 2011).

223 EU Council, *EU Best Practices for the Effective Implementation of Restrictive Measures (Sanctions)*, 8519/18, 4 May 2018, para. 76.

States exclude acts intended to create or restore democracy, the constitution or human rights,²²⁴ which could be relevant in some conflicts.

At the international level, by contrast, there has been a reticence to recognize clear humanitarian exceptions from CTL. A Swiss proposal during the drafting of the Terrorist Financing Convention to exclude funds for humanitarian purposes was not accepted.²²⁵ A person who donates funds for a humanitarian purpose may thus be criminally liable for financing terrorism where the person knows that part of the funds are to be used for terrorism, even if that is not intended. From a strict CTL standpoint, there are concerns about the fungibility of funds and their diversion for terrorist purposes. While one Security Council sanctions regime, concerning Somalia, recognizes a specific, automatic humanitarian exception,²²⁶ the same benefit has not been extended to CTL sanctions. At most, as mentioned, Security Council resolutions since 2019 have urged States to “take into account” the impacts of CTL on humanitarian and medical activities that are consistent with IHL,²²⁷ and terrorist financing offences must comply with IHL.

No accommodation of IHL

A final approach to the relationship with IHL is the most common in national law²²⁸ and certain regional laws:²²⁹ no explicit exclusion or accommodation of IHL at all, and thus potentially full co-application of CTL. Some national²³⁰ and regional²³¹ courts have upheld CTL offences (as well as terrorist financing measures) in armed conflict on the various bases that (1) international law (including the ICTCs) does not prohibit the criminalization of hostilities in NIAC (even if not prohibited by IHL) and no combatant immunity exists in NIAC;²³² (2) the application of IHL and war crimes law does not preclude the concurrent

224 Austrian Criminal Code, Art. 278(c)(3); Swiss Criminal Code, 1937, Art. 260^{quinquies} (3) (concerning terrorist financing offences only). See also the repealed Greek Penal Code, Art. 187A(8) (from 2004 to 2010) and repealed New Zealand Terrorism Suppression Act, 2002, Sec. 8(2) (from 2002 to 2007).

225 UN, “Proposal Submitted by Switzerland”, UN Doc. A/AC.252/1999/WP.1, 15 March 1999, proposed Art. 1(1); see also UN General Assembly, above note 215, p. 57.

226 UNSC Res. 2385, 14 November 2017, para. 33.

227 UNSC Res. 2462, 28 March 2019, para. 24; UNSC Res. 2482, 19 July 2019, para. 16.

228 See, for example, UK Terrorism Act, 2000, Sec. 1, applied in UKSC, *Gul*, above note 47; Australian Criminal Code, 1995, Sec. 100.1; Dutch Supreme Court, *Opinion on Extradition of Requested Person to Republic of Turkey*, ECLI:NL:HR:AF6988, Judgment, 7 May 2004, paras 3.3.7–3.3.8; District Court of The Hague, *Prosecutor v. Maher H*, Case No. 09/767116-14, Judgment, 1 December 2014, para. 3; District Court of The Hague, *Context Case*, above note 107, paras 7.23–7.29.

229 EU Common Position 2001/931/CFSP, above note 206 (concerning terrorist financing), applied in Court of Justice of the European Union (CJEU), *Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union*, Case No. T-208/11, Judgment of the General Court (Sixth Chamber), 16 October 2014, paras 54–83; CJEU, *A, B, C and D v. Minister van Buitenlandse Zaken*, Case No. C-158/14, Judgment, 14 March 2017. Most regional treaties do not mention IHL.

230 UKSC, *Gul*, above note 47, paras 48–51; Dutch Supreme Court, *Opinion on Extradition*, above note 228, paras 3.3.7–3.3.8; District Court of The Hague, *Maher H*, above note 228, para. 3; cf. District Court of The Hague, *Selliaha*, above note 205.

231 CJEU, *LTTE*, above note 229, paras 54–83; CJEU, *Minister*, above note 229.

232 UKSC, *Gul*, above note 47, paras 48–51; District Court of The Hague, *Maher H*, above note 228, para. 3.

application of CTL;²³³ (3) there is no common international law approach to exclusion, including under the ICTCs or in national laws,²³⁴ and Resolution 1373 does not exempt armed forces in armed conflict;²³⁵ (4) States may still “gold-plate” treaties with exclusion clauses by going beyond them, since the treaties do not prohibit this;²³⁶ (5) there is no exception for resistance to oppression;²³⁷ and (6) attacks specifically on UN-authorized military forces (such as in Afghanistan) could be contrary to UN principles and purposes.²³⁸

Such laws criminalize acts by armed forces and other actors alike, as well as acts in conformity with IHL or not. In many States, as in the drafting of most criminal offences, interaction of CTL with IHL may not be front of mind, since most States are not engaged in armed conflicts involving terrorist organizations, let alone extraterritorial conflicts. However, given Security Council obligations to cooperate with other States in the suppression of terrorist offences, even States not embroiled in conflict may encounter requests from other States for extradition or mutual assistance in relation to offences in foreign armed conflicts. The issue is thus relevant for all States. In other States, such laws may reflect a deliberate choice to maximize the reach of CTL, for instance to criminalize the making of improvised explosive devices in NIAC or incitement to commit hostilities. The drawbacks of such an approach were addressed earlier in this article.

Where laws do not generally accommodate IHL, there can still be some flexibility in them. States will inevitably exempt their own military forces from counterterrorism laws since there will be positive legal authority in national law for the military operations of these forces, providing a lawful or reasonable excuse for CTL charges. In addition, the functional immunity of one State’s military personnel would shield them from counterterrorism laws before another State’s courts (since neither the ICTCs nor Security Council measures lift immunities), as would combatant immunity under IHL if a case proceeded to the merits.

The burden of counterterrorism laws will thus fall asymmetrically on OAGs in NIAC. At most, persons in NIAC can hope that prosecutorial discretion (and related devices such as consent to prosecute from an attorney-general or justice minister) will be exercised not to lay counterterrorism charges where they do not violate IHL. This is unlikely in many States, however, given that CTL is often precisely designed to target rebels. It is also undesirable from a rule of law standpoint, since it politicizes prosecutors by inviting them to selectively determine who should be regarded as a terrorist (say, IS but not Kurdish forces

233 Dutch Supreme Court, *Opinion on Extradition*, above note 228, paras 3.3.7–3.3.8; CJEU, *LTTE*, above note 229; District Court of The Hague, *Maier H*, para. 3.

234 UKSC, *Gul*, above note 47, paras 47–48, 51; Court of Appeal of England and Wales, *R v. Gul*, [2012] EWCA Crim 280, 22 February 2012, paras 37–41.

235 CJEU, *LTTE*, above note 229, para. 74 (here in the context of asset freezing, but the same point applies to criminal measures under UNSC Res. 1373).

236 UKSC, *Gul*, above note 47, para. 53.

237 *Ibid.*, paras 29, 33; CJEU, *LTTE*, above note 229.

238 UKSC, *Gul*, above note 47, para. 49 (approving UKSC, *Al-Sirri v. Secretary of State for the Home Department*, [2013] 1 AC 745, 2013, para. 68).

in Syria), abdicates the legislature's responsibility to clearly identity the scope of liability, and compromises the rule of law.²³⁹

Conclusion

There is clearly little support in State practice for entirely quarantining armed conflict from CTL and exclusively applying IHL; to the contrary, the thrust of CTL since the 1970s, accelerating after 2001 and promoted by the Security Council, has been a story of co-application (sometimes) with diverse exceptions. Amongst the exceptions, support is strongest for the exclusion of the activities of armed forces in armed conflict, evident in six ICTCs, proposed in the Draft UN Convention, and generalized in EU law across all terrorism offences. The Security Council is, regrettably, missing in action in this regard, despite being the progenitor of much contemporary national CTL offences and other measures.

An exception for “armed forces” in armed conflict should therefore be adopted in the Draft UN Convention, by the Security Council to delimit its CTL measures, and in regional and national laws. This would minimize adverse impacts on incentives for OAGs to comply with IHL and on prospects for peace and post-conflict reconciliation. It may come at the expense, however, of preventing CTL (including its preparatory offences and machinery of prevention and cooperation) from co-regulating violations of IHL by armed forces, whether to strengthen protection of civilians or fighters, including where war crimes laws are too limited. For the same reason, excluding any acts (by whomever) governed by IHL goes too far, additionally because it exempts not only members of OAGs (who are usually subject to an internal disciplinary system) but anyone who sporadically participates directly in hostilities.

A preferable approach is to confine an armed forces exception to activities which are not unlawful under IHL—as the ICRC proposed for the Draft UN Convention, and as reflected in “best practice” Canadian and New Zealand law—thus buttressing IHL without unduly detracting from it (for instance, by criminalizing mere participation in hostilities). There are still drawbacks to this approach: in practice, States are unlikely to criminalize their own military forces as terrorists even when violating IHL, and the asymmetric stigmatization of OAGs as terrorists may still undermine compliance and impede peace and reconciliation. Even so, if a group is already systematically violating IHL, at that point IHL's weak incentives to comply are already likely to be ineffective, and the application of CTL may then enhance, not detract from, civilian protection and overall respect for IHL's core purposes.

Finally, it is essential that the Security Council unambiguously “decide” that all of its mandatory CTL offences and other measures adopted since 2001 must be implemented in conformity with IHL obligations concerning medical

239 UKSC, *Gul*, above note 47, para. 36.

and humanitarian personnel and activities, as well as any other specific IHL rules especially impacted by CTL. Such guidance must, however, faithfully reflect IHL and not deliberately or inadvertently trump “true” IHL with the Council’s own restrictive interpretation of it favouring CTL.

Counterterrorism and the risk of over-classification of situations of violence

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Abstract

Richard Baxter famously stated that “the first line of defence against international humanitarian law is to deny that it applies at all”. While “under-classification” remains an issue today, a parallel trend needs to be acknowledged. This is the tendency to over-classify situations of violence, especially in relation to transnational terrorist organizations such as the so-called Islamic State group or

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Al-Qaeda. This tendency stems from practical difficulties inherent in the changing operational environment. The last few years have witnessed a proliferation of armed non-State actors that are labelled or designated as terrorists (e.g., in Iraq, Syria, Mali, Nigeria and Yemen). Terrorist groups are characterized by opaque, often volatile organizational structures and tend to operate in decentralized networks rather than clear hierarchies. The formation of splinter groups, changing alliances, temporary reunification and even open hostility among former allies are common phenomena. This complex factual situation has led to the proliferation of theories of conflict classification, many of them arguing in favour of more flexible classification via the loosening of existing standards. Because international humanitarian law is in many respects less protective than international human rights law, particularly regarding the rules on the use of force and detention, classifying a situation of violence as an armed conflict when the threshold has not been met is a problem that should not be underestimated. In this article, we revisit the criteria of intensity and organization, as well as the related matter of the role of motives in conflict classification, considering conflicts involving armed groups described as terrorists. Our goal is to identify minimum requirements that could diminish the risk of over-classification by various stakeholders.

Keywords: over-classification, counterterrorism, international humanitarian law, international human rights law, non-international armed conflict, conflict classification, organized armed groups, use of force, terrorist groups.

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Introduction

Richard Baxter famously stated that “the first line of defence against international humanitarian law is to deny that it applies at all”.¹ It is certainly a politically sensitive matter for States to admit the existence of an armed conflict on their soil, particularly when facing a perceived domestic terrorist threat. Even when faced with overwhelming evidence of an armed conflict, some States have tended to ignore international humanitarian law (IHL) and formally treat the matter as a simple issue of law enforcement.² This “under-classification” phenomenon has been particularly problematic in situations which are arguably too volatile to be

- 1 Richard Baxter, “Some Existing Problems in Humanitarian Law”, in *The Concept of International Armed Conflict: Future Outlook*, Proceedings of the International Symposium of Humanitarian Law, Brussels, 1974, p. 2.
- 2 For example, such has been the position of the Russian Federation and Turkey towards the conflicts with Chechen insurgents and the Kurdistan Workers’ Party, respectively, and this was reflected in these States’ submissions to the European Court of Human Rights (ECtHR) in cases related to these situations. See, for example, ECtHR, *Ergi v. Turkey*, Appl. No. 66/1997/850/1057, 28 July 1998; ECtHR, *Isayeva v. Russia*, Appl. No. 57950/00, 24 February 2005; ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Appl. Nos 57947/00, 57948/00, 57949/00, 24 February 2005; ECtHR, *Aslakhonova and Others v. Russia*, Appl. Nos 2944/06, 8300/07, 50184/07, 332/08, 42509/10, 18 December 2012.

properly contained by the more restrictive framework of international human rights law (IHRL).

Yet today, the opposite is often the case: situations which ought not be covered by IHL are treated as armed conflicts in order to justify means not permissible under IHRL. There is an increasing tendency for terrorism to be treated as an armed conflict rather than a policing matter in the post-9/11 world. The rise of global terrorist networks incentivizes some States to use lethal force in a manner which is at odds with the standards of IHRL. The more permissive rules of IHL governing the use of force seem to offer an attractive alternative to the law enforcement paradigm for counterterrorist operations, as attested to by numerous examples, such as the targeted killing of Al-Qaeda cleric Al-Awlaki in Yemen in 2011 in a US drone strike,³ or the Egyptian government's response to terrorist attacks (with no apparent link to the ongoing Sinai insurgency) in what resembles a conduct of hostilities manner.⁴

There are two main reasons for this current problem of “over-classification”.⁵ First, the tendency clearly stems from practical difficulties inherent in the changing operational environment today. The last few years have witnessed a proliferation of armed non-State actors that are labelled or designated as terrorists (e.g., in Iraq, Syria, Mali, Nigeria and Yemen). Terrorist groups are characterized by opaque, often volatile organizational structures and tend to operate in decentralized networks rather than clear hierarchies. The formation of splinter groups, changing alliances, (temporary) reunification and even open hostility among former allies are common phenomena. Eric Talbot Jensen summarizes the common organizational features of terrorist groups: many designated terrorist groups have no “pyramidal” (hierarchical) structure, preferring a decentralized organizational command chain; their leadership often merely provides instructions and guidance and not orders or commands in the military sense; their “fighters” are geographically dispersed, with cells operating in very different contexts and perhaps with significant geographical distance between operatives conducting an attack and the group's leadership; and finally, there are great fluctuations in the functioning of terrorist networks, with even their leadership possibly being unaware of which individuals are members.⁶ After

3 “Islamist Cleric Anwar Al-Awlaki Killed in Yemen”, *BBC News*, 30 September 2011, available at: www.bbc.com/news/world-middle-east-15121879 (all internet references were accessed in September 2021).

4 After a late 2018 bomb attack against a tourist bus in Giza, Egyptian forces claimed to have killed forty alleged terrorists in Giza and Northern Sinai. See “Egypt Police ‘Kill 40 Militants’ in Raids after Tourist Bus Blast”, *BBC News*, 29 December 2018, available at: www.bbc.com/news/world-middle-east-46708695. As far as the authors of this article are aware, Egypt has not publicly stated its views on the use of force paradigm governing the raids, but the operation was aimed at eliminating “militants” rather than arresting suspected criminals as required under law enforcement.

5 A concise restatement of the problem of over-classification is offered by Sassòli, who notes that “States try to ‘overclassify’ a situation as an armed conflict in order to apply IHL even where it does not apply”. Marco Sassòli, “The Implementation of International Humanitarian Law: Current and Inherent Challenges”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007, p. 50.

6 Eric Talbot Jensen, “Targeting of Persons and Property”, in Geoffrey S. Corn *et al.*, *The War on Terror and the Laws of War: A Military Perspective*, Oxford University Press, Oxford, 2015, p. 86.

the so-called Islamic State group (IS) lost most of the territories that it once controlled in Iraq and Syria, analysts feared a proliferation of splinter groups that are less structured but no less deadly, and a further geographical dispersion of their activities through “foreign fighters” returning home or relocating and sleeper cells in Europe and elsewhere;⁷ identifying the workings of such groups, their links to the “parent group”, where one group ends and another begins and how they coordinate, can prove a difficult exercise. Classifying conflicts under these circumstances can be nigh impossible: how should one navigate, say, conflicting claims regarding the attribution of attacks in Mali to Nusrat Al-Islam,⁸ or the uncertainties regarding the organizational structure of various factions in Libya⁹ and Yemen,¹⁰ in order to determine with some degree of confidence that IHL applies to certain acts or groups? Yet the presumption more often than not seems to be that one or more non-international armed conflicts (NIACs) exist and that IHL applies to the situation of violence as a whole.

The second cause of over-classification relates to a lack of clarity in IHL regarding the classification criteria of organization and intensity, and their intertwined nature. Practitioners usually rely on standards developed by international criminal tribunals to ascertain whether an armed conflict exists. However, as this jurisprudence is inherently limited by the facts presented to the courts in specific cases, applying these standards verbatim to a very different context can lead to counterintuitive results. Theories of conflict classification have therefore proliferated in the past decade, many of them arguing in favour of more flexible classification by loosening existing standards and factors.¹¹ This is typically framed as a response to challenges raised by complex factual situations

- 7 See Syed Huzaifah Bin Othman Alkaff and Remy Mahzam, “Islamic State after the Fall of Mosul and Raqqa: Impact on Organisation and Propaganda”, *Counter Terrorist Trends and Analyses*, Vol. 10, No. 1, 2018.
- 8 See Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), “Non-International Armed Conflicts in Mali”, available at: www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mali#collapse2accord.
- 9 See Geneva Academy, “Non-International Armed Conflicts in Libya”, available at: www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-libya#collapse2accord.
- 10 See Geneva Academy, “Non-International Armed Conflicts in Yemen”, available at www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse2accord.
- 11 See, for example, Rogier Bartels, “The Organisational Requirement for the Threshold of Non-International Armed Conflict Applied to the Syrian Opposition”, *Armed Groups and International Law*, 9 August 2012, available at: <https://armedgroups-internationalallaw.org/2012/08/09/the-organisational-requirement-for-the-threshold-of-non-international-armed-conflict-applied-to-the-syrian-opposition/>; Ashley Deeks, “Common Article 3 and Linkages between Non-State Armed Groups”, *Lawfare*, 4 October 2017, available at: www.lawfareblog.com/common-article-3-and-linkages-between-non-state-armed-groups; Vaios Koutroulis, “Classifying Contemporary Conflicts: The Challenge of Coalitions of Non-State Armed Groups and/or States”, in *Legal Challenges for Protecting and Assisting in Current Armed Conflicts*, 20th Bruges Colloquium, 2019; Marten Zwanenburg, “Addressing the Threat Posed by Coalitions of Non-State Armed Groups: A State Perspective”, in *Legal Challenges for Protecting and Assisting in Current Armed Conflicts*, 20th Bruges Colloquium, 2019; Jelena Nikolić, Thomas de Saint Maurice and Tristan Ferraro, “Aggregated Intensity: Classifying Coalitions of Non-State Armed Groups”, *Humanitarian Law and Policy Blog*, 7 October 2020, available at: <https://blogs.icrc.org/law-and-policy/2020/10/07/aggregated-intensity-classifying-coalitions-non-state-armed-groups/>; Adil Ahmad Haque, “Triggers and Thresholds of Non-International Armed Conflict”, *Just Security*, 29 September 2016, available at: www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/; and many others.

involving many different groups fighting the government or each other, and also commonly engaging in tactical or strategic cooperation against a common enemy. Scholars have thus tended to soften the NIAC criteria and look for new ways of establishing that they have been met—by aggregating acts of violence committed by different groups, or by linking different groups through notions of “associated forces” or “co-belligerency” (or some derivative of the “support-based approach”), or by downright diminishing the requirements under each of the criteria. Although the motivation is understandable, we strongly believe that the costs of such “flexibility” greatly outweigh its benefits.

In relation to counterterrorism operations more specifically, scholars have also raised IHL standards as a necessary tool for fighting powerful global networks. Some authors, such as Buchanan and Keohane, have gone so far as to find that “the large scale of major terrorist attacks means that the war paradigm is a better fit than the policing paradigm for the sorts of conflicts that make a regulatory regime for lethal drone use valuable”.¹² Peter Margulies—who advocates for a more flexible approach to conflict classification in relation to counterterrorism—has written that “[u]nder IHRL, terrorists have a greater opportunity to operate with impunity. Applying [the law of armed conflict], in contrast, diminishes the non-State actor’s room to maneuver.”¹³

We disagree with these attempts, and in the present article argue against theories and interpretations that in our view lead to the current over-classification problem in relation to counterterrorism. Because IHL is in many respects less protective than IHRL, particularly regarding the rules on the use of force and detention, classifying a situation of violence as an armed conflict when the threshold has not been met is a problem that should not be underestimated. For example, the status/function-based targeting rules of IHL allow the immediate application of intentional lethal force against combatants/fighters and civilians directly participating in hostilities, whereas IHRL restricts such force to a measure of last resort in the protection of human life against an imminent threat.¹⁴ In the same vein, IHL allows administrative detention for security reasons without proper *habeas corpus*, while under IHRL, such internment remains wholly exceptional and *habeas corpus* remains a requirement at all times.¹⁵ In our view, over-applying IHL

12 Allen Buchanan and Robert O. Keohane, “Toward a Drone Accountability Regime”, *Ethics & International Affairs*, Vol. 29, No. 1, 2015, p. 16.

13 Peter Margulies, “Networks in Non-International Armed Conflicts: Crossing Borders and Defining ‘Organized Armed Group’”, *International Law Studies*, Vol. 89, 2013, p. 57.

14 See, in this regard, Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, International Committee of the Red Cross (ICRC), Geneva, 2013.

15 See, for example, Human Rights Committee, General Comment No. 35, “Article 9 (Liberty and Security of Person)”, UN Doc. CCPR/C/GC/35, 16 December 2014, paras 15, 66. See also ECtHR, *Hassan v. United Kingdom*, Appl. No. 29750/09, 16 September 2014, para. 106; UK Supreme Court, *Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant)*, [2017] UKSC 2, 17 January 2017, paras 99–109; and, more generally, Els Debuf, *Captured in War: Lawful Internment in Armed Conflict*, Hart Publishing, Oxford, 2013.

does not serve victims of acts of terror and may play the role of a self-fulfilling prophecy by fuelling acts of violence.¹⁶

In order for a situation to be described as a NIAC, it must involve “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.¹⁷ This influential remark by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the *Tadić* case was subsequently interpreted as resting on two pillars of classification: the existence of a sufficient degree of organization of the belligerent parties, and of a certain degree of intensity of the armed violence.¹⁸ If a situation of violence does not fulfil both criteria separately, it cannot be considered a NIAC.¹⁹

Hence, our main argument is that these criteria cannot be construed too broadly, and that even a situation of violence of high intensity cannot be considered an armed conflict if it does not involve armed clashes with a belligerent group exhibiting a certain and specific level of organization. The manner in which a number of “terrorist groups”²⁰ function is unsuitable for either criterion, and they will only exceptionally be classified as organized armed groups (OAGs) for the purposes of IHL. Over-classification in the context of counterterrorism is only one of the manifestations of the phenomenon (though

16 Social sciences support the notion that the radicalization of non-State groups often arises as a reaction to the actions of others, including States. See Clark McCauley and Sophia Moskalenko, “Mechanisms of Political Radicalization: Pathways Toward Terrorism”, *Terrorism and Political Violence*, Vol. 20, No. 3, 2008; Marc Sageman, *Turning to Political Violence: The Emergence of Terrorism*, University of Pennsylvania Press, Philadelphia, PA, 2017; Tom Parker, *Avoiding the Terrorist Trap: Why Respect for Human Rights is the Key to Defeating Terrorism*, World Scientific Press, London, 2019.

17 International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision (Appeals Chamber), 2 October 1995, para. 70.

18 See, for example, ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 84; ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, paras 32 ff.

19 See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed. Geneva, 2016 (2016 Commentary on GC I), para. 434.

20 It should be recalled that there exists no universally accepted definition of terrorism (or terrorist groups) in international law, although a number of groups have been individually designated as terrorist by States and/or the UN Security Council; these include the Taliban, Al-Qaeda and IS. See, for example, UNSC Res. 1267, 15 October 1999; UNSC Res. 1373, 28 September 2001; UNSC Res. 2253, 17 December 2015. On the lack of a definition of terrorism, see Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, pp. 125–126; Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006; Marco Sassòli, “La définition du terrorisme et le droit international humanitaire”, *Revue Québécoise de Droit International*, Special Issue, 2007; Gilles Ferragu, *Histoire du terrorisme*, Éditions Perrin, Paris, 2014; Anthony Richards, *Conceptualizing Terrorism*, Oxford University Press, Oxford, 2015; Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2020. For a human rights perspective on counterterrorism, see Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, Oxford, 2011; Martin Scheinin, “Terrorism”, in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, Oxford, 2018, pp. 585–586. For an overview of existing counterterrorism treaties, see Daniel O’Donnell, “International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 854–856. For international jurisprudence, see, in particular, Special Tribunal for Lebanon, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Decision (Appeals Chamber), 16 February 2011, paras 83–113.

perhaps the most significant one because of the peculiar characteristics of numerous terrorist groups, as outlined above—e.g., opaque, volatile and decentralized structures), and it may equally concern other groups which have not been designated as terrorist. As well as the above points, we believe that there is one additional factor to consider in relation to the over-classification problem: the role that a group's motives could play in conflict classification. As this matter relates to the criteria of both organization and intensity, we shall deal with it in a separate section.

Our analysis proceeds as follows. First, we examine the organizational requirements and challenges for a designated terrorist group to be considered an OAG for the purposes of IHL; then, we take a look at counterterrorism from an intensity perspective (as understood under IHL) and the conditions under which a situation may evolve from peacetime law enforcement to conduct of hostilities, as well as whether the fact that more than one group is active in the same context could influence the intensity analysis. Finally, we re-evaluate the matter of the impact of a group's motives for conflict classification.

Terrorist groups and the criterion of organization

What type and degree of organization is required? The need for fighting forces and accountability structures as minimal requirements

IHL treaties do not establish the threshold for a NIAC in the sense of Article 3 common to the Geneva Conventions, nor do they define the notion of an “organized armed group”. Some elements of the concept may however be inferred from the treaties, namely from common Article 3 itself and from Additional Protocol II to the Geneva Conventions (AP II).

Common Article 3, which is applicable to all NIACs,²¹ does not employ the term “organized armed group”. It simply states that “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each *Party to the conflict* shall be bound to apply, as a minimum, the following provisions”.²² The term “Party” has been interpreted as requiring the existence of organized actors, be they States or non-State actors.²³ The ICRC Commentary on Geneva Convention I noted already in 1952 that one possible criterion for determining the existence of a NIAC is that “the Party in revolt against the *de jure* Government possesses an organized military force, an

21 International Court of Justice (ICJ), *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, *ICJ Reports* 1986, para. 218. See also Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, Oxford, 2008, p. 261.

22 Common Article 3, para. 1 (emphasis added).

23 2016 Commentary on GC I, above note 19, paras 422, 429.

authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention”.²⁴

In its case law,²⁵ the ICTY further clarified the content of the criterion of organization. The Tribunal never developed strict standards as to what elements a group would have to meet to be considered an OAG, but simply used a list of indicative factors to that end.

These factors could be classified into two broad categories. The first category, which could be called structural elements, relates to a group’s internal structure. These elements include indicators such as the existence of a responsible command capable of exercising authority and direction over the forces in the accomplishment of the mission; of an organizational chart; and of internal rules, including disciplinary rules and standards. The second category—let us call them operational elements—is important for the group’s operations: its ability to recruit and train new fighters, to control territory, to set up headquarters, and to launch operations bringing together different units. Some indicators, such as a group’s ability to “speak with one voice”, may be both structural and operational.

The ICTY has highlighted that these factors are neither cumulative criteria nor a checklist for demonstrating the existence of the organizational threshold—they are simply indicators.²⁶ Thus, organization cannot be determined *in abstracto* but requires analysis on a case-by-case basis.

It has rightly been argued that this approach provides little added value for determining the existence of a NIAC. The jurisprudence of the international criminal tribunals is of course fact-driven, but which, or how many, factors need to be present in order to classify a situation of armed conflict remains totally open and unspecified.²⁷ In jurisprudence subsequent to the *Tadić* case, the ICTY never made an effort to clarify its underlying “classification logic”—namely, why it considered specific factors as relevant and others as not, or whether all of those used carried the same weight in the Tribunal’s deliberation. For example, the Trial Chamber in the *Haradinaj* case made no reference at all to principles underlying its classification of the conflict between Yugoslav forces and the Kosovo Liberation Army (KLA) in the southern Serbian province of Kosovo in 1998–99: it simply regarded the situation *ex post facto* and took up certain elements of that situation in order to say that it had indeed amounted to a NIAC.²⁸ These elements, the Tribunal found, were also present in the conflicts in

24 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (1952 Commentary on GC I), p. 49; cf. 2016 Commentary on GC I, above note 19, paras 422–437.

25 Notably in the *Tadić*, *Delalić*, *Haradinaj*, *Limaj* and *Boškoski* cases, on which we focus in this section.

26 See, for example, ICTY, *Limaj*, above note 18, paras 93 ff.

27 See Ilya Sobol, “Judicial Practices of Identifying Non-International Armed Conflicts: An Inquiry into Normative Status and Use of ‘Indicative Factors’”, LLM Thesis, Geneva Academy, 2018, p. 20; cf. Jann K. Kleffner, “The Legal Fog of an Illusion: Three Reflections on ‘Organization’ and ‘Intensity’ as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict”, *International Law Studies*, Vol. 95, 2019, pp. 168 ff.

28 ICTY, *Haradinaj*, above note 18, paras 63 ff.

Bosnia and Herzegovina and Croatia, and finally in Kosovo itself.²⁹ Therefore, because certain indicators existed in one situation which was described as an armed conflict, their presence elsewhere implied that armed conflicts existed in those territories as well. Such a methodology – evidently based on a comparison between various contexts – does not provide clear guidance for classification purposes in contexts which are very different from the ones examined by the ICTY, but which may nevertheless amount to NIACs. Particularly compelling in this regard is the argument that the approach used by the ICTY to classify “conflicts of high intensity ... provides no meaningful guidance in assessment of low-intensity conflicts”.³⁰

Another unknown element is the extent/degree of organization required. Should the threshold of organization be high (as for the threshold of intensity), or could armed actors with some rudimentary organization be considered as OAGs for the purposes of IHL? The phrase “minimum” or “minimal level of organization” is occasionally employed, for example in the *Boškoski* case,³¹ although it does not seem to have ever become a proper term of art. Even if this concept was taken as a yardstick, it may be given two different meanings: it may set a low threshold, accepting for an OAG any level of organization higher than that of a mob; or it may be seen, to the contrary, as setting a higher standard, namely if “minimum” were interpreted as referring to a certain level of organization, which is not necessarily low.

In its early jurisprudence, the ICTY seemed to adopt a reasoning that was congruent with the latter meaning. In the Appeals Chamber judgment in the *Tadić* case, the Tribunal evoked the notion of “an organised and hierarchically structured group, such as a military unit or ... armed bands of irregulars or rebels”, that has “a structure, a chain of command and a set of rules as well as the outward symbols of authority”.³² In later jurisprudence, though, the ICTY seemed to be less demanding. In the *Limaj* case, for instance, the ICTY adopted a very flexible approach to qualify the KLA as an OAG despite the fact that the “organisational structure and the hierarchy of the KLA were confusing”.³³ Similarly, in the *Haradinaj* case, the Tribunal found that the KLA did not possess disciplinary rules and mechanisms,³⁴ and that it had developed “a mainly spontaneous and rudimentary

29 *Ibid.*, paras 32ff.

30 I. Sobol, above note 27, pp. 16 ff.

31 ICTY, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 194. See also ICRC, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Geneva, 2008, p. 5; 2016 Commentary on GC I, above note 19, para. 423 (“The ICRC has expressed its understanding of non-international armed conflict, which is based on practice and developments in international case-law, as follows: Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organisation*”).

32 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 120.

33 ICTY, *Limaj*, above note 18, para. 132.

34 ICTY, *Haradinaj*, above note 18, para. 69.

military organization at the village level”, but that it nevertheless satisfied the requirement of an OAG for the purposes of IHL.³⁵

Of related note is the ICTY’s reluctance to cast the criterion of organization in light of the capacity to respect IHL; this is particularly visible in its handling of the KLA’s lack of disciplinary mechanisms. In fact, when the defence in the *Limaj* case raised that “a party to a conflict must be able to implement international humanitarian law and, at the bare minimum, must possess: a basic understanding of the principles laid down in Common Article 3, a capacity to disseminate rules, and a method of sanctioning breaches”, the Chamber explicitly rejected this argument, finding that “some degree of organisation by the parties will suffice to establish the existence of an armed conflict” and that “[t]his degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation”.³⁶ A similar approach to the one taken by the *Limaj* and *Haradinaj* chambers was subsequently applied by the chambers of the International Criminal Court (ICC) in the *Lubanga* case, when the Trial Chamber rejected the argument that an armed group needed to be under “responsible command” (no mention is otherwise made of the group’s capacity to respect IHL)³⁷—all that was necessary was for the group to be “sufficiently organized” in light of factors that were “potentially relevant”.³⁸

The “minimal level of organization”, thus understood, does not seem to have much precedent in earlier practice and discussions, nor is it supported by the International Committee of the Red Cross’s (ICRC) Commentaries to the Geneva Conventions. According to the latter, the organizational element of any non-State armed group, in order for that group to be considered a party to an armed conflict, must be such as to allow it to implement IHL, a “fundamental criterion which justifies the other elements” of the NIAC definition.³⁹ This understanding is commonly restated in doctrine, and is logically necessary for the application of common Article 3.⁴⁰ Thus, “[w]hile the group does not need to have the level of organisation of state armed forces, it must possess a certain level

35 *Ibid.*, para. 89. Beyond international criminal courts and tribunals, the Inter-American Commission on Human Rights (IACHR) in *Abella v. Argentina*—the famous *Tablada* case—also decided that it sufficed for the armed group to be “relatively organized”; see IACHR, *Juan Carlos Abella v. Argentina*, Case No. OEA/Ser.L/V/II.98, 18 November 1997 (*Tablada*), para. 152.

36 ICTY, *Limaj*, above note 18, paras 88–89.

37 The Trial Chamber held that “Article 8(2)(f) [of the Rome Statute of the ICC] does not incorporate the requirement that the organised armed groups were ‘under responsible command’ Instead, the ‘organized armed group’ must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence.” ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment (Trial Chamber), 14 March 2012, para. 536.

38 *Ibid.*, para. 537.

39 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977: Commentary*, ICRC, Geneva, 1987, para. 4470.

40 See, for example, J. Nikolić, T. de Saint Maurice and T. Ferraro, above note 11: “IHL requires that the parties to armed conflicts have the capacity to conduct military operations and to apply IHL rules.” Cf. M. Sassòli, above note 5, p. 56; see also Marco Sassòli and Yuval Shany, “Should the Obligations of States and Armed Groups under International Humanitarian Law Really Be Equal?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 425–436.

of hierarchy and discipline and the ability to implement the basic obligations of IHL”.⁴¹

We therefore disagree with the ICTY’s approach in *Limaj* and *Haradinaj*, which in our view does not reflect older and contemporary doctrine, nor indeed the Tribunal’s own earlier position in *Tadić*. We are not saying that the Kosovo War did not amount to a NIAC: we simply disagree with the ICTY’s methodology. This methodology is contrasted by the one chosen by the ICC Trial Chamber in *Katanga*, which found that “‘organised armed groups’ must therefore have a sufficient degree of organisation to enable them to carry out protracted armed violence and to implement the provisions of humanitarian law applicable to that type of conflict”.⁴² This is the better view, one which is also supported by doctrine.⁴³

We submit that any analysis of whether a particular group meets the criterion of organization must be teleological – namely, looking at the object and purpose of IHL rules – and not simply comparative. There are in fact two main reasons why the “organization” of armed groups is key from an IHL perspective.

1. The first reason is to distinguish proper armed conflicts from “isolated”, “sporadic” or otherwise less serious acts of violence performed by unorganized criminal bands.⁴⁴ The armed group needs to be organized *with a view to conducting hostilities* or a continuum of attacks (the ability to launch a “continuum of attacks” seems to us the most precise understanding of the capacity to engage in hostilities, as the group should be able to engage in more than just an isolated incident of violence and should rather be capable of engaging in recurrent and prolonged violence). This is supported by the ICRC’s recent study on *The Roots of Behaviour in War*, which notes that “[a]ll armed groups capable of launching operations with some semblance of a military character have structures of one kind or other – one or more leaders and degrees of organization which, though they may vary, exist and need to be identified”.⁴⁵ To engage in a continuum of

41 Cordula Droege, “Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians”, *International Review of the Red Cross*, Vol. 94, No. 886, 2012, p. 550; see also 2016 Commentary on GC I, above note 19, para. 429.

42 ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment (Trial Chamber), 7 March 2014, para. 1185.

43 See, for example, René-Jean Wilhelm, “Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international”, *Recueil des Cours*, Hague Academy of International Law, Vol. 137, 1972, pp. 347–348; Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, *Recueil des Cours*, Hague Academy of International Law, Vol. 163, 1979, p. 147; C. Droege, above note 41, p. 550; Gloria Gaggioli, “Targeting Individuals Belonging to an Armed Group”, *Vanderbilt Journal of Transnational Law*, Vol. 51, No. 3, 2020, p. 908.

44 See, for example, Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 1(2); 2016 Commentary on GC I, above note 19, para. 431. See also ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para. 562, stating that the criteria of organization and intensity “are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”.

45 Daniel Muñoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, 2020, p. 13.

attacks, the armed group must possess the ability to launch military operations bringing together different units and to confront enemy armed forces in the context of proper armed clashes, and this ability is illusory without proper organization. In other words, there must exist an *armed wing* whose function is to regularly conduct hostilities. The criterion of “continuous combat function” developed by the ICRC to determine individual membership in an OAG is thus also useful to determine whether an OAG exists in the first place.⁴⁶

2. The second reason is to make sure that the group would be able to respect IHL.⁴⁷ The existence of an accountability mechanism allows the group to respect IHL. It has been argued by some authors that the existence of a disciplinary mechanism and the ability to implement IHL is merely an indicative element of organization, and not a necessary aspect of an OAG.⁴⁸ We disagree with this view. While it is not required of a group to actually respect IHL in order for that body of law to apply, what is required is the existence of some accountability in the group for the acts of its members in general. Such “accountability” could exist even if the group’s fighting forces are given a great deal of initiative in their accomplishment of various missions, but at the very least the armed group, under responsible command, exercises sufficient control over the acts of its members for those acts to be considered as its own. Such an accountability mechanism need not be exclusive to ensuring accountability for IHL violations: indeed, the group might rather be interested in punishing disloyalty or desertion, but the same mechanism could in principle be applied for breaches of IHL. This goes hand in hand with the previous requirement for the existence of sufficiently regular/stable fighting forces (an “armed wing”). Volatile groups whose members participate in hostilities in a sporadic manner, and which possess no accountability mechanisms at all, should not be considered OAGs.

In brief, it is only if a group is capable both of launching a continuum of attacks and ensuring the accountability of its members that it may be considered sufficiently organized for the purposes of IHL. These are in our view minimum requirements and not mere indicative factors.

What lessons can be derived for classifying groups designated as terrorist? The relevance of the dichotomy between the networked and hierarchical models of terrorist organizations

Linking these theoretical considerations more specifically to designated terrorist groups, it is first pertinent to recall that scholarship commonly distinguishes

46 See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, ICRC, Geneva, 2009, pp. 32 ff.

47 See above note 40; AP II, Art. 1(1); Tilman Rodenhäuser, “Armed Groups, Rebel Coalitions, and Transnational Groups: The Degree of Organization Required from Non-State Armed Groups to Become Party to a Non-International Armed Conflict”, *Yearbook of International Humanitarian Law*, Vol. 19, 2016, pp. 14 ff.

48 See, in particular, R. Bartels, above note 11.

between “networked” and “hierarchical” models of terrorist organization. Thus, Gunaratna and Oreg (as well as a number of other authors⁴⁹) distinguish between groups with a “command-cadre (hierarchical) structure” and those with a “network structure”:

The hierarchical or command-cadre structure is like a terrorist army, where the leadership provides to the middlemen and the members both material as well as non-material (ideological) incentives. A network, on the other hand, is composed of a set of actors (or nodes) connected by ties. Networks are self-organized and self-enrolling.⁵⁰

Hierarchical groups’ functioning may more closely resemble that of armed forces,⁵¹ while networks employ “intermediaries to keep cells isolated from each other but in communication with leadership”.⁵² Networked organization allows for greater group resilience to detection and elimination by the authorities, but only a hierarchically organized group is capable of carrying out “complex attacks such as the 11 September attack on New York and Washington, DC”.⁵³ Although there are different types of terrorist (and, in general, criminal) networking, networks typically have a core (hub) “characterized by dense connections among individuals who, in the case of a directed network, provide the steering mechanism for the network as a whole”, and a periphery featuring “less dense patterns of interaction and looser relationships than the core”.⁵⁴

We submit that this dichotomy is pertinent when classifying armed conflicts as well, although the structural type (hierarchical or networked) should be seen as indicative of a group’s organizational capacity rather than as dictating it. Thus, hierarchical organizations will sooner conform to the notion of “organized armed group” than networks because, essentially, they will be better equipped to launch a continuum of attacks and to ensure the accountability of their members. This dichotomy is similar to the one identified by the ICRC between centralized and decentralized groups in its study *The Roots of Restraint in War*.⁵⁵ This study further demonstrates that decentralized groups have looser coordination in military planning and operations and few observable signs of military discipline.⁵⁶ In other

49 For example, Patrick B. Johnson *et al.*, *Foundations of the Islamic State: Management, Money and Terror in Iraq, 2005–2010*, RAND Corporation, Santa Monica, CA, 2016, pp. 68–69; Abdulkader H. Sinno, “Armed Groups’ Organizational Structure and Their Strategic Options”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 316.

50 Rohan Gunaratna and Aviv Oreg, “Al Qaeda’s Organizational Structure and Its Evolution”, *Studies in Conflict and Terrorism*, Vol. 33, No. 12, 2010, p. 1045.

51 “Hierarchical terrorist organizations are more akin to conventional armies or guerrilla movements. They use unconventional battlefield tactics, but their organization centralizes authority from the top down”: P. B. Johnson *et al.*, above note 49, p. 69.

52 *Ibid.*, p. 69.

53 R. Gunaratna and A. Oreg, above note 50, p. 1045.

54 Phil Williams, “Transnational Criminal Networks”, in John Arquilla and David Ronfeldt (eds), *Networks and Networks: The Future of Terror, Crime, and Militancy*, RAND Corporation, Santa Monica, CA, 2001, pp. 72–74.

55 Fiona Terry and Brian McQuinn, *The Roots of Restraint in War*, ICRC, Geneva, 2018.

56 *Ibid.*, p. 46.

words, they are less capable of launching a continuum of attacks and of ensuring the accountability of their members—both of which are necessary to fulfil the two minimum requirements of organization described above.

The hierarchical–networked dichotomy is not a strict categorization but rather a spectrum: some groups may lean more to the poles, while others may be in between, or their internal factions/branches may all levitate between the two models. Some groups exhibit characteristics that do not properly conform to either model, but this is the exception rather than the rule. Crossover types of groups are not exclusive to designated terrorist groups; this is the case, for instance, for the Free Syrian Army (FSA), now known as the Syrian National Army (SNA). The UN Independent International Commission of Inquiry on Syria found that a NIAC erupted in Syria between November 2011 and August 2012, but at the time of its initial report, when some OAGs such as the FSA had already been founded, the Commission was not able to conclude that the intensity and organization criteria had been met as of March 2011.⁵⁷ Some months later, it determined that a NIAC had come into existence on the basis that Syrian opposition forces were now engaged in sustained military operations against the government (including in the capital), had organized *local* military councils claiming leadership over fighters in an area, and had access to sufficient weapons, funding and logistics.⁵⁸ And yet, it does not appear that the FSA/SNA ever achieved a strong hierarchical model or managed to establish a command structure, despite attempts to that effect.⁵⁹ The opposition remains “fractious and deeply divided”,⁶⁰ and the group itself is described by one commentator as having “no rules and no military or religious order. Everything happens chaotically. ... The FSA lacks the ability to plan and lacks military experience.”⁶¹ Assuming that the FSA/SNA is indeed a single armed group (as most media tend to do), then it must be seen as a decentralized one made of several structured factions.⁶² In such a case, the question of whether such a group is an “organized armed group” for the purpose of IHL may be disconcerting given the absence of an internal disciplinary system.⁶³ The better view, however, is perhaps to consider

57 Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/S-17/2/Add.1, 23 November 2011, paras 97 ff.

58 Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/21/50, 16 August 2012, paras 21 ff.

59 See Geneva Academy, “Non-International Armed Conflicts in Syria”, available at: www.rulac.org/browse/conflicts/non-international-conflicts-in-syria#collapse3accord.

60 “Guide to the Syrian Opposition”, *BBC News*, 17 October 2013, available at: www.bbc.com/news/world-middle-east-15798218.

61 Ghaith Abdul-Ahad, “Al-Qaida Turns Tide for Rebels in Battle for Eastern Syria”, *The Guardian*, 30 July 2012, available at: www.theguardian.com/world/2012/jul/30/al-qaida-rebels-battle-syria.

62 On the decentralized character of the group, see Charles Lister, *The Free Syrian Army: A Decentralized Insurgent Brand*, Brookings Institution, Washington, DC, 2016.

63 See R. Bartels, above note 11 (assuming that the FSA is an OAG and deriving from this assumption the idea that the factor regarding the existence of a disciplinary system is not a must). See also our contrasting opinion above regarding the need to consider the existence of an accountability mechanism as a minimum requirement based on a teleological interpretation of the law.

the FSA/SNA as a network of smaller groups which are merely nominally affiliated to the FSA/SNA and are fighting for a common cause.⁶⁴

In any case, the existence of groups which are difficult to classify on the networked/hierarchical spectrum does not detract from the latter's usefulness as a tool for conflict classification. It would therefore be wise to develop tools – with the help of social scientists – to better understand the structure and functioning of various armed non-State actors and to classify them along the lines of the hierarchical and networked models. This would ensure a more scientific approach to conflict classification while keeping the criterion of organization as the focal point of the exercise. Such classification would need to be conducted over time for each group, as a group may (d)evolve from a hierarchical to a networked model, typically to avoid detection and to act more clandestinely. Obviously, the characterization of such a group as an OAG can and should equally evolve overtime.

Although understanding the structure of clandestine organizations designated as terrorist groups is difficult, a convincing IHL analysis cannot be done without adequate consideration of the structure and functioning of armed non-State actors and their evolution over time. A combined use of minimal requirements for determining the existence of the organization criterion and of typologies of various armed non-State actors would facilitate legal classifications and help predict their evolution.

Consider the structure of Al-Qaeda in the Arabian Peninsula (AQAP) or IS. In its heyday, the latter even claimed statehood and worked hard, in addition to its military efforts, to provide services to the local population in lieu of the Syrian and Iraqi authorities; it began organizing to this effect at least as early as 2006.⁶⁵ The expansion of IS and the establishment of its authority over a number of settlements in Iraq allowed the group to build up functioning public services that included oversight of electricity supply, health spending, education, street cleaning and food provision.⁶⁶ Its military wing was organized by experienced foreign jihadists who had fought in other conflicts, such as in Chechnya, and who had perhaps even served in State armed forces before joining IS; these individuals created a centralized chain of command to manage the IS paramilitary force,⁶⁷ which in 2014 may have numbered as many as 31,000 fighters in Iraq and Syria.⁶⁸ The organization kept detailed information on its incoming and permanent fighters, their salaries and duties, and their permission and reasons for leaving, leading Shapiro and Siegel to conclude that “[a]ny human resources manager would want to capture that

64 On the FSA/SNA as a banner organization or a “loose alliance of rebel groups”, see Geneva Academy, above note 59.

65 See Aymenn Al-Tamimi, “The Evolution in Islamic State Administration: The Documentary Evidence”, *Perspectives on Terrorism*, Vol. 9, No. 4, 2015, p. 118.

66 *Ibid.*, p. 123.

67 Guillaume N. Beaurpere, “ISIS and Protracted War: Why Violent Extremists Persist in the Face of Defeat”, *Counter Terrorist Trends and Analyses*, Vol. 6, No. 8, 2014, p. 6.

68 See, for example, “Islamic State Fighter Estimate Triples – CIA”, *BBC News*, 12 September 2014, available at: www.bbc.com/news/world-middle-east-29169914.

information”.⁶⁹ There can be no doubt that IS, a designated terrorist group,⁷⁰ met the requirements for an OAG under IHL in 2015 (and allegedly well before that⁷¹): this is because it was able to mount sustained attacks and engage in concerted military action guided by a clear strategy. The IS military wing possessed an internal structure and disciplinary system which would allow it to ensure respect for the rules of military discipline – but also IHL, had the responsible command so desired.

This structure of IS is thus very different from that of other jihadist groups, such as the Pakistan-based Al-Qaeda in the Indian Subcontinent (AQIS). AQIS is a smaller group, a loose collection of mujahedeen across the Indian subcontinent which is affiliated to Al-Qaeda Central and which has also pledged allegiance to Mullah Omar, former head of the Afghan Taliban. It does not engage in sustained military action but rather in more “traditional” terrorist conduct such as assassinations and hijackings.⁷² The violence projected by such a group can be devastating, but this alone does not make it an OAG under IHL. Although information on the internal functioning of AQIS is admittedly scarce, it seems to resemble that of older terrorist groups such as those functioning in Europe in the second half of the twentieth century (e.g., the Red Army Faction), which demonstrated a complete lack of a military (hierarchical) structure and were not considered armed groups even though they projected high degrees of violence.⁷³

Designated terrorist groups also tend to evolve very quickly, and such a group may still be generally perceived as a single OAG even after its structure has changed considerably. For instance, in Nigeria, after the death of Boko Haram’s founder Mohammed Yusuf in 2009, the group split into different factions, of which there were as many as six in 2014, answering to different leaders with limited control over their many cells⁷⁴ (some of these later pledged allegiance to IS while others did not, and Boko Haram as a whole seems to have lost its ability to “speak with one voice”).⁷⁵ It is difficult, in our view, to speak of a single “organized” armed

69 Jacob N. Shapiro and David A. Siegel, “Moral Hazard, Discipline, and the Management of Terrorist Organizations”, *World Politics*, Vol. 64, No. 1, 2012, p. 51.

70 See UNSC Res. 2253, 17 December 2015.

71 See, for example, A. Al-Tamimi, above note 65; J. N. Shapiro and D. A. Siegel, above note 69.

72 See Alastair Reed, *Al Qaeda in the Indian Subcontinent: A New Frontline in the Global Jihadist Movement?*, International Centre for Counter-Terrorism, 2016, pp. 10 ff. See also Mapping Militants, “Al Qaeda in the Indian Subcontinent”, Stanford University, available at: <https://cisac.fsi.stanford.edu/mappingmilitants/profiles/al-qaeda-indian-subcontinent-aqis>.

73 For the functioning of the Red Army Faction, its organization and the way it was considered by the West German authorities, see Reinhard Rauball, *Die Baader-Meinhof-Gruppe*, De Gruyter, Berlin, 1973, pp. 29–42; Karrin Hanshew, *Terror and Democracy in West Germany*, Cambridge University Press, New York, 2012, pp. 111 ff., 160 (the latter recalling that State representatives “insisted on trying the members of the RAF as simple criminals rather than grant them special recognition as political combatants”).

74 “The movement, never very hierarchical, is more dispersed than ever, with many leaders in the Adamawa mountains, Cameroon, and Niger. Its isolated leader, the violent Abubakar Shekau, probably has little daily control over cells, and it is fragmenting into factions, including the relatively sophisticated Ansaru, which focuses more on foreign targets.” International Crisis Group, *Curbing Violence in Nigeria (II): The Boko Haram Insurgency*, 3 April 2014, p. ii.

75 *Ibid.*, pp. 21 ff. Notably, the report recalls (p. 22) that “in the past four years [Boko Haram] has split into many factions with varying aims, to the point that some believe it is *too fragmented to present a common front for dialogue*” (emphasis added).

group if the group breaks up into different factions acting separately and using different means.⁷⁶

There are thus various reasons why the ideological, strategic, tactical and organizational workings of designated terrorist groups *in principle* do not correspond to the classical hierarchical OAG model. IS and other terrorist OAGs such as the group's predecessor, Al-Qaeda in Iraq, are therefore quite exceptional in the milieu of groups labelled as jihadist and/or terrorist. Most of them are either decentralized or should be considered as an assemblage of various smaller armed groups.

Moreover, no sufficient evidence has been produced to demonstrate that either Al-Qaeda or IS are worldwide, unitary, transnational OAGs. Should terrorist attacks conducted by IS cells or adherents around the world be considered part of the same "continuum of attacks" as the conflicts involving the group in Iraq or Syria? Do their perpetrators find themselves within the same chain of command as the IS fighters in the Middle East? The answer is probably no, and simply sharing an ideology is not enough to replace proper organizational links as required by IHL.

It may be tempting for States to consider jihadist networks such as Al-Qaeda or IS as forming part of the same OAG, but a deeper analysis shows this to be little more than a fiction, one which allows the use of more permissive rules on targeting than those governing simple law enforcement operations.⁷⁷ Some OAGs may also pledge allegiance to – or pretend to belong to – a broader terrorist network, such as IS, in order to attract financial resources and manpower, even though such links are not (yet) in existence. Such a phenomenon has been recorded in the Philippines in relation to the Maute group pretending to belong to the Islamic State of Iraq and Syria (ISIS) without any actual linkages to this terrorist network.⁷⁸ In any case, the mere fact that various jihadist groups share a common ideology and have loose connections with one another is not enough to consider that they together constitute an OAG for the purposes of IHL. Certainly, there is nothing in IHL to limit OAGs to a particular State or geographical area,⁷⁹ and to the extent that IS operates as a single entity in the territories of Iraq and Syria, notably, it clearly qualifies as a "transnational" armed group.⁸⁰ What matters is that the group is able to perform attacks of a sufficient magnitude and which are linked with one another in a single continuum, and that the

76 According to the International Crisis Group report, "[l]ately [Boko Haram] has evolved into pure terrorism, with targeting of students attending secular state schools, health workers involved in polio vaccination campaigns and villages supporting the government": *ibid.*, p. ii.

77 See, in this regard, G. Gaggioli, above note 43, p. 901.

78 Trishia Billiones, "Maute Group Not Accredited by Terror Group ISIS, Says Analyst", *ABS-CBN News*, 25 May 2017, available at: <https://news.abs-cbn.com/focus/05/25/17/maute-group-not-accredited-by-terror-group-isis-says-analyst>.

79 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, Geneva, 2019 (2019 Challenges Report), p. 10.

80 See Pavle Kilibarda and Gloria Gaggioli, "Globalization of Non-International Armed Conflicts", in Mark Latimer and Philip Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War*, Hart Publishing, London, 2018.

responsible command/management exercises sufficient control over the acts performed by subordinates. Only such parts of a broader organization/network that correspond to a group which can perform attacks with sufficient magnitude and in a single continuum can be equated with OAGs for the purposes of IHL. In other words, the ISIS/Al-Qaeda networks are to be understood as ideological/political organizations that contain various distinct groups, some of which correspond to OAGs for the purposes of IHL.

Terrorist groups and the criterion of intensity

What degree and type of violence is required? The existence of proper armed clashes and the necessity of moving away from law enforcement means as a benchmark

Besides organization, the other criterion used to establish the existence of a NIAC is that of intensity. Violence between a State and individuals under its jurisdiction is a matter of domestic law and IHRL “as long as such violence does not rise to a certain level”.⁸¹ The intensity requirement should therefore be understood as an indicator that a certain situation can no longer be resolved through law enforcement means, allowing governments to use force under the conduct of hostilities paradigm.

The ICTY has considered a number of factors to be indicative of the existence of a level of violence sufficiently intense for fighting involving non-State armed groups to be described as a NIAC. For instance, in the *Haradinaj* case, it first recalled that the criterion of “protracted armed violence” as discussed in the *Tadić* case referred “more to the intensity of the armed violence than to its duration”⁸² (the duration of a conflict may, in any event, only be gleaned retrospectively,⁸³ and international bodies have not given it much relevance in their practice),⁸⁴ before providing a non-exhaustive list of indicators to be taken into consideration when evaluating the intensity of armed violence. These included

the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.⁸⁵

81 Marco Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 181; cf. 2016 Commentary on GC I, above note 19, para. 415.

82 ICTY, *Haradinaj*, above note 18, para. 49.

83 See M. Sassòli, above note 81, p. 182.

84 In the *Tablada* case, the IACHR found that armed violence lasting no more than two days amounted to a NIAC between Argentinian forces and an insurgent group; see IACHR, *Tablada*, above note 35.

85 ICTY, *Haradinaj*, above note 18, para. 49. For comparison, see similar factors used in other ICTY case law, such as ICTY, *Lima*, above note 18, paras 135 ff.; ICTY, *Boškoski*, above note 31, paras 177 ff.; ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, paras 188 ff.; ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment (Appeals Chamber), 17 December 2004, paras 333–341.

As mentioned earlier, these indicators are depicted as indicative and not determinative of a NIAC. Contrary to the organization criterion, there appears to be consensus that the level of intensity needs to be high. In terms of classification, this is one of the distinguishing features between the IHL of international armed conflicts (IACs) (where there is no threshold of violence, at least according to the “Pictet theory”⁸⁶) and the IHL of NIACs (where the level of intensity needs to be high⁸⁷).

While the focus is generally put on degree, more thought should be given to the type of violence required. This matter is not discussed in IHL treaties, other than to exclude internal tensions or disturbances from the category of NIACs.⁸⁸ However, the fact that the violence should be of a specific nature is implicit in the ICTY’s list of factors.

All of the ICTY’s indicators focus on the military, and not law enforcement, nature of the State’s response, implying that the State *in casu* is no longer capable of containing the situation, which has consequently escalated into an armed conflict. This view is echoed in the ICRC’s position on the scope of application of common Article 3 – namely, that the threshold of intensity may have been reached “when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces”.⁸⁹

Terrorist violence can doubtless leave a horrifying number of casualties, but this does not in itself qualify it for regulation by IHL: the violence must be of a specific nature and not just of a specific degree. We propose that two aspects be taken into consideration when classifying a situation from an intensity perspective: whether the violence under examination amounts to armed clashes, and whether those armed clashes reach such a degree that they may no longer be resolved through law enforcement means.

1. The “armed clashes” requirement has been raised several times in doctrine.⁹⁰ The existence of such clashes is a necessary requirement for a NIAC to arise. We understand “armed clashes” to mean an exchange of violence or individual confrontations between organized parties. The violence cannot be committed only by one side; it must be projected mutually, which requires an exchange of violence between at least two sides. The ICRC’s 2019 Challenges Report states that “confrontations must take place between at least two organized parties” for a NIAC to arise.⁹¹ Unilateral violence,

86 See 2016 Commentary on GC I, above note 19, para. 236.

87 See in this regard the theory advanced by Jean Pictet in the 1952 Commentary on Common Article 3, which also takes into account a list of exigent factors to establish the existence of a “genuine” armed conflict. 1952 Commentary on GC I, above note 24, pp. 49 ff.

88 AP II, Art. 1(2).

89 ICRC, above note 31, p. 3.

90 See, for example, J. K. Kleffner, above note 27, p. 2169: “While this is not to suggest that one-sided armed violence – for instance, the killing of civilians or destruction of civilian objects – cannot also feature in the intensity analysis for determining the existence of a NIAC, fighting between the parties is a quintessential precondition, and as such, a determinative factor.”

91 2019 Challenges Report, above note 79, p. 51.

however shocking, does not amount to an armed conflict. Although arguments have been made in favour of a unilateral trigger for a NIAC,⁹² this does not conform to the traditional understanding of an armed conflict and could lead to an over-classification of such situations.

2. The armed clashes (and related violence) must achieve a sufficient level to amount to an armed conflict. In cases of violence between a State and a non-State actor, which are primarily governed by the State's human rights obligations, this means that a resort to military force and conduct of hostilities rules must be justified by the State's law enforcement mechanisms no longer being able to maintain order in the relevant territory.⁹³ This analysis presupposes an underlying principle of necessity, which is both objective and situational. It is objective in the sense that it depends not on the State's will but on whether, as a matter of fact, its law enforcement authorities can be expected to cope with the matter. It is situational as it involves an *in situ* analysis, and not just a theoretical capacity-based analysis. This means that even States with very powerful law enforcement and police forces can become a party to a NIAC if in a part of their territory (or when acting abroad) they have no choice but to take more severe measures, such as deploying the military.⁹⁴

The lack of a central monitoring body responsible for independent conflict classification becomes particularly problematic with respect to internal tensions and disturbances, namely "other situations of violence" (OSVs) that could evolve into NIACs. It is often practically impossible to pinpoint the exact moment when OSVs become NIACs, even though this point entails a crucial shift of legal frameworks. This problem is compounded by the fact that international jurisprudence typically does not take into consideration the reasons for which armed forces and military-grade weapons are deployed to contain an OSV, and simply takes these as retrospectively indicative of an armed conflict. Yet States should not resort to such measures unless it seems impossible to cope with the situation by means of law enforcement—otherwise, the door could be left wide open to abuse as a State could take wartime measures and claim that the conduct of hostilities paradigm applies as a direct result of its own excessive measures. In other words, a State cannot "create" the required level of intensity if the situation does not require it. It is therefore crucial to consider whether such measures were necessary in the first place, rather than simply being taken in order to determine the beginning of a NIAC. It is only when the bilateral violence has reached such

92 A. A. Haque, above note 11.

93 "[L]e conflit armé interne, aux yeux des experts, est celui qui met en présence les forces armées organisées du gouvernement établi et du parti insurgé. Cette dernière notion implique que le gouvernement établi, pour faire face aux hostilités dirigées contre lui, doit recourir non seulement aux forces de police normalement chargées du maintien de l'ordre, mais à de véritables forces armées": R.-J. Wilhelm, above note 43, pp. 347–348.

94 This is not to say that law enforcement officials cannot engage in hostilities, but the continued deployment of the police using force according to law enforcement standards seems indicative of the fact that the State does not believe that there is as of yet a need for more extreme measures to contain the situation.

an intensity that law enforcement measures have proven inadequate, or would be inadequate, to maintain or restore order that a situation of violence may be considered a NIAC and may allow the State to resort to the conduct of hostilities.

Specific problems may arise in relation to NIACs taking place between OAGs with no State involvement (“non-State NIACs”). States, and not armed groups, are obliged by international law to ensure law and order in a given territory, and the principle of necessity related to the maintenance of order discussed above would therefore not make sense when applied to a non-State actor directly. However, NIACs usually take place within the territory of a State,⁹⁵ and regardless of whether that State is a party to the armed clashes in question, the conflict classification must take place on the basis of its own capacity to maintain order. Gasser writes that “[a]nother case [of NIAC] is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power”⁹⁶ (the implication is that the “non-state NIAC” emerges in the absence of State authority, not in spite of it). Thus, whether armed clashes between rival drug cartels in Mexico or Colombia have reached the threshold of an armed conflict cannot be considered in isolation from those States’ ability to contain the clashes. Non-State, “private” violence is normally much better regulated by domestic law and IHRL than by IHL.

In the counterterrorism context, a specific problem may arise when States act against terrorist groups abroad. Unless the intervening State is joining a pre-existing NIAC on the side of the territorial State (in which case the criterion of intensity will have already been fulfilled for the “domestic” NIAC), the requirement to exhaust possibilities for maintaining order may be problematic for the foreign State. For example, State A can only be in a NIAC against armed group X in the territory of State B (which is itself a non-belligerent) if the armed clashes are of a sufficient degree for law enforcement means to no longer be able to resolve the matter. The fact that X is not situated in A’s territory will have to be taken into account for establishing whether the criterion of necessity – as defined above – is met (namely, A is probably not in a position to maintain order in B).⁹⁷ However, there still need to be armed clashes between A and X, which is to say bilateral violence. If A were to simply launch air strikes or drone strikes against X, which is not capable of defending itself against such strikes, such unilateral force will be inadequate to be considered a NIAC. The situation may be different if B invites A to take care of X in its stead: assuming that B is not already involved in a NIAC, it would be absurd not to consider B’s capacity to maintain order in its own territory when determining the intensity of the conflict

95 Some NIACs have historically involved naval confrontations on the high seas, and confrontations could hypothetically take place in outer space as well; however, the asymmetry characterizing most conflicts between States and non-State actors largely confines them to land warfare in territories belonging to one or more States.

96 Hans-Peter Gasser, “International Humanitarian Law: An Introduction”, in Hans Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement*, Henry Dunant Institute, Geneva, 1993, p. 555.

97 The question of consent by the territorial State may figure in this analysis as a factual consideration, but unlike for *jus ad bellum*, it is not constitutive of the intervening State’s obligations under IHL or IHRL.

between A and X. This would create a loophole wherein it would be possible for intervening States to engage in conduct otherwise prohibited to the territorial State.⁹⁸ Nevertheless, the existence of such an invitation should probably be taken as indicative that the necessity criterion has been met (although it should not be definitive).

We recall that the above arguments are not imported from *jus ad bellum* but are rather derived from the necessity of demonstrating that law enforcement measures are inadequate or unavailable before considering IHL applicable. If States were to wage war against armed non-State actors without demonstrating the necessity of doing so (e.g., when the group is disorganized or does not project a sufficient level of violence), such use of force would almost certainly amount to a serious violation of human rights law. IHL should not be considered applicable before there exist violent armed clashes between two or more parties. The application of IHL should never become a reward for States opting to employ extreme measures, but can only ensue from an objective state of necessity in a given moment.

To summarize, the simple enumeration of indicative factors by the jurisprudence is not sufficient to ascertain whether the criterion of intensity has been met in each situation. The intensity criterion should be proven considering the existence of armed clashes and the related necessity of resorting to hostilities because law enforcement measures would be inadequate or have proven to be inadequate.

Who should project violence, and can intensity be accumulated in cases of alliances or coalitions between armed groups labelled as terrorist? Assessing theories pertaining to “co-belligerency”, the “support-based approach” and “cumulated/aggregated intensity”

Numerous jihadist groups around the world function with a certain degree of cooperation and mutual assistance. This does not necessarily make them part of the same supranational group, but it does raise the problem of whether such cooperation can impact the classification of a particular situation of violence. Jihadist groups are often perceived as entertaining various levels of interaction with other factions espousing a common ideology. These dynamics can become very intricate. For example, the Mali-based Nusrat Al-Islam, described as an Al-Qaeda “affiliate”, is apparently a merger of several other jihadist groups in the

98 See Oona A. Hathaway, Rebecca Crootof, Daniel Hessel, Julia Shu and Sarah Weiner, “Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict”, *University of Pennsylvania Law Review*, Vol. 165, No. 1, 2016, pp. 23 ff. and 40 in particular (arguing that, if intensity were not required for an intervening State, it would be allowed to use force in a way that would be impossible for the territorial State; if, however, the intervening State is acting upon the invitation of the territorial State regarding an existing “domestic” NIAC, there is no need for this criterion to be met separately by the intervener). For the idea that the intensity criterion for an extraterritorial NIAC may be higher in order to respect the territorial State’s sovereignty, see Sasha Radin, “Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts”, *International Law Studies*, Vol. 89, 2013, pp. 736–737.

region, most of which are also former individual “affiliates”; the group’s leaders apparently swore oaths of fealty to Al-Qaeda leadership following the merger.⁹⁹ Depending on the relationships between its constituent elements, Nusrat Al-Islam may be either a unitary group or a coalition of different groups (as understood by Nikolić, de Saint Maurice and Ferraro, who describe it as an “umbrella organization”: a coalition of “various armed groups operat[ing] with different structures and motives”¹⁰⁰). Nusrat Al-Islam has also been active in Burkina Faso, where it has allegedly been “cooperating” with the Islamic State in the Greater Sahara (ISGS) even though IS and Nusrat Al-Islam are rivals elsewhere.¹⁰¹ In Libya, various jihadist and Islamist militias banded together in the Shura Council of Benghazi Revolutionaries, a coalition of separate groups with a common purpose of defending themselves against anti-Islamist operations by other groups.¹⁰² It is less common for non-jihadist groups to be perceived as working in a coalition, but such examples do exist, for example in Mali, where a coalition of nationalist groups works under the aegis of the Coordination of Azawad Movements.¹⁰³ Therefore, although there is a tendency to link designated terrorist groups into coalitions (a term that is seldom defined by authors), inter-group cooperation in any form is not restricted to such groups. Our analysis here, therefore, has broader implications than just counterterrorism.

Legally, the question boils down to the following: if State A is in a NIAC with armed group B, and B cooperates with group C, could there *ipso facto* be a NIAC between A and C (and in the absence of direct clashes between A and C)? If our answer to this question is yes, then we can only conclude that the intensity of violence between A and B may be extended to cover C as well. There are several strains of thought arguing for such a possibility in doctrine.

We may call the oldest such position the co-belligerency approach. Scholars of the law of armed conflict rarely feel compelled to define “co-belligerency”, which is certainly an old IHL concept. Traditionally, “[c]o-belligerency is a concept that applies to international armed conflicts and entails a sovereign State becoming a party to a conflict, either through formal or informal processes”.¹⁰⁴ The concept has been used historically to describe members of a common alliance (which may

99 See Center for Strategic & International Studies, *Backgrounder: Jama'at Nasr al-Islam wal Muslimin (JNIM)*, 2018, available at: <https://tinyurl.com/fvnxvhmp>.

100 J. Nikolić, T. de Saint Maurice and T. Ferraro, above note 11.

101 Philip Kleinfeld, “Jihadis, Vigilantes, and Demoralised Troops: A Who’s Who in Burkina Faso’s Spiralling Crisis”, *The New Humanitarian*, 9 March 2020, available at: www.thenewhumanitarian.org/analysis/2020/03/09/who-is-who-burkina-faso-crisis.

102 See Jason Pack, Rhiannon Smith and Karim Mezran, *The Origins and Evolution of ISIS in Libya*, Atlantic Council, 2017, pp. 12 ff.; Henrik Gråtrud and Vidar Benjamin Skretting, “Ansar al-Sharia in Libya: An Enduring Threat”, *Perspectives on Terrorism*, Vol. 11, No. 1, 2017.

103 See Andrew McGregor, “Anarchy in Azawad: A Guide to Non-State Armed Groups in Northern Mali”, *Terrorism Monitor*, Vol. 15, No. 2, 2017.

104 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/68/382, 13 September 2013, para. 60; “Co-Belligerents”, in John P. Grant and J. Craig Barker (eds), *Encyclopaedic Dictionary of International Law*, Oxford University Press, Oxford, 2009 (“In strictness, co-belligerents are simply States engaged in a conflict with a common enemy, whether in alliance with each other or not”); Rebecca Ingber, “Co-Belligerency”, *Yale Journal of International Law*, Vol. 42, No. 1, 2017.

be formal or informal) vis-à-vis a specific armed conflict wherein States could be considered belligerent parties regardless of whether or not they actually took part in hostilities (for example, one or more co-belligerent States may simply have declared war against the common enemy without themselves engaging in battle). Geneva Convention IV refers to the concept when establishing who may become a protected person when in the hands of a belligerent party.¹⁰⁵ As a relation of co-belligerency between States may usually be inferred from formal treaties, declarations and other public sources, international law does not spell out the conditions for co-belligerency.

It is very controversial whether the concept can be applied by analogy in a NIAC, in particular as regards relationships between different armed groups. The US judiciary has notably understood the term “associated forces” to be synonymous with co-belligerency and has applied it to OAGs. In *Hamlily v. Obama*, the Columbia District Court accepted that “[a] ‘co-belligerent’ in an international armed conflict context is a state that has become a ‘fully fledged belligerent fighting in association with one or more belligerent powers’”, and proceeded to apply the concept to associated forces of Al-Qaeda.¹⁰⁶ This interpretation of co-belligerency would require the co-belligerent to actually fight alongside one of the principal belligerents, excluding situations where no such fighting takes place.¹⁰⁷ As the concept is here used with respect to OAGs and not States, it makes sense that the US government and judiciary are referring to co-belligerency in this more narrow sense. Therefore, the co-belligerency approach as advanced by some governments and scholars in relation to OAG coalitions requires, perforce, that each “associated force” is itself engaged in hostilities, and does not simply profess a common worldview or pay lip service to the same ideological crusade—an OAG may not simply “declare war” on a State and thereby trigger a NIAC or become a co-belligerent in the same way as this may happen in an IAC.

We are not convinced that co-belligerency, a concept imported from the law of IACs and the law of neutrality, may be applied by analogy in a NIAC, for two main reasons: (1) unlike IACs, NIACs require that a threshold of intensity be reached, and there is no reason why violence perpetrated by a third OAG in a NIAC should not first be evaluated *separately* when classifying the conflict;¹⁰⁸ and (2) even when it comes to States, not every violation of the law of neutrality

105 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 4(2): “Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

106 Columbia District Court, *Hamlily v. Obama*, 616 F Supp 2d 63, 2009, pp. 74–75.

107 See Nathalie Weizmann, “Associated Forces and Co-belligerency”, *Just Security*, 24 February 2015, available at: www.justsecurity.org/20344/isil-aumf-forces-co-belligerency/; A. Deeks, above note 11; V. Koutroulis, above note 11, p. 13; M. Zwanenburg, above note 11, p. 27.

108 It may be argued that the necessity requirement which we discussed for intensity would be met *ipso facto* for another group if it has already been met for one group, but this may not necessarily be the case: for example, the other group might be active in a part of a State’s territory where the State’s capacity to maintain law and order is unhampered by the ongoing NIAC against a different group elsewhere. And

would result in the third State becoming a party to the conflict¹⁰⁹ (as wrongly suggested by the Court in *Hamilly*¹¹⁰). It also goes without saying that the notion of “association” or “support” required for co-belligerent status is completely undefined for a NIAC. Even authors arguing in favour of the co-belligerency approach (under one name or another) have trouble ascertaining the requisite standard to be applied in such cases. Thus Koutroulis, who argues that non-State armed group (NSAG) “coalitions” should be treated as a single party to a NIAC if they have a person or a group (e.g., a joint council) that exercises the overall leadership of the groups in terms of operational coordination and strategic authority,¹¹¹ admits that it would be difficult to distinguish such coalitions from decentralized NSAGs.¹¹² If the existence of a coalition depends on the existence of common leadership, even on a purely strategic level, then we do not see the added value compared to analyzing the coalition as a single OAG (other than, perhaps, lowering the organization threshold, which we disagree with). Finally, the co-belligerency approach does not resolve the problem of a higher threshold for the application of AP II (namely, it may apply to some groups, but not to others). Although a “cumulative approach” has been suggested to apply AP II to all groups involved in the coalition if just one of them fulfils its criteria, this does not seem to correspond at all with positive law.¹¹³ It is also problematic in practice because an OAG which does not have territorial control will simply not be able to fulfil all the obligations foreseen in AP II.

A second position regarding OAG coalitions/alliances relies on the ICRC’s support-based approach. This approach was developed by the ICRC with regard to NIACs involving foreign intervention, in order to determine whether “the nature of the intervening power’s involvement in the pre-existing NIAC could mean that it is considered a ‘co-belligerent’, making it a party to the conflict”.¹¹⁴ Because a NIAC already exists, a third party’s involvement would need to be evaluated not against the general NIAC criteria, but according to its relationship with one of the belligerent parties. Under this approach,

[o]nly activities that have a direct impact on the *opposing* Party’s ability to carry out military operations would turn multinational forces into a Party to a pre-

most importantly, the bilateral projection of violence (armed clashes) would still have to exist separately, in addition to necessity.

109 For example, before the United States entered the Second World War in 1941, it had already lost its neutrality for commercially favouring the United Kingdom, but was still not considered a belligerent itself: see R. Kolb and R. Hyde, above note 21, pp. 277 ff.

110 “One only attains co-belligerent status by violating the law of neutrality, i.e., the duty of non-participation and impartiality. ... If those duties are violated, then the adversely affected belligerent is permitted to take reprisals against the ostensibly neutral party”: Columbia District Court, *Hamilly*, above note 106, p. 75.

111 V. Koutroulis, above note 11, pp. 18–19.

112 *Ibid.*, p. 18.

113 See Raphaël van Steenberghe and Pauline Lesaffre, “The ICRC’s ‘Support-Based Approach’: A Suitable but Incomplete Theory”, *Questions of International Law*, Vol. 59, 2019, pp. 16–18; see also M. Zwanenburg, above note 11, p. 31 (Zwanenburg disagrees with the “cumulative approach” regarding AP II application).

114 Tristan Ferraro, “The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015, p. 1231.

existing non-international armed conflict. ... [A]ctivities such as those that enable the Party that benefits from the participation of the multinational forces to build up its military capacity/capabilities would not lead to the same result.¹¹⁵

The main difference between the co-belligerency and support-based approaches is that the latter does not require potential coalition members to engage in hostilities themselves.¹¹⁶ In this respect, it sets a lower threshold for an external party to become a belligerent party to a conflict. Zwanenburg summarizes the criteria under the support-based approach as follows:

First, there needs to be a pre-existing NIAC taking place on the territory where the third power intervenes. Second, actions related to the conduct of hostilities need to be undertaken by the intervening power in the context of that pre-existing conflict. Third, the military operations of the intervening power should be carried out in support of one of the parties to the pre-existing NIAC. Last, the action in question should be undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict.¹¹⁷

The criticism levelled at the co-belligerency approach may equally be applied to the support-based approach, at least when applied to OAG coalitions. We may add for good measure that the ICRC examines the intervention and involvement of foreign States, not armed groups.¹¹⁸ However, some international lawyers, such as van Steenberghe and Lesaffre, argue that “no logical reason prevents the ICRC’s ‘support-based approach’ from applying to other types of interventions in pre-existing NIACs, in particular to the support provided by armed groups to one party to a pre-existing NIAC”.¹¹⁹ These authors submit that the requirements of the support-based approach are better defined than those of co-belligerency, and are thus a viable alternative to the broad interpretation given by the United States to the concept of “associated forces”. If one group, however well-organized, does not engage in acts of violence (a traditional prerequisite for determining the existence of a NIAC), but simply provides material and logistical support to another, why would we accept *ipso facto* that it has become a party to an armed conflict and that lethal force may be employed against the group according to the conduct of hostilities paradigm? Doesn’t this approach unduly expand the categories of targetable individuals? Isn’t the concept of “support” too elastic, and

115 2016 Commentary on GC I, above note 19, para. 446 (emphasis in original).

116 “[A]ctions such as logistical support involving the transportation of the troops of one of the belligerents on the front line, the provision of intelligence used immediately in the conduct of hostilities and the involvement of members of the third power in planning and coordinating military operations conducted by the supported party are all types of support that fall within the scope of application of the ICRC’s position—in the same way as direct involvement by the intervening power in combat operations does—because they have a bearing on the applicability *ratione personae* and *ratione materiae* of IHL”: T. Ferraro, above note 114, p. 1231. See also M. Zwanenburg, above note 11, pp. 26–27.

117 M. Zwanenburg, above note 11.

118 T. Ferraro, above note 114, p. 1231; the ICRC refers to the involvement of a “third power”.

119 R. van Steenberghe and P. Lesaffre, above note 113, p. 11.

what would be its source in the context of conflict classification? Isn't the notion of direct participation in hostilities enough to deal with individuals who support one party to the conflict to the detriment of another's military operations? It is worth recalling that the Columbia District Court in *Hamilly* has already dismissed the US government's similar arguments with respect to individuals providing "substantial support" to the Taliban or Al-Qaeda.¹²⁰ Is the support-based approach workable in practice for OAGs? For instance, the last criterion, the existence of an official decision by the intervening "power", would in practice be quite difficult to establish for fluid OAGs. The idea of applying the support-based approach to OAGs therefore causes more problems than it could ever solve.

Several authors¹²¹ also contend that NSAG coalitions may be inferred on the basis of the ICRC's approach to direct participation in hostilities. This position produces similar results to those of the support-based approach, but the criteria are rather based on the ones for direct participation in hostilities as developed by the ICRC (namely, the existence of a threshold of harm, direct causation and a belligerent nexus).¹²² It is debatable whether this interpretation is more restrictive or more permissive than the support-based one, but as direct participation in hostilities normally pertains to individual rather than group conduct, the fact that it finds a place in discussions of NSAG coalitions is somewhat perplexing. Deeks writes:

[T]here may be some utility in considering the DPH [direct participation in hostilities] factors in evaluating associations between groups in their adverse relationship to the state. This is because the DPH factors are intended to assess the links between military-like acts by an actor who does not fall within the core of a NSAG, and an existing NIAC (or IAC) itself.¹²³

If the nature of Group Y's support to Group X in its hypothetical NIAC with State A meets certain cumulative criteria, then Y is a "functional co-belligerent" of X. The test of functional co-belligerency requires positive answers to three questions, cumulatively: "Was Group Y's participation or action likely to adversely affect the military options of State A? Did Group Y's participation directly lead to tangible harm to State A? Was Group Y's participation intended to benefit Group X and harm State A?"¹²⁴ This approach raises many challenges, not least because of the difficulty inherent in determining whether any of these criteria have been met by a group (Zwanenburg remarks that the question of whether the act was intended to harm State A will be very difficult to answer in practice¹²⁵), but also because direct participation in hostilities, developed primarily to determine whether civilians lose protection from direct attack at a given moment, is always

120 See Columbia District Court, *Hamilly*, above note 106, pp. 68 ff.

121 See, *inter alia*, A. Deeks, above note 11; M. Zwanenburg, above note 11, p. 28; R. van Steenberghe and P. Lesaffre, above note 113, pp. 19 ff.

122 N. Melzer, above note 46, pp. 46 ff.

123 A. Deeks, above note 11.

124 *Ibid.*

125 M. Zwanenburg, above note 11, p. 28.

provisional: when a civilian is no longer directly participating in hostilities, he or she may no longer be targeted. By implication, this would mean that Group Y as a “functional co-belligerent” could only be targeted when it is directly participating in hostilities, but not afterwards or in between such acts, which is counterintuitive.¹²⁶

The last approach we examine here may be labelled as cumulative or aggregated intensity. This theory takes several different forms, all of which have in common the notion that violence projected by separate OAGs could be evaluated jointly for the purposes of conflict classification. For example, Nikolić, de Saint Maurice and Ferraro observe that, in some complex situations of violence,

it might be both practically impossible and legally illogical to look at bilateral confrontations and disentangle the level of violence by each of the armed groups involved. In such situations ... it might therefore be more legally sound to consider aggregating the intensity of identified organized NSAGs for ... classification purposes.¹²⁷

These authors invoke in this regard the ICRC’s 2019 Challenges Report, which finds that “[w]hen several organized armed groups display a form of coordination and cooperation, it might be more realistic to examine the intensity criterion collectively by considering the sum of the military actions carried out by all of them fighting together”.¹²⁸ The prerequisite for aggregating intensity would be to have a number of groups that fulfil the criterion of organization separately but work together to form a “coalition”. Clearly the problem remains of how to define such a coalition and the nature of inter-group relations necessary for it to arise: Nikolić *et al.* offer a number of indicative factors in this regard, but beyond excluding merely ideological and political similarities between coalition members, they ultimately do not provide a clear instruction on how to identify them. They also refer to notions such as “coordination and cooperation” almost interchangeably with the notion of coalition, even though the former conveys the idea that the relationship between the groups is even more fluid and unstable than in a coalition. Writing separately on the same issue a few years earlier, Kleffner had developed the “cumulative intensity” theory, but divorced from the notion of coalition. He suggested that the violence projected by *all* armed forces in a “geographical and temporal continuum” should be added to the equation of determining whether a NIAC exists, regardless of whether various OAGs are fighting together or against each other¹²⁹ (this is the key difference between Kleffner’s view and the aggregated intensity approach suggested by Nikolić *et al.*, which does not require the existence of such a continuum, merely a “coalition”). A modification of Kleffner’s view is also advocated by Redaelli, who finds that

126 Van Steenberghe and Lesaffre examine this issue and, while arguing in favour of this approach, accept that it should in such situations have a broader scope than when discussing individuals and targeting: see R. van Steenberghe and P. Lesaffre, above note 113, pp. 19 ff.

127 J. Nikolić, T. de Saint Maurice and T. Ferraro, above note 11.

128 2019 Challenges Report, above note 79, p. 51.

129 J. K. Kleffner, above note 27, pp. 172 ff.

the coalition ought to be fighting against a “common enemy” as an additional requirement.¹³⁰ Again, these interpretations are based on theoretical constructions driven by the desire to facilitate conflict classification in situations where the facts are difficult to ascertain.

The cumulative/aggregated intensity approach presents an easy way out of persistent and frustrating legal headaches, but is it justifiable to loosen legal standards simply because this is more easily done than collecting and evaluating data from the field? Is it even legally sound to do so?

Ultimately, like the other approaches we examine here, cumulative/aggregated intensity suffers from the same problem of potentially leading to an over-classification of situations of violence. An armed conflict, whether international or non-international, is an objective, factual state, one which in principle exists independently of the perception of external observers—and it is also a legal state, in the sense that it triggers the applicability of a certain body of law. While the question of whether IHL or IHRL provides greater protection to human beings is more grey than black and white, when it comes to fundamental issues such as the use of force or deprivation of liberty, the latter is clearly preferable to IHL. By simplifying conflict classification, each of the above theories effectively creates a presumption (in case of doubt) in favour of IHL, when there should rather be a presumption against it. As aptly noted by Sivakumaran, “[t]he default presumption for international human rights law is that it applies, and for international humanitarian law that it does not”.¹³¹

It may be submitted that there is a humanitarian interest in facilitating conflict classification in order to bind an armed non-State actor by rules of international law (specifically, IHL). We do not find this argument convincing for several reasons. As stated above, IHL contains not only protective rules but also a “license to kill” (or at least an absence of prohibition to intentionally kill legitimate targets) in a manner which is very foreign to human rights law—it is extremely difficult to conclude whether the interest of binding a non-State actor by IHL outweighs the loss of human rights protection vis-à-vis the State. The growing body of doctrine holding that non-State actors, including OAGs, have human rights obligations should also not be disregarded.¹³² At any rate, if an armed conflict exists, then every individual (whether civilian or combatant/fighter) within its geographical scope may violate IHL if they engage in prohibited or criminalized conduct with a nexus to it—it is not necessary for them to first belong to an OAG in order for them to be bound by IHL. Above all, the interests underlying the aggregating/cumulating intensity cannot make up for

130 See Chiara Redaelli, “A Common Enemy: Aggregating Intensity in Non-International Armed Conflicts”, *Humanitarian Law and Policy Blog*, 22 April 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/04/22/common-enemy/>.

131 Sandesh Sivakumaran, “International Humanitarian Law”, in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, Oxford, 2018, p. 508.

132 See, in particular, Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017.

any organizational deficiencies in the groups involved: to combine the violence projected by such groups could even lead to a situation where all the violence projected in a territory, including isolated acts of criminal violence, might be considered for conflict classification. If that were the case, the distinction between other situations of violence and proper armed conflicts would tend to disappear.

Accordingly, we submit that less is sometimes better than more, and that when classifying violence projected by and against armed groups, a bilateral approach should be taken to determine which groups are belligerent parties. This remains without prejudice to the possibility that one or more individuals who do not clearly belong to one of the belligerent parties may be considered as direct participants in hostilities and thereby lose their protection from attack for such time as they directly participate in hostilities.

An analogy may be made here with the “internationalization” of NIACs through third-State intervention. Both the International Court of Justice (ICJ)¹³³ and the ICTY¹³⁴ have treated the acts of an OAG and a third State intervening on its behalf separately for purposes of conflict classification and determination of the applicable law—Robert Kolb refers to this as the theory of “bilateral bundles” (*faisceaux bilatéraux*).¹³⁵ It has never been suggested that the acts of violence projected by the OAG could be cumulated with the acts of violence projected by the intervening State; even the view that the conflict should be considered “internationalized” as a whole has been abandoned despite its practicality and humanitarian value.¹³⁶ It is therefore all the more disconcerting that a cumulative approach should be advanced for relations between OAGs (which would result in the extension to one or more of them of the law of NIACs, instead of considering human rights law applicable to them), when the notion of internationalization (which would merely transform a NIAC into an IAC) is itself losing favour. If a bilateral approach is adopted for a foreign State intervention on behalf of an OAG, there is no good reason why the same should be abandoned when two groups operate in the same area or when they loosely coordinate their actions.

Although a situation of violence may be colloquially described as a single “war”, there may be many armed conflicts, all of which represent a bilateral *legal* relationship between individual belligerent parties. Only on a bilateral level may the content of these parties’ legal obligations be fairly ascertained. Of course, such bilateral legal relations do not exist in a factual vacuum, and an ongoing NIAC with one group may influence the evaluation of the NIAC criteria in

133 ICJ, *Nicaragua*, above note 21, para. 219.

134 ICTY, *Tadić*, above note 32, paras 84, 162 (here, the Tribunal does not even consider the NIAC threshold once it has attributed the conduct of an OAG to a foreign State—the conflict is *ipso facto* an IAC).

135 Robert Kolb, *Ius in bello: Le droit international des conflits armés*, Helbing & Lichtenhahn, Basel, 2003, paras 175 ff.

136 For positions advocating internationalization, see Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 152; James G. Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict”, *International Review of the Red Cross*, Vol. 85, No. 850, 2003. For an opposing view, see the current ICRC position on conflicts with “double classification” in T. Ferraro, above note 114.

relation to fighting against another (for example, the State's capacity to maintain law and order could be impacted by the ongoing NIAC and thus create a situation where the criterion of intensity for another NIAC may be more easily met), but the classification analysis itself should always be done on a bilateral level. Otherwise, if the facts are unclear or insufficient to establish the existence of an armed conflict between specific belligerent parties, then human rights law is the applicable legal framework, not IHL.

Further reflections on the importance of an OAG's motives for conflict classification

In the previous sections, we scrutinized separately the criteria of organization and intensity in relation to "counterterrorist NIACs". We believe that there is one further transversal issue important for over-classification that could impact both the criteria of organization and intensity. We speak of the influence of an OAG's motives on its structure and activities.

Although it has been suggested that OAGs need to act towards achieving specific *political* purposes (to differentiate them from criminal groups),¹³⁷ this has largely been rejected in doctrine¹³⁸ as well as by the ICRC, which finds that "introducing political motivation as a prerequisite for non-international armed conflict could open the door to a variety of other motivation-based reasons for denying the existence of such armed conflicts", and that "[w]hat counts as a political objective ... might be controversial; non-political and political motives may co-exist; and non-political activities may in fact be instrumental in achieving ultimately political ends".¹³⁹ This position seems indisputable today, and even groups which do not exist to fulfil an overtly political purpose (such as drug

137 See, for example, H.-P. Gasser, above note 96, p. 555: "The members of [OAGs] – whether described as insurgents, rebels, revolutionaries, secessionists, freedom fighters, terrorists, or by similar names – are fighting to take over the reins of power, or to obtain greater autonomy within the State, or in order to secede and create their own State." For similar views, see Claude Bruderlein, *The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars*, Centre for Humanitarian Dialogue, 2000, pp. 8 ff.; David Petrusek, *Ends & Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, 2000, p. 6; Jann K. Kleffner, "The Applicability of International Humanitarian Law to Organized Armed Groups", *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 450; Juan E. Ugarizza and Matthew J. Craig, "The Relevance of Ideology to Contemporary Armed Conflicts: A Quantitative Analysis of Former Combatants in Colombia", *Journal of Conflict Resolution*, Vol. 57, No. 3, 2012.

138 See, for example, Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations", *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 78: "Some observers add a further condition to the notion of non-international armed conflict. They suggest that account needs to be taken of the motives of the non-governmental groups involved. This type of conflict would thus cover only groups endeavouring to achieve a political objective. 'Purely criminal' organizations such as mafia groups or territorial gangs would thus be eliminated from that category and could in no way then be considered as parties to a non-international armed conflict. However, in the current state of humanitarian law, this additional condition has no legal basis." Cf. Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012.

139 2016 Commentary on GC I, above note 19, para. 484.

cartels) may be considered an OAG if they possess the organizational capacity to engage in hostilities. Classification is fact-based, and motivation and ideology are not facts that are relevant for the assessment of whether a NIAC exists.

It would nevertheless be unwise to deny a group's motives any importance, as the reason for which a group is constituted has implications for its structure, functioning and choice of means and methods. Just as the structure of an organized crime syndicate would *prima facie* be conducive to its illegal activities (for financial gain) and not to the conduct of hostilities, so too will the structure of terrorist organizations reflect their primary purpose in the commission of acts of terrorism that may be quite different from the sort of armed clashes arising in an armed conflict. For example, the functioning of the group will be different if its objectives are to coerce State authorities into complying with political demands through violence rather than overtaking governmental authority, seceding or creating a new State, which would involve a prolonged armed struggle against State forces.

Accordingly, the reasons for which a group is constituted may *de facto* have a bearing on both the organization and intensity criteria. With respect to the former, they may influence whether the group has a capacity to conduct hostilities as a necessary component for the applicability of IHL; regarding the latter, they will influence, or even dictate, the group's activities, which may or may not involve armed clashes of a certain intensity with opposing armed forces.

Consider the working of the infamous Cali drug cartel, originating in southern Colombia, which was organized so as to have "a set of key figures at the core and a periphery that included not only those directly involved in the processing and transportation of cocaine, but also taxi drivers and street vendors who were an invaluable source of information at the grass-roots level";¹⁴⁰ the authorities apparently even maintained that "the Cali group isn't a cartel, really, but rather a consortium of loosely affiliated and cooperating trafficking groups".¹⁴¹ The nature of the drug trade dictated the group's organizational structure as a networked organization (with a preference for secrecy and survivability to impact) and distribution of autonomous cadres in a cell-based layout, with individual members avoiding direct confrontation with the authorities. A "quieter, smarter, more businesslike group of traffickers" than the Medellín cartel,¹⁴² the Cali cartel shunned political violence, judging the threat of violence as sufficient for its purposes to be achieved. Different drug cartels may of course opt for different means of ensuring the drug trade, and may even develop more explicitly political objectives,¹⁴³ but they should not *a priori* be considered, because of their principal purpose, as possessing a capacity to conduct hostilities or engage in armed clashes against governmental forces of a

140 P. Williams, above note 54, p. 74.

141 Linda Robinson, Gordon Witkin, Matthew Cooper and Scott Minerbrook, "New Target: The Cali Cartel", *US News & World Report*, 23 December 1991.

142 *Ibid.*

143 For example, the United Self-Defence Forces of Colombia, apart from being a drug trafficking group, was specifically created to fight left-wing paramilitaries threatening drug cartel interests in the country.

degree necessary for the existence of a NIAC.¹⁴⁴ In terms of intensity, the violence perpetrated by criminal groups is usually clandestine, taking the form of assassinations, kidnappings, torture and, exceptionally, armed clashes with law enforcement or other gangs; this does not, however, so fundamentally impair a State's capabilities to maintain order as to justify a conduct of hostilities response.

Even between terrorist groups such as Al-Qaeda and IS (which are normally classified under the same *chapeau* of jihadist terrorism), ideological nuances spell out different ways of organizing themselves and acting to achieve their goals. For example, whereas "IS wants the caliphate, a theocracy for all Muslims under the leadership of the Prophet's successor, straightaway", Al-Qaeda "sees the caliphate as the end state of a lengthy development", and "[a]ccordingly, [it] is committed to this day to the fight against the distant enemy IS can be seen more as a revolutionary regime that is attempting to establish a state according to its principles and to aggressively enforce and expand its ideology and claim to power."¹⁴⁵ The motives (ideology) of IS necessitate engaging in hostilities with governmental forces and rival non-State actors; those of Al-Qaeda do not necessarily require such actions, and rather focus on clandestinely planning, organizing and carrying out acts of terrorism.

We therefore submit that a group's objectives, purposes and goals exert a significant influence on the NIAC criteria of organization and intensity. A non-State actor's motives are not an independent or decisive factor in conflict classification, but they may be considered as setting a (rebuttable) presumption regarding a group's structure and functioning. Thus, if a group's motives do not imply that it intends to conduct hostilities and unless it is conclusively demonstrated that its structure and functioning are nevertheless conformant to the NIAC criteria, the presumption should be against determining that a NIAC exists.

Conclusion

The over-classification phenomenon we describe in this article is complex because of both its multifaceted nature and its capacity for "shapeshifting" (beyond its basic form involving conflict classification, it has occasionally expanded to the scope

144 The lively discussion on "drug wars" and IHL is still ongoing in academic circles, with many controversies as to whether such conflicts may amount to NIACs: on this topic, see, for example, Andrea Nill Sánchez, "Mexico's Drug 'War': Drawing a Line Between Rhetoric and Reality", *Yale Journal of International Law*, Vol. 38, No. 2, 2013, p. 467; Carrie A. Comer and Daniel M. Mburu, "Humanitarian Law at Wits' End: Does the Violence Arising from the 'War on Drugs' in Mexico Meet the International Criminal Court's Non-International Armed Conflict Threshold?", *Yearbook of International Humanitarian Law*, Vol. 18, 2015; Geneva Academy, "Two New Non-International Armed Conflicts in Mexico Involving the Sinaloa Drug Cartel", 10 March 2020, available at: www.geneva-academy.ch/news/detail/314-two-new-non-international-armed-conflicts-in-mexico-involving-the-sinaloa-drug-cartel; "Do the Laws of Armed Conflict Apply to Drug-Related Violence?", debate held at Colombia Law School, 11 February 2013, available at: <https://www.hr-dp.org/print/206>.

145 Ulf Bruggemann, *Al-Qaeda and the Islamic State: Objectives, Threat, Countermeasures*, Federal Academy for Security Policy, 2016, p. 3.

ratione loci and *ratione personae* of IHL), as well as its numerous causes, none of which may be singled out as the principle one.

Although the primary responsibility to ensure respect for international law is upon States, the problem cannot be attributed to them exclusively. There are incentives for some States to resort to IHL rather than IHRL, as the former gives more room for manoeuvre. For this reason, more and more States adopt flexible standards and invoke blurry concepts such as “associated forces”, “networks” or “sleepers cells”. All of these different euphemisms facilitate the classification of situations of violence that are located in a grey zone as armed conflicts and thus lead to a deviation from human rights obligations, notably to employ lethal force as an *ultima ratio*. Additionally, terrorist groups themselves may have an interest in being considered as OAGs, as this magnifies the menace they pose to society and may facilitate recruitment as well as attracting funding and weapons.¹⁴⁶

Even international criminal tribunals and courts, as well as humanitarian organizations and experts, have had a role to play in shaping the current over-classification tendency. In the context of the *ex-post* fight against impunity, expanding the scope of application of IHL opens the door for war crimes prosecutions, which are more straightforward than prosecutions for crimes against humanity or acts of genocide. For some humanitarian organizations, there may be a professional interest in describing a situation as having reached the threshold of a NIAC for operational reasons and to engage in a humanitarian dialogue with belligerent parties. Lastly, the desire of eminent legal scholars to clarify and facilitate conflict classification—having in mind particularly complex situations that often involve groups designated as terrorist—may further contribute to creating the over-classification phenomenon. Various theories such as those pertaining to “co-belligerency”, the “support-based approach” and “aggregate intensity” have been developed to fill in perceived gaps in conflict classification.

All these reasons are understandable and may be seen as legitimate, but they may ultimately decrease the legal protections afforded to victims of situations of violence. We would therefore like to conclude this piece on a cautionary note, recalling that IHL is a framework reserved for exceptional circumstances, to be applied under restrictive conditions. The threat of terrorism, however intimidating, will often not fulfil these conditions. International law requires that conflict classification be undertaken with the greatest scrutiny, and that situations of internal disturbances and tensions reach not only a certain degree, but also a specific *quality*, before they may be described as a NIAC. In case of doubt, IHRL is the legal framework that is presumed to apply and to protect individuals, not IHL.

¹⁴⁶ See Hamilton Bean and Ronald J. Buikema, “Deconstituting Al-Qa’ida: CCO Theory and the Decline and Dissolution of Hidden Organizations”, *Management Communication Quarterly*, Vol. 29, No. 4, 2015.

Better a war criminal or a terrorist? A comparative study of war crimes and counterterrorism legislation

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Abstract

This article poses the question as to whether and why States overlook the prosecution of people for war crimes rather than terrorist offences, where war crimes would be preferred. It looks at whether a diverse range of States (Afghanistan, Australia, Mali, the Netherlands and the Russian Federation) are able through their domestic legislation to prosecute people for war crimes or for terrorist offences. It considers what the value of prosecutions is theoretically and legally, and what the impact of prosecutions is practically in a State. It proposes that prosecutors, police and judges should ask the question whether an alleged offender should be prosecuted for war crimes and/or terrorist offences with war crimes being the preferred option where there is evidence that they have been committed.

Keywords: war crimes, counterterrorism, terrorists, terrorism, foreign fighters, legislation, prosecution, comparative studies.

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Introduction

Over the last twenty years there has been an increase in laws related to terrorism. Since the war in Syria in 2011, and the creation of the Islamic State (IS) group encouraging young people to join their fight by leaving their own countries to go primarily to Syria and Iraq, there has been a wave of legislation which cancels citizenship, prohibits association with terrorists and terrorist organizations, designates certain parts of the world as prohibited for citizens to travel to, and expands extra-territorial jurisdiction. While counterterrorism legislation potentially presents concerns for international human rights law,¹ it also poses a significant problem for the continued respect for international humanitarian law (IHL) because so many of the offences occur in times of armed conflict or associated with armed conflict.

Tristan Ferraro, in his article in this edition of the *International Review of the Red Cross*, addresses the IHL issues around counterterrorism legislation and the need for IHL savings clauses (whereby legislation must be read in accordance with existing IHL obligations of the State) and humanitarian exemptions (for humanitarian workers to continue to work in so-called terrorist-controlled areas).² This article does not replicate the IHL definitions and discussions from Ferraro's article. In complement to his article, it looks at the risk, when States adopt a raft of legislative measures around terrorism and start to prosecute people for terrorist offences, that war crimes which normally should be the law applied (as the enforcement mechanism of IHL) are being overlooked.

Those who go to fight in Syria and Iraq (foreign fighters) and then return to their home countries (wherever they are allowed to do so) are sometimes (not often) prosecuted under counterterrorism legislation, where they are suspected of having fought for an armed group or organization labelled as terrorist by their home country. However, they have probably fought as a member of or alongside a party that is usually known for using unlawful means and methods of warfare as part of its strategy.³ They may have committed war crimes. There is talk of establishing a war crimes court in Syria and Iraq for such foreign fighters,⁴ but nothing has come of this idea yet. Prosecutions remain a matter for domestic law: in this context why is prosecution for terrorist offences favoured over war crimes?

- 1 See, e.g., the work of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, available at: <https://www.ohchr.org/EN/Issues/Terrorism/Pages/Issues.aspx> (all internet references were accessed in September 2021).
- 2 For a more detailed analysis, refer to Tristan Ferraro's article, "Counterterrorism, Sanctions and International Humanitarian Law: ICRC Perspectives on Finding the Right Balance", *International Review of the Red Cross*, 2021, this edition.
- 3 Lydia Khalil and Rodger Shanahan, "Foreign Fighters in Syria and Iraq: The Day After", *Lowy Institute for International Policy*, 2016, pp. 2 and 3, available at: <https://www.lowyinstitute.org/publications/foreign-fighters-syria-and-iraq-day-after>.
- 4 See, e.g., Peter Cephass Dahabreh, "The International Tribunal for the Prosecution of Foreign Fighters Responsible for Serious Violations of International Humanitarian Law and International Human Rights Law Committed in the Territory of the Syrian Arab Republic since 2011", SSRN, 11 March 2019, available at: <https://ssrn.com/abstract=3350683> or <http://dx.doi.org/10.2139/ssrn.3350683>.

Kaikobad has pointed out that “war crimes ... are offences against the law and customs of war, However, acts of terrorism ... are not violations of international law. They are violations essentially of domestic laws which have their geneses in international treaties to which States may or may not in principle adhere.”⁵ He continues that if a person has committed a grave breach of the Geneva Conventions⁶ and also an offence of terrorism, a State has an obligation under international law to prosecute for war crimes rather than terrorist offences.⁷ Nowadays we would extend the obligation to prosecute war crimes under Article 3 common to the four Geneva Conventions, Additional Protocol II and customary international law as serious international crimes which should be investigated and, where there is evidence, prosecuted and punished.⁸

However, as Special Rapporteur, Fionnuala D. Ní Aoláin, says in her interview in this edition of the *International Review of the Red Cross*:

It is highly comfortable for States, especially in the context of non-international armed conflicts, to address actors and their acts as terrorist in nature rather than to make the harder and complicated questions of assessment on what the applicability of common article 3 to the GCs, and Additional Protocol II might mean.⁹

Taking a comparative approach, this article looks at whether States have the ability to prosecute for war crimes and terrorist offences in five States – Afghanistan, Australia, Mali, the Netherlands and the Russian Federation – and if they are equipped to deal with both counterterrorism offences and war crimes, should they preference war crimes? These States have been chosen because they represent diverse regions; they all have citizens who have joined armed conflict through terrorist organizations in other States; and have been or are currently in or involved in armed conflict. These States have all ratified most of the relevant IHL treaties, so they have the corresponding obligations to prosecute persons for war crimes, in addition to those arising out of customary international law.¹⁰

5 Kaiyan Homi Kaikobad, “Crimes against International Peace and Security, Acts of Terrorism and Other Serious Crimes: A Theory on Distinction and Overlap”, *International Criminal Law Review*, Vol. 7, No. 2–3, 2007, p. 213.

6 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 50; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 51; Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 130; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 147.

7 K. H. Kaikobad, above note 5, p. 214.

8 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC CIL Study), Rule 158, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.

9 “Interview with Fionnuala D. Ní Aoláin”, available at: <https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/interview-with-fionnuala-d-ni-aolain/747258EE107B2FF85708C62649907C8C>.

10 The United Kingdom and the United States which have well-developed counterterrorism laws and have also prosecuted a considerable number of individuals with terrorism offences in relation to Islamic State in

This article considers what the value and impact of prosecutions is, both theoretically and legally. Ultimately, the question will be posed as to whether war crimes prosecutions should be preferred over terrorist prosecutions and what impedes such prosecutions.¹¹

Setting the scene: can terrorism and war crimes occur at the same time?

What war crimes have been documented?

A war crime is a serious violation of IHL.¹² War crimes are grave breaches of the Geneva Conventions and Additional Protocol I (international armed conflict), serious violations of common Article 3 and Additional Protocol II (non-international armed conflict),¹³ and other serious violations of the laws of war such as attacking civilians or civilian objects (in both international and non-international armed conflict).¹⁴ The Geneva Conventions are universally ratified; all five of the States considered here are party to Additional Protocol I; and four are party to the Rome Statute. Therefore, they all have the obligation to prosecute and punish persons for grave breaches of the Geneva Conventions and Additional Protocol I, as well as serious violations of common Article 3. In addition, customary IHL, which is of course applicable to all States, requires investigation, prosecution and punishment for all serious violations of IHL as outlined above.¹⁵

Of particular note, “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population” is a war crime in both international and non-international armed conflict.¹⁶ The International Criminal

Iraq and Syria before their courts are not considered here as they have been well covered elsewhere: see, e.g., Todd Landman, “Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism”, *California Western International Law Journal*, Vol. 38, No. 1, 2007; K. N. Trapp, “The Interaction of the International Terrorism Suppression Regime and IHL in Domestic Criminal Prosecutions: The UK Experience”, in D. Jinks, J. Maogoto and S. Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, T.M.C. Asser Press, The Hague, 2014.

11 The Genocide Network—a network of prosecutors in Europe—has produced a report discussing opportunities for investigating and prosecuting foreign terrorist fighters and other members of terrorist organizations not only for terrorist offences but also for war crimes, crimes against humanity and the crime of genocide: “Cumulative Prosecution Of Foreign Terrorist Fighters For Core International Crimes And Terrorism-Related Offences”, *Eurojust*, May 2020, available at: https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.PDF.

12 ICRC CIL Study, above note 8, Rule 156.

13 GC I, Arts 3 and 50; GC II, Arts 3 and 51; GC III, Arts 3 and 130; GC IV, Arts 3 and 147; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 11 and 85; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II).

14 ICRC CIL Study, above note 8.

15 *Ibid.*, Rule 158.

16 PAP I, Art. 51(2); AP II, Art. 13(2); ICRC CIL Study, above note 8, rule 2.

Tribunal for the former Yugoslavia (ICTY) has said in *Galic*,¹⁷ that while they took no view of the customary nature of the crime, that under conventional law in 1992, there existed a crime of spreading terror among the civilian population with the following elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.¹⁸

The Rome Statute of the ICC (Rome Statute)¹⁹ presents a large (but not exhaustive) list of war crimes in Article 8 which deals with (separately) both international and non-international armed conflicts and divides grave breaches of the Geneva Conventions and Additional Protocol I from common Article 3 violations and other serious violations of IHL. Tellingly, the Rome Statute does not cover “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”, although such acts might be partly covered by intentionally directing attacks against the civilian population.²⁰ This is an interesting development considering that the Tribunal in *Galic* was able to consider both attacks on the civilian population and acts of terror as separate charges as they found they both constituted existing war crimes.

It is well documented that recent armed conflicts in Iraq and Syria, where foreign fighters have gone, have been fought with acts of terror on the civilian population, including mass killing of civilians, rape, and in addition in two of our focus-States, Mali and Afghanistan, death, torture and cruel and inhuman treatment of detainees, among other war crimes.²¹ Some examples can be given to demonstrate the point that it would be possible to convict persons for both terrorist offences and war crimes in each of these jurisdictions. Citizens of Australia, Afghanistan, Mali, the Netherlands and the Russian Federation have gone to Syria and Iraq to fight for designated terrorist organizations, whether IS

17 ICTY, *Prosecutor v. Stanislav Galic*, Case No.: IT-98-29-T, Judgement and Opinion, Trial Chamber, 5 December 2003.

18 *Ibid.*, para. 133.

19 Rome Statute of the ICC, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute).

20 *Ibid.*, Arts 8(2)(b)(i) and 8(2)(e)(i).

21 For the war crimes, see, for the possibility of them having been committed in these contexts, ICC, *Situation in the Republic of Mali*, ICC-01/12, available at: <https://www.icc-cpi.int/mali>; ICC, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, available at: <https://www.icc-cpi.int/afghanistan>; for Syria, see Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/45/31, available at: <https://undocs.org/A/HRC/45/31>; for Iraq, see Letter Dated 17 May 2019 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council, UN Doc. S/2019/407*, 17 May 2019, available at: https://www.unitad.un.org/sites/www.unitad.un.org/files/general/17.05.2019_0.pdf.

group or their foes. The United Nations (UN) Independent International Commission of Inquiry on the Syrian Arab Republic has found the following violations by all sides to the conflict: massacres and other unlawful killing, arbitrary arrest and unlawful detention, hostage-taking, enforced disappearance, torture and ill-treatment, sexual and gender-based violence, unlawful attack, use of illegal weapons, sieges, and arbitrary and forcible displacement.²² In Iraq, crimes were committed by Islamic State in Iraq and the Levant (ISIL) in Mosul between 2014 and 2016, including the execution of religious minorities, crimes involving sexual and gender-based violence, and crimes against children.²³ It has been reported that foreign fighters are more likely to be disproportionately involved in extreme acts of violence than nationals of Syria and Iraq.²⁴

The International Criminal Court (ICC) is investigating Mali and Afghanistan. In Mali, the ICC Prosecutor alleged there is a reasonable basis to believe that the following crimes have been committed in Mali: war crimes, including murder; mutilation, cruel treatment and torture; intentionally directing attacks against protected objects; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court; pillaging; and rape.²⁵ In Afghanistan, the Office of the Prosecutor considers that “war crimes of murder; cruel treatment; outrages upon personal dignity; the passing of sentences and carrying out of executions without proper judicial authority; intentional attacks against civilians, civilian objects and humanitarian assistance missions; and treacherously killing or wounding an enemy combatant”²⁶ had been committed.

Not all terrorist offences will be committed as part of, or concurrently with, war crimes or an armed conflict. In many cases, those convicted of terrorist offences have not committed any physical acts, but rather have done acts preparatory to a crime; moreover, many convicted of domestic offences will not have committed any act in times of armed conflict. War crimes are only applicable when there is an international or non-international armed conflict. Therefore, the situation which this article considers relates only to where persons have travelled to, or have been based, where there is an armed conflict. Moreover, as Ferraro has pointed out in this edition of the *International Review of the Red Cross*,²⁷ some acts which could be charged as terrorist offences if committed in peacetime might not be war crimes if they are legitimate acts of war. Conversely, not all war

22 UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/25/65, 14 February 2014, available at: <https://undocs.org/A/HRC/25/65>, p. 1.

23 Letter Dated 17 May, above note 21.

24 L. Khalil and R. Shanahan, above note 3, pp. 2 and 3.

25 ICC, Office of the Prosecutor, *Situation in Mali: Article 53(1) Report*, 16 January 2013, available at: https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf.

26 ICC, *The Prosecutor of International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, 20 November 2017, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>; ICC, *Afghanistan: Situation in the Islamic Republic of Afghanistan*, ICC-02/17, available at: <https://www.icc-cpi.int/afghanistan>.

27 See T. Ferraro, above note 2.

crimes will be committed with terrorist intent or by members of terrorist organizations,²⁸ and these crimes are not considered here.

Can acts committed by those classified as terrorists be prosecuted as war crimes domestically?

As outlined above, war crimes are serious violations of IHL and are crimes which are of concern to the international community as a whole. However, while international, practically, and as a matter of the principle of legality, States cannot prosecute persons for war crimes unless their domestic legislation has relevant powers for judges to sentence, and prosecutors and police to investigate. While all States have the obligation to enact legislation to prosecute for all serious violations of IHL, not all of the five States have relevant war crimes domestic legislation, giving them the actual ability to prosecute for all war crimes. The Afghanistan Penal Code (2017), the Australian Criminal Code Act 1995 Schedule Criminal Code and the Russian Federation Criminal Code 1996 allow for both war crimes and terrorist offences to be prosecuted (the terrorist offences are considered below for all the focus-States) and cumulatively (that is, multiple charges can be brought at the same time for the judge to adjudicate on). The inclusion of both war crimes and terrorist offences in the same law would presumably facilitate the ability to prosecute for both offences. In Australia, however, the Attorney-General must approve the launching of a prosecution for a war crime offence in writing,²⁹ and not for a terrorist offence, which potentially adds a political dimension to the consideration of the prosecution³⁰ which seems an odd distinction, given that terrorist offences are generally considered more political.

Mali and the Netherlands have different pieces of legislation for terrorist offences.³¹ They can both prosecute cumulatively. The Netherlands has done so as will be explained below, which demonstrates that even if laws are in different locations, as long as prosecutors are aware of them, they can be prosecuted at the same time.

Four of the focus-States are party to the Rome Statute and therefore have some legislation to ensure that they are able to prosecute in their own State

28 A Dutch technical report found: “The preoccupation with and the limited focus on one specific organization (IS), during one period (2013–present), in one geographic area (the caliphate) and for only one of the international crimes (genocide) leaves a wide range of possible international crimes untouched and potentially with impunity.” Thijs B. Bouwknecht, *Investigation, Prosecution and Trial of International Crimes in the Netherlands*, 26 August 2019, p. 8. Australia has also launched a war crimes investigation into actions of its Special Forces in Afghanistan, and it would be impossible to charge such offences as terrorist offences: Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report*, 2020, available at: <https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

29 Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268, section 268.121.

30 Anna Hood and Monique Cormier, “Prosecuting International Crimes in Australia: The Case of the Sri Lankan President”, *Melbourne Journal of International Law*, Vol. 13, No. 1, 2012, p. 7.

31 Mali: Law n°08-025 of 23 July 2008; Law n°2016-008 of 17 March 2016; Netherlands: Criminal Code of the Kingdom of Netherlands (1881, amended 2012) and war crimes (Mali: Mali Penal Code (2001); Netherlands: Netherlands International Crimes Act (2003)).

according to the principle of complementarity, including the Article 17 Rome Statute requirements of admissibility.³² Australia and the Netherlands include all of the Rome Statute crimes and make the same distinction between international and non-international armed conflicts. Afghanistan and Mali include most of the Rome Statute crimes. Afghanistan does not make a distinction between international and non-international armed conflicts, except to include a special article dedicated essentially to common Article 3 violations. Mali prohibits mostly crimes in international armed conflicts, although the way it is phrased would suggest that in non-international armed conflicts some crimes are the same as in international armed conflicts.

However, because of their adherence to the Rome Statute crimes, they are unable to prosecute “acts of terror against the civilian population”; none of them have this crime in their domestic law. This is particularly odd for Australia, because one of the pieces of legislation that the Tribunal in *Galic* considered when deciding whether acts of terror were an existing crime under international law was Australia’s War Crimes Act of 1945 which pre-dated the Criminal Code inclusion of war crimes and was superseded by it, and included “systematic terrorism” in its category of war crimes.³³

These States therefore would have to rely on, for example, rape and other sexual violence,³⁴ mutilation,³⁵ attacking civilians,³⁶ attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission,³⁷ or

32 Mali ratified the Rome Statute on 16 August 2000 and referred the situation in its territory since January 2012 to the ICC. The ICC may exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Mali or by its nationals from 1 July 2002 onwards: ICC, *Mali: Situation in the Republic of Mali*, ICC-01/12, available at: <https://www.icc-cpi.int/mali>; on 5 March 2020, the Appeals Chamber of the ICC decided unanimously to authorize the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in the Islamic Republic of Afghanistan: ICC, *Afghanistan: Situation in the Islamic Republic of Afghanistan*, ICC-02/17, available at: <https://www.icc-cpi.int/afghanistan>.

33 ICTY, above note 17, para. 118.

34 Afghanistan Penal Code (2017): in an international armed conflict, Art. 339(22) and also arguably in a non-international armed conflict, Art. 340(1)(1) or (2). Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268: in an international armed conflict, sections 268.59–268.64; in a non-international armed conflict, section 268.71. Mali Penal Code 2001: in an international armed conflict, Art. 31(i)(19); in a non-international armed conflict, Art. 31(i)(29). Netherlands International Crimes Act 2003: in an international armed conflict, section 5(3)(a); in a non-international armed conflict, section 6(2)(a).

35 Afghanistan Penal Code (2017): in an international armed conflict, Art. 339(10); in a non-international armed conflict, Art. 340(1)(1). Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268: in an international armed conflict, section 268.47; in a non-international armed conflict, section 268.71. Mali Penal Code 2001: in an international armed conflict, Art. 31(i)(8). Netherlands International Crimes Act 2003: in an international armed conflict, section 5(2)(b)(ii); in a non-international armed conflict, section 6(1)(a).

36 Afghanistan Penal Code (2017): in both an international and non-international armed conflict, Art. 339(1)(1). Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268: in an international armed conflict, section 268.35; in a non-international armed conflict, section 268.77. Mali Penal Code 2001, Art. 31(i)(1). Netherlands International Crimes Act 2003: in an international armed conflict, section 5(5)(a); in a non-international armed conflict, section 6(3)(a).

37 Afghanistan Penal Code (2017): in both an international and non-international armed conflict, Art. 339(1)(4). Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268: in an international armed conflict, section 268.3; in a non-international armed conflict, section 268.79. Mali

torture,³⁸ to commit so-called terrorists to account as war criminals. To a certain extent these States are equipped to deal with offences in which so-called terrorists might participate, but despite the seemingly long lists of war crimes in these four pieces of legislation, there are significant gaps.

The Russian Federation is not a party to the Rome Statute³⁹ and its Criminal Code⁴⁰ does not replicate the war crimes from either the Geneva Conventions or Additional Protocols (to which it is a party). Article 356 of the Criminal Code prohibits ill-treatment of prisoners of war and of the civilian population, the deportation of the civilian population, the looting of national property in occupied territory, and the use in an armed conflict of means and methods prohibited by an international treaty of the Russian Federation (which includes all those weapons under the Convention on Certain Conventional Weapons and its Protocols, the Chemical Weapons Convention and the Biological Weapons Convention, as well of course the conduct of hostilities provisions of Additional Protocol I and grave breaches of the Geneva Conventions and of common Article 3). This final clause ensures that an important range of crimes related to attacking civilians and use of certain weapons (arguably improvised explosive devices, for example) are included under Russian law. The Russian Federation is also a party to the International Covenant on Civil and Political Rights⁴¹ and the Convention against Torture⁴² which would seem to provide for a range of offences.

Taking the examples of alleged war crimes potentially committed in Syria, Iraq, Mali and Afghanistan, all five focus-States have the ability to prosecute in some way the violations of IHL. Hostage taking, rape, torture, mutilation, attacks on civilians, use of certain types of weapons and attacks on humanitarian workers (among the many other crimes that have been committed and have been legislated for) can all be prosecuted and punished.⁴³ It remains striking that none of the States addressed have the ability to prosecute for specific acts of terror in

Penal Code 2001: Art. 31(i)(2). Netherlands International Crimes Act 2003: in an international armed conflict, section 5(5)(o); in a non-international armed conflict, section 6(3)(c).

38 Afghanistan Penal Code (2017): in an international armed conflict, Art. 337(2); in a non-international armed conflict, Art. 340. Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268: in an international armed conflict, section 268.25; in a non-international armed conflict, section 268.73. Mali Penal Code 2001: Art. 31(b). Netherlands International Crimes Act 2003: in an international armed conflict, section 5(1)(b); in a non-international armed conflict, section 6(1)(a).

39 Decree on the Intention not to Become a Party to the Rome Statute of the International Criminal Court, 16 November 2016, Russian Federation, *ICC Legal Tools Database*, available at: <https://www.legal-tools.org/doc/02c22f-1/>.

40 Available at: <https://base.garant.ru/10108000/>.

41 International Covenant on Civil and Political Rights, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171, adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976).

42 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, Vol. 1465, p. 85, adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984 (entered into force 26 June 1987).

43 See footnotes 34–38 and discussion on Russian Federation above.

armed conflict, which is possibly why war crimes might be overlooked in some cases of terrorist offences in armed conflict. Then next section addresses whether these five States can also prosecute for relevant terrorist offences.

Can so-called terrorist acts be prosecuted as terrorist offences under the legislation of the five focus-States?

While it is arguable that in fact terrorist offences are international crimes because they are found in international conventions and UN Security Council (UNSC) resolutions,⁴⁴ war crimes are distinguishable by being crimes which have universal definitions. Terrorist offences are notoriously subject to different definitions and political interpretations.⁴⁵ The international community has been trying for decades to adopt a Convention on Terrorism⁴⁶ but has so far failed. Article 2 of that Convention provides:

1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
 - (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

This definition in the modern context seems very restrictive to particular acts of violence. Nowadays, the extent of terrorist offences goes well beyond the acts of violence to the preparation, training, travelling for the purposes of and other acts or omissions as are partially seen in the examples of the five focus-States below. Nonetheless, the traditional notion of terrorism related to violence in fact would accord more naturally with the kinds of war crimes which so-called terrorists perpetrate in armed conflict as addressed above. It is the new versions of terrorist offences, such as designated areas legislation (restricting travel to certain areas controlled by those designated as terrorists on domestic or UN lists) which pose other problems related to IHL including access by and activities of humanitarian organizations.

44 See, e.g., UNSC Letter and Annexes, Guiding Principles on Foreign Terrorist Fighters, UN Doc. S/2015/939, 23 December 2015; UNSC Letter and Annex, Addendum to the Guiding Principles on Foreign Terrorist Fighters, UN Doc. S/2018/1177, 28 December 2018.

45 TRIAL International, *Universal Jurisdiction Annual Review 2020: Terrorism and International Crimes: Prosecuting Atrocities for What They Are*, 30 March 2020, available at: https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf, p. 14.

46 Draft Comprehensive Convention against International Terrorism, Appendix II, Letter Dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly, UN Doc. A/59/894, 12 August 2005 (Draft Comprehensive Convention).

Interestingly, the most contentious aspects of the Draft Comprehensive Convention seem to be around the applicability of the treaty to armed conflict.⁴⁷ Draft Article 20⁴⁸ posed the issue of whether people acting in pursuit of a political goal against occupiers exercise self-determination and whether if they engage in terrorist-like activities they should be prosecuted under the international criminal law regime of this treaty. The Chair's text represented an attempt to find a balance between the use of terrorism during armed conflict and peace. It reads:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by the present Convention.

The Organisation of the Islamic Conference proposed that the text be reworded as follows:

The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.⁴⁹

The challenge was that agreement on a definition of "armed forces" could not be reached. Another issue was whether "armed forces" can also be prosecuted for so-called "state terrorism", when their belligerent attacks on civilians amount to terrorism in peace time as defined under the treaty.⁵⁰ Likewise, a decision on an IHL "savings clause" which would require prosecutors to prosecute perpetrators for war crimes rather than terrorist offences remains a difficulty.

Another example of international processes related to terrorism is the Special Tribunal for Lebanon, established for offences outside of armed conflict, which has determined, controversially,⁵¹ that there is a transnational crime of terrorism that is now customary international law.⁵² The Appeals Court of the Tribunal provided that a customary definition of a terrorist offence would require three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element. The

47 Mahmoud Hmoud, "Negotiating the Draft Comprehensive Convention on International Terrorism Major Bones of Contention", *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 1035.

48 See Draft Comprehensive Convention, above note 46, Art. 20.

49 Measures to Eliminate International Terrorism, Report of the Working Group, Sixth Committee of the General Assembly, UN Doc. A/C.6/60/L.6, 14 October 2005, available at: <https://undocs.org/en/A/C.6/60/L.6>, p. 6.

50 Antonio Cassese, "The Multifaceted Criminal Notion of Terrorism in International Law", *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 944.

51 See, e.g., Kai Ambos, "Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?", *Leiden Journal of International Law*, Vol. 24, 2011.

52 Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis, 16 February 2011, para. 85.

Tribunal was keen to emphasize that their definition of a customary international crime only applies in peace time and not armed conflict. They referred to national courts which had also defined a customary international crime in peace time.⁵³ Aside from the controversy around whether there is a customary crime in peace time, this definition adheres strongly to the traditional notion of a terrorist offence related to violence and a specific terrorist intent. The addition of a transnational element, whereby there should be an international aspect, or action in two or more States⁵⁴ seems incongruous to the need to prosecute home-grown terrorism on occasion. Indeed, the purpose of the Tribunal is to address domestic crimes in Lebanon.

Terrorist offences are usually offences which relate to the security of the individual State and each State determines how they wish to frame the offences. This is true of the five focus-States. While the majority of the situations where people would be prosecuted for terrorist offences addressed by this article are committed outside the territory of the State that may be prosecuting, they all have the ability to prosecute for terrorist offences which occur solely on their territory and solely against their government, without the international or transnational dimension necessary. They all also have the ability to prosecute for terrorist offences committed in both peace and armed conflict, so the distinction made by the Special Tribunal for example is not applicable.

There are in fact a broad range of offences which could be classified as “terrorist”. While the violence-related offences accord more to the types of war crimes which have been discussed above, the large range of offences would, it is arguable, make it easier to prosecute for terrorist offences. Terrorist offences can range from membership of a terrorist organization, through to assistance, material support, training, and financial support to a terrorist organization or associated person. Terrorist offences can also encompass legislation designating areas which are allegedly controlled by terrorist organizations to which persons cannot travel. There is usually a requirement for particular terrorist intent.

The Australian Criminal Code section 100.1 defines a terrorist offence as action which:

- (a) causes serious harm that is physical harm to a person; or
- (b) causes serious damage to property; or
- (c) causes a person’s death; or
- (d) endangers a person’s life, other than the life of the person taking the action; or
- (e) creates a serious risk to the health or safety of the public or a section of the public; or
- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or

53 *Ibid.*, para. 86.

54 *Ibid.*, para. 89.

- (iii) a financial system; or
- (iv) a system used for the delivery of essential government services; or
- (v) a system used for, or by, an essential public utility; or
- (vi) a system used for, or by, a transport system.

With the particular intention:

of advancing a political, religious or ideological cause; and the action is done or the threat is made with the intention of: coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or intimidating the public or a section of the public.

Division 101 of the Australian Criminal Code goes well beyond the traditional notion of acts pertaining to violence by providing for a range of terrorist acts such as: providing or receiving training for a terrorist act, or owning or creating documents for the purpose of a terrorist act. Division 102 provides for offences associated with a terrorist organization (prescribed under the Act and associated regulations), including membership, recruitment, training, funding, and providing support. Division 119 provides for incursions on to foreign territory, which is where the transnational element comes in and includes the offence of entering an area declared by the Minister, if “he or she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country”. Australia does have a number of “humanitarian exemptions” which allow the activities of humanitarian organizations, but no IHL savings clause.

The Netherlands Penal Code, Section 83a, likewise provides:

“Terrorist intent” shall be understood to mean the intention of causing fear in the population or a part of the population of a country, or unlawfully compelling a public authority or international organisation to act or to refrain from certain acts or to tolerate certain acts, or of seriously disrupting or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The Netherlands legislation addresses “terrorist intent” as a sentencing tool for increasing the sentence for crimes such as incitement to violence or criminal action (sections 131 and 132), recruitment (section 205), forgery (section 225), threat of public violence (section 285), theft with intent to cause a terrorist offence (section 311(1)(6)), theft and violence (section 312(2)(5)), extortion or blackmail (sections 317 and 318), embezzlement (section 322), deception (326) and destruction of property, data, telecommunication networks, water supplies, vehicles and cargo (sections 350–352). In this regard, the legislation largely remains dedicated to the tradition offences of violence and some aspects of financing of terrorism.

In Mali, the law reflects the international terrorism conventions to which Mali is a party. Mali Law n°2016-008/of 17 March 2016 (which prescribes a uniform law on the fight against money laundering and terrorist financing) provides in Article 1 that a terrorist act is:

any act intended to kill or wound a civilian or any other person not taking a direct part in hostilities in a situation of armed conflict when, by its nature or context, it is intended to intimidate a population or to compel a Government or an international organisation to do or to abstain from doing any act.

This particular law adheres strongly to the traditional definition of terrorism as defined by the Draft Comprehensive Convention and the Special Tribunal, but there is no IHL savings clause or humanitarian exemption which would otherwise allow the law to be read in accordance with IHL and therefore require prosecution for war crimes (as applicable) rather than terrorist offences.

Law n°08-025 of 23 July 2008 on the suppression of terrorism in Mali provides for a range of offences such as compromising the safety of aircraft, committing violence on an aircraft, sabotaging vehicles, on sea and land, stealing nuclear material, and attacking infrastructure or information services, among other crimes. These are extraterritorial offences as well as applicable on the territory of Mali.

The Afghanistan Penal Code 2017 provides for the following terrorist offences (in order to influence the political affairs of the Government of Afghanistan or a foreign government or national or international organizations or to destabilize the government system of Afghanistan or of a foreign government (Article 263) inside or outside Afghanistan): hostage taking (Article 270), kidnapping (Article 267), suicide bombing (Article 265), use of explosives (Article 266), destruction of infrastructure (Article 269), use or transfer of nuclear materials (Article 268), killing and attacking international protected persons (Article 271), crimes against aviation (Articles 272–276), membership of and cooperating with a terrorist organization (Article 277) and financing terrorist activities (Article 279). Once again, these offences tend towards the traditional definitions of terrorist activities related to violence with no IHL savings clause.

The Russian Federation Criminal Code is broader than some of the other examples above and criminalizes terrorist acts (Article 205): facilitation of terrorist activities (Article 205.1), public incitement, justification and propaganda of terrorism (Article 205.2), training for terrorist activities (Article 205.3), organization of and participation in terrorist groups and terrorist activities (Articles 205.4 and 205.5), non-reporting or false reporting on terrorism (Articles 205.6 and 207), taking hostages (Article 206), hijacking of an aircraft, water transport or railway rolling stock (Article 211), armed rebellion (Article 279), public calls for extremism (Article 280), attacks on persons and entities entitled to international protection (Article 360) and international terrorist acts (Article 361). The transnational or international element is clearly not an issue for the other offences. There is no IHL savings clause and there are some aspects which are rather political in nature, such as the non-reporting of terrorist offences which seems dedicated to ensuring the media report a particular narrative of persons potentially engaged in armed conflict as terrorist rather than combatants.

In the more traditional sense, according to Article 205 of the Russian Federation Criminal Code, terrorism is the commission of an explosion, arson or other actions that frighten the population and create the risks of death, significant

property damage or other grave consequences in order to destabilize the activities of government bodies or international organizations or influence their decision-making; and the threat of committing these actions to influence government or international organization decision-making.

A number of these crimes relate to physical acts which correlate with the war crimes outlined above, but it is the ability to charge someone for membership of, or association with, a terrorist organization that would enable the prosecution of a large number of people with little examination of the activities in which they were engaged. While the legislation for counterterrorism is less uniform than that of war crimes, all five States have the ability to prosecute anyone returning from Syria or Iraq for a range of counterterrorism offences. In the following section, the article will address whether in fact anyone has been prosecuted for war crimes or terrorist offences, and the section after that will consider whether there are some political, philosophical and moral issues related to such prosecutions.

Have there been instances of prosecution for war crimes and terrorism?

Having established that war crimes have been committed in Syria, Iraq, Mali and Afghanistan, as well as terrorist offences in each of the five States considered, it is pertinent to next ask: has anyone been prosecuted under the existing laws?

In the period 2015–2020, globally there were over 100⁵⁵ convictions for terrorist offences recorded. There were twenty-five⁵⁶ people prosecuted domestically for war crimes. This figure is probably more accurate because of the limited nature of the prosecution of such offences. If the number of international tribunal prosecutions is added, the number increases to twenty-seven.⁵⁷ For the purposes of comparison, Table 1 demonstrates the number of convictions for terrorist offences compared with war crimes offences.⁵⁸

55 According to the International Crimes Database, there were twenty-five terrorism convictions between 2015 and 2020, available at: <http://www.internationalcrimesdatabase.org/SearchResults/?q=&cat=10&fy=2015&ty=2020&p=5&a=1#results>; however, Table 1 demonstrates many more from individual country sources.

56 Sources: TRIAL International Database, available at: <https://trialinternational.org/resources/universal-jurisdiction-database>; International Crimes Databases, available at: <http://www.internationalcrimesdatabase.org/>; TRIAL International Universal Jurisdiction Annual Review, available at: https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf, https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf, <https://trialinternational.org/latest-post/make-way-for-justice-4-momentum-towards-accountability/>, https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf, https://trialinternational.org/wp-content/uploads/2016/05/UJAR_2016.pdf.

57 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, 27 September 2016, Trial Chamber, Doc No. ICC-01/12/-01/15-171, available at: https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF; Extraordinary Chambers in the Courts of Cambodia, Case 002/02, Judgement, Trial Chamber, 16 November 2018, Doc. No. 002/19-09-2007/ECCC/TC, available at: <https://www.eccc.gov.kh/en/document/court/case-00202-judgement>.

58 Sources: Russian Federation Statistical databases, available at: <http://eng.stat.gov.ru/>.

Table 1. *Number of prosecutions in the five focus-States*⁵⁹

| State | Number of convictions for terrorist offences | Number of convictions for war crimes | Time period |
|---------------------------|---|--------------------------------------|-------------|
| Afghanistan ⁶⁰ | (At least) 6 ⁶¹ | Unknown – presume 0? ⁶² | 2016–2017 |
| Australia ⁶³ | 39 ⁶⁴ | 0 | 2015–2020 |
| Mali ⁶⁵ | (At least) 19 ⁶⁶ | Unknown – presume 0? ⁶⁷ | 2015–2019 |
| Netherlands ⁶⁸ | 106 ⁶⁹ | 4 ⁷⁰ | 2015–2020 |
| Russian Federation | Between 1500 to 2400 terrorist crimes are registered every year | 0 | 2015–2020 |

The approach initially by most States was to encourage persons not to leave their countries in the first place, and this is where several prosecutions have taken place. Australia, for example, has restrictions in place (citizenship requirements,

⁵⁹ Based on research on file with the author.

⁶⁰ It was challenging to find any comprehensive information of court judgements from Mali and Afghanistan, other than in the US country report. NGO reports also make reference to efforts by the courts but do not provide any specific statistics that would be worth including. Hence, these numbers are not complete.

⁶¹ Based on US Country Reports on Terrorism. For 2016, see https://www.state.gov/wp-content/uploads/2019/04/crt_2016.pdf, pp. 39–41, for 2017, see https://www.state.gov/wp-content/uploads/2019/04/crt_2017.pdf, p. 29; for 2018, see <https://www.state.gov/wp-content/uploads/2019/11/Country-Reports-on-Terrorism-2018-FINAL.pdf>, p. 30; for 2019, see <https://www.state.gov/wp-content/uploads/2020/06/Country-Reports-on-Terrorism-2019-2.pdf>. The 2016 (p. 238) and 2017 (p. 169) reports note that the Attorney-General's office prosecutes a number of terrorist offences and highlights six particular cases in total; the subsequent reports do not mention specific cases, but imply there are numerous cases (2019 report, p. 152).

⁶² On the basis of field experience of the author in Afghanistan specifically working on criminal processes.

⁶³ For Australia and The Netherlands (the two countries for which there were the most accurate court reports) the prosecutions were for conduct related to an armed conflict situation, i.e. as an alleged member of a “terrorist” organization in territory where an armed conflict was taking place. Other prosecutions not included are prosecutions such as financing of terrorism, conspiracy to commit domestic terror attacks or actual participation in a domestic terrorist attack.

⁶⁴ Cases from October 2017 to 2020, available at: https://csd.njca.com.au/recent-cases/#PID_8118; cases from 2015 to 2017 from search of all Australian case law, available at: http://www.austlii.edu.au/advanced_search.shtml.

⁶⁵ See above note 60.

⁶⁶ Based on US Country Reports on Terrorism, 2016, 2017, 2018 and 2019, above note 61. In 2017, it was reported that “[i]n 2017, the government opened 69 terrorism-related cases and detained 30 people for terrorism-related crimes. Resource constraints, a lack of training in investigative techniques, and inexperience with trying terrorism cases plagued a weak judicial system. The Malian government has never investigated, prosecuted, and sentenced any terrorists from start to finish.” (p. 29)

⁶⁷ On the basis that all the other instances covered are 0 and that the ICC is investigating Mali, and no domestic cases have been reported in that context which is otherwise public.

⁶⁸ See above note 63.

for example)⁷¹ which prevent citizens or former citizens from returning home. It has been reported that although Russia has a disproportionately high number of persons who have travelled to Syria and Iraq for fighting, they have accepted a small number home, and have so far only prosecuted a few of them.⁷² In the early days of the Syrian armed conflict, it was reported that mostly Chechnyan soldiers were prosecuted on return for mercenary crimes.⁷³ Slightly more recently, another source suggested that prosecutions were more about preventing people from leaving Russia.⁷⁴

In the Netherlands, the first person to be convicted of terrorist offences after returning from Syria where he was found to have trained and fought with a terrorist organization was also convicted of murder and manslaughter.⁷⁵ Those convictions for murder and manslaughter could have been considered in the light of the situation in Syria and upgraded to war crimes. The Netherlands is starting to add charges related to war crimes. In 2019, a Dutch foreign terrorist fighter posed laughing next to a deceased man hanging on a cross. He was prosecuted and convicted for membership in a terrorist organization and the war crime of

69 Statistics from January 2015 to April 2018 from declarations made by the Netherlands to Eurojust Terrorism Convictions Monitor (issues 22–32). These stopped being published after this date. For Issue 22, January–April 2015, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2015-06_TCM-22_EN.pdf (six convictions); for Issue 23, May–August 2015, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2015-10_TCM-23_EN.pdf (two convictions); for Issue 24, September–December 2015, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2016-02_TCM-24_EN.pdf (nine convictions); for Issue 25, January–April 2016, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2016-06_TCM-25_EN.pdf (six convictions); for Issue 26, May–August 2016, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2016-10_TCM-26_EN.pdf (fifteen convictions); for Issue 27, September–December 2016, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2017-03_TCM-27_EN.pdf (twelve convictions); for Issue 28, January–April 2017, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2017-05_TCM-28_EN.pdf (six convictions); for Issue 29, May–August 2017, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2017-10_TCM-29_EN.pdf (eight convictions); for Issue 30, September–December 2017, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2018-04_TCM-30_EN.pdf (twelve convictions); for Issue 31, January–April 2018, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2018-07_TCM-31_EN.pdf (six convictions); for Issue 32, May–August 2018, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2018-12_TCM-32_EN.pdf (twenty-two convictions).

70 Tjitske Lingsma, “First Dutch Islamic State Fighter Convicted For War Crimes”, *Justice Info Net*, 25 July 2019, available at: <https://www.justiceinfo.net/en/42008-first-dutch-islamic-state-fighter-convicted-for-war-crimes.html>; *Oussama Achraf Akhlafa*, Guus K Court of Appeal, 21 April 2017; *Eshetu Alam*, District Court of the Hague 2 March 2018, Case No. 09/748003-18v.

71 Indeed, the Australian Prime Minister Scott Morrison has declared that persons will not be able to return: see Prime Minister of Australia, *Transcript – Radio Interview with Oliver Peterson*, 6PR, Media Release, 22 October 2019, available at: <https://www.pm.gov.au/media/transcript-radio-interview-oliver-peterson-6pr>.

72 Carl Lampe, “Russia’s Repatriation of ISIS Members”, *Foreign Policy Research Institute*, 12 April 2019, available at: <https://www.fpri.org/article/2019/04/russias-repatriation-of-isis-members/>.

73 Muslim Ibragimov and Alexander Ivanov, “Chechen Fighters Enter Syria through Azerbaijan, Interior Ministry Spokesman Says”, *Caucasian Knot*, 20 September 2013, available at: <https://www.kavkaz-uzel.eu/articles/230371?redirected=www.kavkaz-uzel.ru>.

74 Center for Security Studies, *Foreign Fighters: An Overview of Responses in Eleven Countries*, Zurich, March 2014, available at: https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/Foreign_Fighters_2014.pdf, p. 14.

75 *Prosecutor v. Maher H.*, District Court of The Hague, The Netherlands, 09/767116-14, 2 December 2014.

outrage upon personal dignity (inhumane and degrading treatment of dead bodies).⁷⁶ The Netherlands is considering a number of other such cases.

The US Library of Congress reports that “a Russian national who returned home after being wounded while fighting [in Syria] was apprehended and sentenced by a court in Southern Russia in October 2014 [and] three criminal cases were launched in absentia against people who are thought to be fighting in Syria while another provincial court ordered the name of a local resident to be placed on the international wanted list”.⁷⁷ It is unclear whether there were war crimes involved too.

In Australia, the approach has also rather been to prevent people from leaving the country and funding activities in Syria and Iraq rather than prosecutions on return.⁷⁸ The statistics quoted in that reference are from 2014, but indeed since 2015 the numbers of persons going overseas has reduced.⁷⁹ Moreover, by 2018, Braun reports that “none of the around 30 returned FTFs [foreign terrorist fighters] had been convicted in Australia for offences relating to travelling abroad to support terrorist organisations”.⁸⁰

In Mali, while the *pôle judiciaire spécialisé* (competent for all terrorist related crimes in the Office of the Prosecutor) has recently been granted the power given to prosecute for war crimes, no prosecutions for war crimes have taken place. In Afghanistan, while many prosecutions have taken place for terrorist offences within the country, there are no statistics on prosecutions of foreign fighters, although one recent news article suggests that there are 408 IS group members from foreign countries in Afghan custody.⁸¹

The legislation for all five States considered indicates that persons can be prosecuted for both war crimes and terrorist offences, whether committed in their territory or overseas. It is of course more difficult and there might be other reasons why a State may wish to prosecute acts that are committed in their own territory more than those committed overseas, which are explored below. It appears that they are not being prosecuted for war crimes, while some are being prosecuted for terrorist offences. There are reasons to account for the fact that few prosecutions have taken place. If they can be prosecuted for war crimes and are not, this leads to two further questions. First, what would be the benefit of prosecutions for war crimes as opposed to terrorist offences, and second, what are the challenges for such prosecutions? The following two sections deal with these questions.

76 District Court of The Hague, 23 July 2019, reference 09/748003-18 and 09/748003-19.

77 Treatment of Foreign Fighters in Selected Jurisdictions: Country Surveys, available at: <https://www.loc.gov/law/help/foreign-fighters/country-surveys.php>.

78 Center for Security Studies, above note 74, p. 18.

79 Kerstin Braun, “‘Home, Sweet Home’: Managing Returning Foreign Terrorist Fighters in Germany, The United Kingdom and Australia”, *International Community Law Review*, Vol. 20, No. 3–4, 2018, p. 318.

80 *Ibid.*, p. 328.

81 Roshan Noorzai, “Afghanistan to Discuss Fate of Foreign IS Prisoners with Their Countries”, *VOA News*, 3 May 2021, available at: <https://www.voanews.com/extremism-watch/afghanistan-discuss-fate-foreign-prisoners-their-countries>.

Why prosecute at all?

It is pertinent to ask: why would a State engage in prosecution for war crimes or prosecution for terrorist offences? As Drumbl notes, there is little scholarship on why States (and international tribunals) engage in prosecution and punishment for mass atrocity crimes such as war crimes.⁸² He considers historical and contemporary approaches to punishment and sentencing particularly based on his work with victims of mass atrocities.

In relation to war crimes, Drumbl outlines the challenges of opposing views at the end of the Second World War – those of the victims and those of the victors. The framing was eventually around addressing “evil” which was felt to be achievable under international criminal law.⁸³ The Statutes of the Nuremberg and Tokyo Tribunals emphasized retribution as a reason for sentencing those prosecuted for war crimes after the Second World War.⁸⁴ As Nemitz has said, “the implicit purpose of the sentencing judgments was a repressive one: the major war criminals ... committed heinous crimes, therefore they would be punished and get what they deserved.”⁸⁵ He notes that the trials were only dealing with the most senior offenders and any hope of rehabilitation or other reason for the trials was not applicable.⁸⁶ He goes on to examine the Statutes of the ICTY and ICTR whose constitutive resolutions indicate, he says, “a rather repressive approach to sentencing”.⁸⁷

Hafetz notes in relation to the treatment of Guantanamo Bay inmates (which he argues should have been prosecuted for war crimes rather than domestic war crimes or terrorist (or specially created) offences) that “the harsh, often brutal treatment of detainees was premised on the theory that they fell outside the Geneva Conventions because they were members or supporters of a non-state terrorist organization”.⁸⁸ In this regard, an editorial in the *Harvard Law Review* written in the aftermath of the 11 September 2001 attacks suggests that the response of war by the US government to those attacks was because the criminal process was not viewed as “satisfactory” (the authors of the article do not agree with this approach, but use it as a basis for an analysis of historical responses to terrorism).⁸⁹ The argument was that some terrorist attacks are seen as so grave that they require a substantial retribution. This might be particularly

82 Mark A. Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, Cambridge, 2007, p. 2.

83 *Ibid.*, p. 3.

84 Jan Christoph Nemitz, “The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method of Determining the Sentence”, *Yearbook of International Law*, Vol. 4, 2001, p. 89.

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*, p. 91.

88 Jonathan Hafetz, “Diminishing the Value of War Crimes Prosecutions: A View of the Guantanamo Military Commissions from the Perspective of International Criminal Law”, *Cambridge Journal of International and Comparative Law*, Vol. 2, No. 4, 2013, p. 808.

89 Editorial, “Responding to Terrorism: Crime, Punishment, and War”, *Harvard Law Review*, Vol. 115, No. 4, 2002, p. 1229.

relevant where the terrorist attacks occur on the territory of the State in question where the effects are more immediate.⁹⁰

Retributive justice is linked with the idea of “just deserts”, based on the belief that a criminal “deserves” to be punished for their wrongs, and that the harshness of the punishment imposed should be proportionate to the severity of the crimes they committed.⁹¹ Most theories of punishment are characterized by an emphasis on crime prevention, driven by a combination of theories of deterrence, rehabilitation and incapacitation, as outlined below.⁹² Retribution (or the retributive theory of justice) is based on the core premise that punishment is a form of retribution, and that if you commit a wrongful act (especially a serious crime), you should be punished, even if this punishment will not have any other benefit or produce any other good.⁹³ Drumbl outlines the challenges for prosecuting child soldiers in this regard. On Ongwen, he notes that some think he was punished enough by being subject to the same treatment as he meted out; others claim he should suffer for the violence he perpetrated himself.⁹⁴ Clark and Cave go further and reject retribution as a reason for punishment of war crimes perpetrators on the basis that it would “be impossible to retaliate proportionately”.⁹⁵

Clark and Cave rather prefer deterrence as a reason for prosecution of war crimes.⁹⁶ Nemitz points out that the ICTY and International Criminal Tribunal for Rwanda Statutes refer to deterrence as a purpose of punishment,⁹⁷ and the early jurisprudence also indicates this reason for punishing war crimes perpetrators.⁹⁸ Deterrence is frequently invoked as a motivation for punishment, based on the idea that imposing a punishment on someone who has committed a crime will prevent or discourage others from committing offences in the future.⁹⁹ It is framed as a preventative motivation; knowing that punishment and a legal penalty is attached to criminal activity will supposedly act as a disincentive for those who might be considering committing a crime. It is the fear of the legal

90 *Ibid.*, p. 1231.

91 Gerhard Werle and Aziz Epik, “Theories of Punishment in Sentencing Decisions of the International Criminal Court”, in Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 326–327; Michael Moore, *Placing Blame: A Theory of Criminal Law*, Oxford University Press, Oxford, 1997, p. 8; J. G. Murphy, “Legal Moralism and Retribution Revisited”, *Criminal Law and Philosophy*, Vol. 1, No. 1, 2007, p. 11.

92 Frank Neubacher, “Criminology of International Crimes”, in F. Jeßberger and J. Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, p. 28.

93 Mark Tunick, *Punishment: Theory and Practice*, University of California Press, Berkeley, 1992, p. 95.

94 Mark A. Drumbl, “Victims who Victimise”, *London Review of International Law*, Vol. 4, No. 2, 2016, p. 240.

95 Michael Clark and Peter Cave, “Nowhere to Run?: Punishing War Crimes”, *Res Publica*, Vol. 16, No. 2, 2010, p. 200.

96 *Ibid.*, p. 201.

97 J. C. Nemitz, above note 84, p. 91.

98 *Ibid.*, p. 92.

99 Claire Finkelstein, “A Contractarian Approach to Punishment”, in Martin P. Golding and William A. Edmundson (eds), *Blackwell Guide to the Philosophy of Law and Legal Theory*, Blackwell Publishing, London, 2005, p. 208.

penalty that potentially leads to avoidance of the prohibited conduct. Similarly, in relation to prosecuting counterterrorism offences, Braun has said:

The underlying aim of introducing and amending criminal laws in this area lies mainly in the deterrence of the individual from future terrorist conduct as well as the deterrence of others contemplating supporting terrorist organization by demonstrating that their actions will have (severe) legal consequences including incarceration.¹⁰⁰

Another possible reason for prosecution is incapacitation, which Clark and Cave also favour as a reason for war crime prosecutions.¹⁰¹ This is linked with the duty of the State to ensure the protection of the public. The reasoning is that imprisonment (or other forms of punishment such as house arrest or control orders) will incapacitate offenders and make them incapable of offending for periods of time, therefore preventing future crime.¹⁰² This is also notable with counterterrorism offences being linked to the security of the nation and its citizens. The UN Office of Drugs and Crimes has said:

Unsurprisingly, [foreign fighters] are perceived to be a major threat to their home countries. ...the fear is that once they return they will utilize their terrorist training in order to plan and carry out attacks, set up new terrorist cells, or otherwise facilitate future terrorist acts. ... United Nations resolution 2178 calls upon Member States to bring to justice their nationals who travel (or attempt to travel) to other States for the purpose of engaging in the planning or perpetration of terrorist acts. Therefore, immediate coordinated action is required upon the return of an FTF, to secure any retrievable evidence, and if possible, file charges for prosecution.¹⁰³

If incarceration is the goal, the penalties might have an impact on the decision to prosecute for war crimes or terrorist offences. In Afghanistan, a person convicted of membership of a terrorist organization under Article 277 of the Penal Code receives a sentence of “long imprisonment (more than 5 years to 16 years)”. War crimes of direct attacks receive capital punishment or grade one continued imprisonment punishment (more than twenty to thirty years); using certain weapons receive grade two continued imprisonment punishment (more than sixteen to twenty years); and a “long imprisonment sentence” of more than five to sixteen years is applied to rape, other sexual violence, starvation and child recruitment.¹⁰⁴ In Russia, the penalty for terrorist offences is life imprisonment; for war crimes it is twenty years. Article 32 of the Mali Penal Code provides for

100 K. Braun, above note 79, p. 329.

101 M. Clark and P. Cave, above note 95, p. 201.

102 Andrew Ashworth, *Sentencing and Criminal Justice*, Cambridge University Press, Cambridge, 2010, p. 84.

103 UN Office of Drugs and Crime, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia*, 2018, available at: https://www.unodc.org/documents/terrorism/Publications/FTF%20SSEA/Foreign_Terrorist_Fighters_Asia_Ebook.pdf, p. 31.

104 Rape and sexual violence victimizing women are also regulated by the Special Law for Women, the 2009 *Law on Elimination of Violence against Women*, and the sentence is more severe: more than twenty to thirty years of imprisonment or death sentence.

capital punishment for all war crimes. Terrorist offences leading to death of persons entail capital punishment, and other terrorist offences a sentence of up to ten years. In the Netherlands, grave breaches of the Geneva Conventions and Additional Protocol I and sexual violence and perfidy have a sentence of up to thirty years. Other war crimes have a penalty of up to fifteen years. Similarly, terrorist offences entail fifteen to thirty years' imprisonment. In Australia, war crimes entail imprisonment from between ten years to life depending on each specific offence; for terrorist offences, the same range applies. In essence, there is little difference between penalties for war crimes and terrorist offences, so this is probably not a large consideration in deciding with which offence to charge an offender.

The Netherlands has said that their main concern with returning foreign fighters is "to contain this threat and prevent any new upsurge in the phenomenon" through a diverse set of measures.¹⁰⁵ Australia has called returning foreign fighters the "number one national security priority".¹⁰⁶ Højfeldt similarly says that "[d]omestic criminal law is increasingly being applied to conduct [of foreign fighters] committed in times of armed conflict. The policy aim is no longer to repress war crimes, but to safeguard national security".¹⁰⁷

Another reason for prosecution is to end impunity. Ending impunity is generally expressed in relation to international crimes, such as war crimes. For example, it is presented as a fundamental tenet of the ICC's prosecution goals that "the most serious crimes of concern to the international community as a whole must not go unpunished", and that the States Parties are "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention."¹⁰⁸ Lloyd also suggests that failing to prosecute foreign fighters (among other actions by States against their nationals) is "potentially detrimental to ensuring respect for IHL in terms of avoiding impunity for war crimes".¹⁰⁹

There is a fundamental obligation under IHL that those having committed the most serious violations must be prosecuted. The Geneva Conventions require that States prosecute and punish those who have violated the grave breaches provisions. Universal jurisdiction applies. Thus, every State in the world should be able to prosecute anyone suspected of having committed a grave breach of the Geneva Conventions: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." If they cannot prosecute persons suspected of war crimes, they shall extradite them where they can be prosecuted for war crimes. The idea is that war crimes are so serious that they are crimes which

¹⁰⁵ Center for Security Studies, above note 74, p. 12.

¹⁰⁶ K. Braun, above note 79, p. 326.

¹⁰⁷ H. Højfeldt, "Prohibiting Participation in Armed Conflict", *Military Law & Law of War Review*, Vol. 54, 2015, p. 30.

¹⁰⁸ Rome Statute, above note 19, Preamble.

¹⁰⁹ Marnie Lloyd, "Challenges in the Application of the Obligation to Ensure Respect for IHL – Foreign Fighting as an Example", in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law*, Routledge, London, 2020, p. 241.

affect the whole of the international community which should be responsible to ensure that such crimes are never committed again.

The enactment of terrorist offences is advocated by the UN through numerous Security Council resolutions. In 2014, the UNSC Resolution 2178, for example, decided that Member States “shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offence” for “financing, planning, preparation or perpetration of terrorist acts”. However, the crimes essentially remain a domestic matter: each State deals with the crimes differently, and indeed there has never been consensus on the development of an International Counter-terrorism Convention. There is not the same fundamental urge to prosecute to end impunity and to recognize that these are crimes which affect the international community as a whole. Thus, in seeking to distinguish the Guantanamo Military Commissions from international war crimes prosecutions, Hafetz has said:

The magnitude of the crimes, the multiple communities served, and the resource and political constraints on the number of prosecutions that can feasibly be brought, differentiate international criminal justice from domestic prosecutions. The crimes that are prosecuted and the sentences imposed upon conviction are laden with symbolic value. Sanctions imposed under the rubric of war crimes and other international law violations help craft historical narratives and embed normative values across borders. Those sanctions also communicate the outrage of the international community.¹¹⁰

His contention is that the Military Commissions should not have used domestic crimes to prosecute people in Guantanamo Bay for the serious offences that they had committed, but rather should have had regard to war crimes under IHL. There is not the same symbolic and international value in prosecuting for terrorist offences rather than war crimes, he argues.

An end to impunity is also closely linked to the goals of retribution and deterrence as discussed above. The ICTY in *Delalic* considered “Punishment of high-ranking political officials and military officers will demonstrate that such officers cannot flout the designs and injunctions of the international community with impunity.” They framed this under the heading of deterrence.¹¹¹ The ICC’s *Katanga* Chamber reflected such intentions when recognizing:

the legitimate need for truth and justice voiced by the victims and their family members...play a two-fold role: (i) punitive, as “the expression of society’s condemnation of the criminal act and of the person who committed it” and “a way of acknowledging the harm and suffering caused to the victims” that would restrain any desire to exact vengeance; and (ii) deterrent, aiming to “deflect those planning to commit similar crimes from their purpose”.¹¹²

110 J. Hafetz, above note 88, pp. 816–817.

111 ICTY, *Prosecutor v. Delalic et al.*, Case No.: IT-96-21-T, Trial Chamber Judgment of 16 November 1998, para. 1234.

There is also a desire in prosecuting people for war crimes to see the stories of the victims reflected in public, for the truth to be expressed as to what happened, and for victims to be recognized. Indeed, as the Head of the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant has said to the UN:

This call for accountability is not one of retribution, but one of justice. Those who have spoken to the Investigative Team wish for the crimes of ISIL to be exposed, openly and objectively, so that the world can see the true nature of those acts and so that we can, together, honour the victims. In providing their accounts, witnesses and survivors have consistently emphasized that they do not seek revenge, but assistance in obtaining recognition for what they have suffered and in bringing those responsible to justice.¹¹³

This approach is often referred to as preventive justice and seen as restoring peace. As the ICTY in *Delalic* also said, punishment is a “useful measure to return the area to peace. Although long prison sentences are not the ideal, there may be situations which will necessitate sentencing an accused to long terms of imprisonment to ensure continued stability in the area.”¹¹⁴

Overall, there are a number of theories of prosecutions which are applicable to war crimes and terrorist offences. Retribution, deterrence and incapacitation are all used as justifications for the prosecution of war crimes and terrorist offences, with perhaps retribution being stronger where there were direct attacks either from war crimes or terrorist attacks on the territory of the prosecuting State. Additional theories of prosecution related to prevention and ending impunity appear to be more relevant to war crimes. There might indeed be arguments against prosecuting for war crimes. In that regard, Nastevski has suggested that “[t]he Australian experience of undertaking war crimes trials since the end of World War II has been largely unsatisfactory”.¹¹⁵ He attributes this to a lack of desire or political will to prosecute war criminals resident in Australia, while noting Australia’s “appropriate moral rhetoric when participating in the various international efforts to introduce accountability for international crimes”.¹¹⁶

In the end, the decision to prosecute for war crimes or terrorist offences may well be decided based on which theory holds more weight politically. Lloyd suggests that:

in addition to complying with legal duties, a range of policy reasons draw States to respond to foreign fighting. Those reasons might include upholding the State’s claimed monopoly on the legitimate use of force, supporting positions of

112 ICC, *Prosecutor v. Katanga* Art. 76 Decision ICC-01/04-01/07-3484, 25 May 2014, para. 38; Sergey Vasilev, “Punishment Rationales in International Criminal Jurisprudence”, in F. Jeßberger and J. Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, p. 70.

113 Letter Dated 17 May 2019, above note 21, p. 4.

114 ICTY, above note 111.

115 *Ibid.*, p. 241.

116 *Ibid.*

abstention from the intensification of violence, wanting to protect nationals from possible harm, or avoiding foreign policy discomfiture or consular headaches caused by nationals becoming involved in a foreign armed conflict. Relatedly, it can be observed in diplomatic positioning and domestic debate that the predominant concern of States is often security at home, i.e. from the actions of would-be and returning foreign fighters, rather than necessarily the fighter's conduct in a destination State and the respect for IHL more generally.¹¹⁷

In conclusion for this section, war crimes prosecutions have the added moral dimension of ending impunity and seeing justice done. It has been suggested that war crimes also should not be punished if it is not in the interests of justice, in which case a reconciliation approach might be better suited. Restorative justice and reconciliation may be appropriate in the territory of a State at war; Mali and Afghanistan would be candidates for this, although with the armed conflicts on-going there is little chance of a formal process at the moment. A reconciliation approach also does not lend itself well to current situations of so-called terrorist activities in Syria and Iraq in the case of foreign fighters. Restorative justice also is not appropriate where serious violations of IHL have been committed which should be investigated and prosecuted under IHL.

What are the challenges for prosecutions?

Aside from the moral and political considerations considered in the previous sections, there may be legal and practical challenges for prosecutions which would lead a government to consider prosecuting for war crimes or terrorist offences. One practical consideration is how accessible the law is to prosecutors and judges, although this does not seem to be an issue with the five States this article considers. In three of the five States, the offences are in the Penal or Criminal Code and therefore accessible to prosecutors and judges alike. In the Netherlands, the one State with convictions for both types of offences, the crimes are located in different pieces of legislation, but this does not seem to make a difference in the accessibility of the offences. In Mali, there are also two separate pieces of legislation, but the same prosecutor office has responsibility for prosecutions under both pieces of legislation.

Other practical considerations may include the types of evidence required to carry out a prosecution. Practically, the evidence could be challenging to gather for both war crimes and terrorist offences. Braun suggests for terrorist offences “the evidence relied upon to establish any of the ... offences in national criminal courts will be evidence gathered by international intelligence agencies.... intelligence information may be gathered from unknown or illegal sources and is frequently censored and not provided in full to the defendant due to security risks”.¹¹⁸ There are non-governmental organizations (NGOs) which collect

117 M. Lloyd, above note 109, pp. 233–234.

evidence for the purposes of prosecution, but often “reports from these types of human rights organizations belong to a specific genre: ... they are written for activist purposes, while the methodology is the most comparable with a specialized form of investigative journalism”.¹¹⁹ The Centre for Civilian Justice has said:

Apprehending suspects is not the only challenge to carrying out prosecutions during war. Interviewing victims and witnesses still living in Syria is also problematic. Moreover, a prosecutor would need access to documentary and physical evidence, which may also be beyond the reach of expert investigators and forensic analysts.¹²⁰

Bouwknegt, who has conducted research for the Dutch government, agrees that it is challenging to collect evidence for both war crimes and terrorist offences overseas where there are “different political systems and structures; other safety systems and structures; other legal systems, structures and traditions; other economic systems and structures; and other infrastructures”.¹²¹ He adds: “forensic and direct eyewitness evidence is often largely no longer available”.¹²² In this vein, in relation to foreign fighters, Braun quotes an Australia Federal Police officer who says:

the arrests were carried out so long after the alleged offenders’ return from Syria, ... due to difficulties with gathering evidence. ... gathering evidence from Syria, which has been a war zone for more than five years, was almost impossible and police also had to wait to get electronic evidence from social media companies in America.¹²³

Australia attempted to prosecute persons for war crimes allegedly committed in the Second World War and the Balkans armed conflict. In two notable cases, the witnesses were required under the law of evidence at the time to travel to Australia to give evidence in court, but they were too old or ill to travel; the cases were unable to proceed on the basis of a lack of evidence.¹²⁴

Currently, Australia is engaging in war crimes investigations as a result of a report that brought forward allegations of serious violations of IHL by special forces in Afghanistan.¹²⁵ Challenges include the fact that witnesses might be subject to retaliation by the non-State armed group.¹²⁶ Witness protection has also been

118 K. Braun, above note 79, p. 327.

119 T. B. Bouwknegt, above note 28, p. 20.

120 Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, *A Step Towards Justice: Current Accountability Options for Crimes Under International Law Committed in Syria*, Ceasefire Centre for Civilian Rights and Syria Justice and Accountability Centre, May 2015, p. 24.

121 T. B. Bouwknegt, above note 28, p. 39.

122 *Ibid.*

123 K. Braun, above note 79, pp. 328–329.

124 Vasko Nastevski, “The Australian Experience of Conducting War Crimes Trials”, in Jadranka Petrovic (ed.), *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack*, Routledge, London, 2016, p. 222.

125 Inspector-General of the Australian Defence Force, above note 28.

flagged by the Centre for Civilian Rights as a concern for the prosecution of fighters in and returning from Syria around the world.¹²⁷

Simple terrorist offences such as membership of a terrorist organization may be easier to gather evidence on than war crimes or more complex terrorist attacks. TRIAL International has said, “Proving terror charges, especially membership in a terrorist organization, is remarkably straightforward. Convictions have been secured by as few elements as a connection with a known terrorist or traveling to a zone controlled by a terrorist organization.”¹²⁸

Nonetheless, the specific nature of war crimes and the value placed on them¹²⁹ should be acknowledged and prosecuted as such where possible. It is suggested that war crimes charges can “complement and expand the charges” and indeed in the Netherlands this is starting to occur with the practice of cumulative charging.¹³⁰ Ferraro in this edition of the *International Review of the Red Cross* recommends that States enact an “IHL savings clause” in legislation which would both enable terrorist offences to be applied in accordance with IHL.¹³¹ Such clauses require legislation to be read in accordance with IHL and therefore could enable prosecutors to preference war crimes as the *lex specialis* in armed conflict when they have been committed alongside a terrorist offence. Equally, Van Poeke *et al.*, reviewing relevant case law, consider that if there is an exclusion clause in legislation, which “limits the extent to which activities committed in relation to armed conflicts can constitute terrorist offences”, any acts committed by members of a non-State armed group should not be considered “terrorist” but be assessed under war crimes legislation.¹³² Along with the desire to end impunity and uphold laws that all States have adhered to, IHL should be preferred because it provides the correct definitions and understanding of the context in which the crimes were committed. IHL also requires that there are no statutes of limitations and no amnesties which means that crimes can be prosecuted a long time after they were committed, in line with their serious nature. Lloyd suggests that failing to prosecute foreign fighters (among other actions by States against their nationals) is “potentially detrimental to ensuring respect for IHL in terms of avoiding impunity for war crimes”.¹³³

War crimes prosecutions require a certain knowledge of IHL and international criminal law in order to prove the nexus to the armed conflict which

126 Adam Cooper, “Safety Fear for Afghan Villagers Raised in Ben Roberts-Smith Case”, *Sydney Morning Herald*, 7 May 2021, available at: <https://www.smh.com.au/national/safety-fear-for-afghan-villagers-raised-in-ben-roberts-smith-case-20210507-p57pv6.html>.

127 M. Lattimer, S. Mojtahedi and L. A. Tucker, above note 120.

128 TRIAL International, above note 45, p. 14.

129 Ben Saul, “Crimes and Prohibitions of ‘Terror’ and ‘Terrorism’ in Armed Conflict: 1919–2005”, *Humanitäres Völkerrecht – Informationsschriften / Journal of International Law of Peace and Armed Conflict*, Vol. 4, 2005, p. 276.

130 TRIAL International, above note 45, p. 14.

131 See T. Ferraro, above note 2.

132 See Thomas Van Poecke, Frank Verbruggen and Ward Yperman, “Terrorist Offences and the International Humanitarian Law Exclusion Clause: Belgium as the Odd One Out”, *International Review of the Red Cross*, 2021, in this edition.

133 M. Lloyd, above note 109, p. 241.

of course is irrelevant in the prosecution of terrorist offences. Kaikobad has suggested that both alleged war criminals and terrorists would seek to use this nexus to their advantage in defence: that they were legitimate fighters in the case of terrorist prosecutions or that there was no nexus to the armed conflict in the case of war crimes prosecutions.¹³⁴ However, it seems from relevant State practice and the criminal law enacted that there is no combatant immunity for current terrorist offences. Thus, when persons are charged with terrorist offences it appears that the State does so in the belief that they are not legitimate fighters. Deeks has suggested as much in relation to the hesitancy of States to engage in negotiations of new terrorist treaties requiring implementation: “IHL traditionally has been undergirded by symmetrical legal obligation between the conflict’s participants and an expectation of roughly reciprocal treatment between the warring parties. [Now] States—reasonably—do not expect to receive reciprocal treatment by those non-state armed groups.”¹³⁵ There is a linked concern that terrorist offences are not connected to State agents who might themselves have committed war crimes.¹³⁶ If you start to investigate war crimes, there might need to be a reckoning for both or all sides of a conflict.

Perhaps this approach is another reason why States are wanting to prosecute for terrorist offences rather than war crimes; they do not see the fighters as legitimate, so they are unwilling to give them war crimes trials and thereby perceived legitimacy. With this approach, they can call persons who are members of terrorist organizations “terrorists” and therefore “other” and not consider the actual activities in which they have engaged.

A connected potential concern by States is that war crimes sit alongside judicial guarantees which ensure the right to a fair trial in such a strict way that it is a war crime not to confer a legitimate trial on someone who is prosecuted. While human rights and constitutional law will accord the right to a fair trial, there are exemptions and national security concerns that can be invoked for terrorist prosecutions;¹³⁷ indeed, another reason to be concerned about the higher number of terrorist prosecutions to war crimes.

Conclusion

This article has posed a central question of whether and why war crimes and IHL implementing legislation are being overlooked as a result of counterterrorism

134 K. H. Kaikobad, above note 5, p. 228.

135 Ashley Deeks, “Domestic Humanitarian Law: Developing the Law of War in Domestic Courts”, in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects*, Springer, London, 2014, p. 138.

136 TRIAL International, above note 45, p. 13.

137 See, e.g., Anthony Whealy, “A Judicial Perspective: Surveillance Evidence and the Right to a Fair Trial”, in Fergal Davis, Nicola McGarrrity and George Williams (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism*, Routledge, London, 2013; Clive Walker, “Terrorism Prosecutions and the Right to a Fair Trial”, in Ben Saul (ed), *Research Handbook on International Law and Terrorism*, Edward Elgar Publishing, Cheltenham, 2020.

legislation in the context of both foreign fighters and existing armed conflicts in the territory of some States. The legislation of Australia, Afghanistan, Mali, the Netherlands and the Russian Federation is particularly well equipped to deal with a range of terrorist offences, and particularly those which would apply in times of armed conflict, such as violent acts. More broadly they are all equipped to prosecute and punish those who are members of a banned terrorist organization. They are less well equipped to prosecute and punish those who have committed relevant war crimes—none can address the war crime of terrorizing the civilian population for example. Nonetheless, they all have quite comprehensive war crimes legislation which could fit the relevant crimes which appear to be committed by designated terrorist organizations. One recommendation would be for States to review their war crimes legislation to ensure that they have effective crimes in place to address offences committed by designated terrorist organization members in armed conflict which would otherwise be war crimes.

Having recommended that, it is worth highlighting again the paucity of data and where there is data of prosecutions for either terrorist offences or war crimes. The challenges of prosecuting in an armed conflict (for Mali and Afghanistan) and where evidence must be gathered from overseas (in all five cases potentially) exist for both terrorist offences and war crimes. That said, the vast majority of cases are terrorist cases rather than war crimes. Kaikobad has said “in many situations acts of terrorism will in fact be a species of war crimes, a fact which will entail the application of the laws and customs of war as opposed to domestic laws incorporating sectoral conventions”.¹³⁸ This approach does not seem to be followed by many States nowadays.

TRIAL International has suggested of the preference of prosecution of terrorist offences over war crimes “What is in appearance a procedural detail actually reflects a deep—and alarming—legal trend which bears multiple consequences.”¹³⁹ In many cases there are equal procedural, moral and theoretical claims for both types of prosecutions; both lend themselves to theories of retribution, deterrence and incapacitation. Penalties in all five States examined are comparable between the two types of offences, so there is a strong argument that both types of offences can result in punishment, deterrence and imprisonment of offenders.

So why, are States choosing to prosecute for terrorist offences? It must be the subtle policy, legal and moral differences which make the distinction: the expediency, the greater emphasis on retribution and incapacitation, and the value add of UNSC resolutions emphasizing terrorist prosecutions. Nonetheless, if States do not want to see an erosion of IHL and the continuing importance of ending impunity for the most serious violations of IHL, they should seriously consider the situation each time they have the choice: would it be better to prosecute for war crimes or terrorist offences? War crimes represent crimes that

138 K. H. Kaikobad, above note 5, p. 276.

139 TRIAL International, above note 45, p. 13.

the international community, all States, have agreed to and have fundamental obligations to uphold. Therefore, while taking into account the challenges of prosecution, the preference should be to prosecute for war crimes to ensure that this important body of law applicable in armed conflict is respected and upheld. This article has demonstrated that for a broad range of States, war crimes prosecutions for terrorist-related activities in armed conflict prosecution is possible and the challenges for prosecutions are almost the same as those for terrorist offences. Now is the time for States to seriously consider prosecuting for war crimes to end impunity.

International humanitarian law and the criminal justice response to terrorism: From the UN Security Council to the national courts

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Abstract

Since the adoption of the first United Nations Security Council (UNSC) counterterrorism resolution after the 9/11 attacks, the UNSC has increasingly required the domestic criminalization of “terrorism” acts and ancillary activities. Without the inclusion of an explicit international humanitarian law (IHL) or humanitarian exception, the UNSC has—so far—failed to harmonize the counterterrorism legal framework with IHL, leaving it up to States to define the interaction between the two. In their national legislation and courts, States’ interpretations have varied but counterterrorism legislations have been used to adjudicate conducts in armed conflicts, regardless of their legality under IHL. As the domestication of UNSC offences is ongoing, good practices are highlighted in this paper and recommendations are offered to ensure the development of international customary law in accordance with IHL.

Keywords: terrorism, international humanitarian law, United Nations Security Council, criminal justice, international criminal law, universal jurisdiction, national courts.

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Introduction

After the 9/11 attacks against the United States, the United Nations Security Council (UNSC) significantly contributed to transnational criminal law¹ by requiring the domestic criminalization of “terrorism” acts and ancillary activities.² It also listed several non-State armed groups (NSAGs) involved in terrorist activities, including Al-Qaeda, the Islamic State of Iraq and the Levant (ISIL, also known as Da’esh) in Syria and Iraq, and Boko Haram in the Sahel,³ through the 1267 sanctions regime.⁴ Researchers and practitioners,⁵ including the International Committee of the Red Cross (ICRC),⁶ have warned that these decisions have created some

- 1 Transnational criminal law is defined by Neil Boister as a subset of international criminal law which deals with treaty crimes. Contrary to the core crimes spelled out in the Rome Statute of the International Criminal Court, these “crimes of international concern” with potential transboundary effects are criminalized and prosecuted at the domestic level. Transnational criminal law treaties require States to cooperate in the investigation and prosecution or extradition of suspects under the principle of “extradite or prosecute”. This is the case for the nineteen treaties and conventions, and their protocols, that deal with categories of offences regarded as “terrorist”. See Neil Boister, “Transnational Criminal Law?”, *European Journal of International Law*, Vol. 14, No. 5, 2003.
- 2 See Neil Boister, *An Introduction to Transnational Criminal Law*, 2nd ed., Oxford University Press, Oxford, 2008, p. 115; Luis Miguel Hinojosa Martinez, “The Legislative Role of the Security Council in Its Fight against Terrorism: Legal, Political and Practical Limits”, *International and Comparative Law Quarterly*, Vol. 57, No. 2, 2008. Some authors stress the challenge that this role raises for the multilateral approach to criminal justice and treaty-making processes: see, for example, Nigel D. White, “The United Nations and Counter-Terrorism”, in Ana Marià Salinas de Frias, Katja Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice*, Oxford University Press, New York, 2012, p. 81; Titilopemi Ogunlade, “The UN Security Council as Legislator: A Critical Analysis”, master’s thesis, Université de Genève Maitrise, 2014.
- 3 See United Nations (UN), “Security Council Al-Qaida Sanction Committee Adds Boko Haram to Its Sanction List”, Press Release SC/11410, 22 May 2014, available at: www.un.org/press/en/2014/sc11410.doc.htm (all internet references were accessed in October 2021).
- 4 Initially known as the 1267 UN sanctions regime, two separate sanctions regimes finally emerged in 2011, as per UNSC Res. 1988 and UNSC Res. 1989, 17 June 2011. The first deals with the Taliban and the second concerns ISIL, Al-Qaeda and associated individuals, groups, undertakings and entities. In June 2021, the ISIL and Al-Qaeda sanctions regime, pursuant to UNSC Res. 1257, 1989, 2253 and 2368, comprised targeted sanctions measures—an arms embargo, a travel ban and an asset freeze—against 261 individuals and eighty-nine entities listed on the ISIL and Al-Qaeda sanctions list.
- 5 Including Jelena Pejic, “Armed Conflict and Terrorism: There Is a (Big) Difference”, in A. M. Salinas de Frias, K. Samuel and N. D. White (eds), above note 2; Tristan Ferraro, “Interaction and Overlap between Counter-Terrorism Legislation and International Humanitarian Law”, *Proceedings of the 17th Bruges Colloquium*, 2016; Alice Debarre, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework*, International Peace Institute, New York, September 2018; Naz K. Modirzadeh, Dustin A. Lewis and Claude Bruderlein, “Humanitarian Engagement under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape”, *International Review of the Red Cross*, Vol. 93, No. 833, 2011.
- 6 See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, pp. 57–65; College of Europe and ICRC, “Terrorism, Counter-Terrorism and International Humanitarian Law”, *Proceedings of the 17th Bruges Colloquium*, 20–21 October 2016.

overlap and contradictions between the laws governing counterterrorism measures⁷ and international humanitarian law (IHL).

IHL regulates situations of international and non-international armed conflict. The existence of armed conflicts is established based on a factual assessment⁸ and regardless of the political designation of “terrorist” of one of the parties to the conflict or of its activities. Further, while IHL takes a two-pronged approach in regulating both lawful and unlawful conducts in armed conflicts, terrorism is always regarded as criminal.⁹ There is therefore an apparent tension between IHL and counterterrorism, which can be highlighted both at the policy level (in analyzing UNSC resolutions) and in practice (in looking at criminal proceedings in domestic courts). Examining the issue from both of these perspectives, this paper aims to assess the impact of UNSC counterterrorism resolutions on the use of and respect for IHL in national criminal proceedings.

The paper begins with an overview of the development of the UNSC response to terrorism since 2001 and the offences it has required States to criminalize. It analyzes how the UNSC has created conflicting obligations on States, and discusses the judicial and political implications of these conflicts. The first section concludes that the UNSC has left it up to States to define the interaction between the two frameworks and has opened the door to various practices and interpretations at the domestic level.¹⁰ Secondly, the paper surveys State practices in the adjudication of offences regulated by both IHL and national counterterrorism legislation. It observes that individuals whose conduct is governed by both IHL and counterterrorism law have been charged and indicted for terrorist offences, regardless of the legality or illegality of their activities in situations of armed conflict. To remediate this development, the paper highlights two good practices – first, the adoption of an IHL exclusion clause and a sectoral humanitarian exemption in domestic legislation, and second, the use of dual legal qualification in domestic courts. The paper ends with a call for action to national authorities and the UN system to ensure better consideration for IHL in States’ domestic criminal justice processes and to shape customary international law in a manner that is consistent with IHL.

7 These measures include the international legal framework (comprised of nineteen treaties and conventions, and their protocols) and domestic criminal laws addressing terrorism.

8 If acts of violence committed by “terrorist” groups are isolated and do not lead to an armed confrontation which passes the threshold of intensity required, the situation would not amount to a non-international armed conflict (NIAC) and IHL would not apply. However, if acts of violence committed by a terrorist group which meets the command-and-control structure criteria pass a threshold of intensity, the situation could escalate to an armed conflict. See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, paras 432–438, 867, available at: <https://tinyurl.com/23cfhnh6>; International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70; ICTY, *The Prosecutor v Duško Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para. 562.

9 J. Pejic, above note 5.

10 Ben Saul, *Defining Terrorism in International Law*, Oxford Scholarship Online, New York, 2010, p. 50.

The UNSC's response to terrorism and its implications for IHL

Historical development

Since 2001, the UNSC has tackled terrorism as a threat to international peace and security and has adopted more than twenty binding counterterrorism resolutions under Chapter VII of the UN Charter.¹¹ These resolutions have expanded the sanctions regime against listed individuals and entities associated with the Taliban, Al-Qaeda and ISIL.¹² Further, in adopting Resolutions 1373,¹³ 2178,¹⁴ 2396¹⁵ and 2462,¹⁶ the UNSC has taken a quasi-law-making role¹⁷ and has imposed legal obligations on United Nations (UN) member States. These legal obligations “relate to [States’] general legal frameworks, including codification of the international counterterrorism instruments, denial of safe haven, recruitment, jurisdiction, bringing terrorists to justice, and international legal cooperation”.¹⁸ The aforementioned resolutions outline, *inter alia*, a series of “terrorist” and ancillary acts to be established “as serious criminal offences in domestic law and regulations”¹⁹ so as to respond to emerging and evolving threats. With Resolution 1373, the UNSC required member States to criminalize

the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.²⁰

Resolution 1373 also calls on States to

[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is

11 The Chapter VII UNSC Resolutions on “threats to international peace and security caused by terrorist acts” are: UNSC Res. 1373, 28 September 2001; UNSC Res. 1452, 20 December 2002; UNSC Res. 1455, 17 January 2003; UNSC Res. 1526, 20 January 2004; UNSC Res. 1535, 26 March 2004; UNSC Res. 1566, 8 October 2004; UNSC Res. 1617, 29 July 2005; UNSC Res. 1735, 22 December 2006; UNSC Res. 1822, 30 June 2008; UNSC Res. 1904, 17 December 2009; UNSC Res. 1988, 17 June 2011; UNSC Res. 1989, 17 June 2011; UNSC Res. 2082, 17 December 2012; UNSC Res. 2083, 17 December 2012; UNSC Res. 2160, 17 June 2014; UNSC Res. 2161, 17 June 2014; UNSC Res. 2170, 15 August 2014; UNSC Res. 2178, 24 September 2014; UNSC Res. 2199, 12 February 2015; UNSC Res. 2253, 17 December 2015; UNSC Res. 2396, 21 December 2017; UNSC Res. 2462, 28 March 2019.

12 See above note 4.

13 UNSC Res. 1373, 28 September 2001.

14 UNSC Res. 2178, 24 September 2014.

15 UNSC Res. 2396, 21 December 2017.

16 UNSC Res. 2462, 28 March 2019.

17 See, for instance, L. M. Hinojosa Martinez, above note 2. Some authors stress the challenge such a role has raised for the “criminal justice multilateral approach” to law-making processes, including treaty negotiations and voluntary ratification. See, for example, N. D. White, above note 2, p. 81; T. Ogunlade, above note 2.

18 UNSC, *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions*, UN Doc. S/2019/998, 21 December 2019, p. 6.

19 UNSC Res. 1373, 28 September 2001.

20 *Ibid.*, op. para. 1(b).

brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations.²¹

In 2014, as thousands of foreign fighters had travelled to join the self-proclaimed Islamic State (IS) in Iraq and Syria, the UNSC adopted Resolution 2178 to address this trend. The resolution requests States to establish relevant criminal offences to prosecute and penalize²² nationals and individuals who “travel or attempt to travel to a State other than their States of residence or nationality, for the purpose of perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training”.²³ In 2017, as IS faced a military defeat and lost territories, fears grew regarding the return or relocation of foreign fighters, which paved the way for the adoption of UNSC Resolution 2396.²⁴ This resolution put emphasis on judicial measures, including prosecution, as well as reintegration and rehabilitation of returning individuals and their families.²⁵ Finally, in 2019, Resolution 2462 was adopted as a consolidated text on countering the financing of terrorism.²⁶ It reaffirms the provisions contained in previous resolutions on establishing criminal offences against the direct and indirect financing of terrorism as well as against “the travel, recruitment and financing of foreign terrorist fighters”.²⁷ It further requests States to establish serious criminal offences for the “wilful provision or collection of funds, financial assets or economic resources or financial or other related services ... to be used for the benefit of terrorist organizations or individual terrorists for any purpose”.²⁸ The UNSC also established the Counter-Terrorism Committee (CTC)²⁹ and the Counter-Terrorism Committee Executive Directorate (CTED)³⁰ to monitor the implementation of these binding resolutions and to develop technical recommendations and guiding principles to facilitate their transposition at the national level.³¹

21 *Ibid.*, op. para. 2(e). This is also reiterated in UNSC Res. 2178, 24 September 2014, op. para. 6; UNSC Res.

2396, 21 December 2017, op. para. 17; and UNSC Res. 2462, 28 March 2019, op. para. 2.

22 UNSC Res. 2178, 24 September 2014, op. para. 6.

23 *Ibid.*, op. para. 6(a).

24 UNSC Res. 2396, 21 December 2017.

25 *Ibid.*, op. paras 29–41.

26 UNSC Res. 2462, 28 March 2019.

27 *Ibid.*, op. para. 2.

28 *Ibid.*, op. para. 5.

29 Through UNSC Res. 1373, 28 September 2001, op. para. 6, the UNSC created the CTC “to monitor implementation of this resolution” and called on States to report to the Committee on “steps they have taken to implement this resolution”.

30 The UNSC established CTED through the adoption of UNSC Res. 1535, 26 March 2004.

31 See CTED, *Madrid Guiding Principles: A Practical Tool for Member States to Stem the Flow of Foreign Terrorist Fighters*, UN Doc. S/2015/939, 23 December 2015 (Madrid Guiding Principles); CTED, *2018 Addendum to the Madrid Guiding Principles*, 2018; UNSC, above note 18.

Conflation with IHL and implications

In adopting these Chapter VII resolutions on counterterrorism and expanding criminal liability for “terrorism”, the UNSC has created a potential overlap with obligations under IHL. This is due to four main reasons: (1) the UNSC has requested the criminalization of broad “support” and “indirect financing” of terrorism; (2) the UNSC has not legally defined the constitutive elements of terrorist offenses; (3) the UNSC has extended application of these offenses to situations of armed conflict and designated certain NSAGs as terrorists; and (4) the UNSC has adopted these resolutions without providing any explicit IHL exclusion clause or a sectoral humanitarian exemption.³² These decisions can thus have important judicial repercussions for protected individuals in situations of armed conflict, including impartial humanitarian actors.

First, as noted above, the UNSC has called on all States to criminalize a number of acts and to incorporate these into their domestic laws and regulations as prosecutable offences. It has thus expanded the scope and types of “terrorist” activities, particularly ancillary activities, which it requires States to repress under domestic law. Amongst others, the provision of “any form of support, active or passive, to entities or persons involved in terrorist acts”³³ is prohibited, and the “wilful provision or collection of funds, financial assets or economic resources or financial or other related services”³⁴ as well as “support” to terrorism is to be punishable by law.³⁵ However, when “support”, “economic resources” or “other related services” are broadly interpreted, impartial humanitarian bodies³⁶ may be suspected of such offences when providing humanitarian assistance to listed individuals, or in cases of incidental transactions, or of payments of taxation for humanitarian access to listed groups. Such allegations would run directly counter to the principles underpinning impartial humanitarian activities.

Second, the UNSC has not settled the contentious debates surrounding the definition of terrorism, nor has it circumscribed its definitions to specific constitutive elements of crimes with the adoption of a binding resolution.³⁷ Instead, the UNSC requires States to criminalize the “perpetration of terrorist

32 Note that a fair amount of conceptual uncertainty remains regarding the difference, if any, between the term “humanitarian exemption” and the terms “humanitarian exception” and “humanitarian carve-out”, and their relationship with the more generic concept of “humanitarian safeguards”. Regarding the lack of consistency in the use of these terms and the implications that this has had, see the contribution by Sue Eckert and the interview with Alena Douhan in this issue of the *Review*.

33 UNSC Res. 1373, 28 September 2001, op. para. 2(a).

34 UNSC Res. 2462, 28 March 2019, op. para. 5.

35 UNSC Res. 1373, 28 September 2001, op. para. 2(e); UNSC Res. 2178, 24 September 2014, op. para. 6; UNSC Res. 2396, 21 December 2017, op. paras 17, 23, 30; UNSC Res. 2462, 28 March 2019, preambular para. 4.

36 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 55, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

37 In 2004, the UNSC adopted UNSC Res. 1566, which provided a working definition of terrorism. It “defined terrorism as serious (sectoral) criminal violence intended to provoke a state of terror, intimidate a population or compel a government or organization”. This resolution, however, was not adopted under Chapter VII of the UN Charter and is not binding on States. See Ben Saul, “Definition

acts” without delineating the material elements which would amount to such acts. In effect, the Council has endowed the terms “terrorism” and “terrorist acts” with operative legal meaning without defining or delineating the constitutive elements of these crimes.³⁸ This has allowed for a broad interpretation of these crimes, which can be in tension with rules under IHL. For instance, in an armed conflict, an act of violence committed by a designated “terrorist” NSAG against an opposing State’s armed forces which constitute a military target would not be illegal under IHL if the act respected the principles of distinction, proportionality and precaution, along with all other applicable rules of IHL.³⁹ If any act of violence committed by the terrorist group is regarded as “terrorist” and is thus automatically considered to be reprehensible, it may suggest “that merely participating in hostilities as a member of a NSAG constitutes a terrorist offence”.⁴⁰ This rationale is problematic, as it would likely deter armed groups from respecting IHL in their conduct of hostilities.⁴¹ Indeed, if charges of terrorism can be expected regardless of tactical choices in an armed conflict, there may be no reason to limit one’s targets and conduct to lawful ones.

Third, the UNSC has extended the application of these terrorist offenses to situations of armed conflict and has designated certain NSAGs as terrorists, which can further create overlaps with obligations under IHL. In particular, direct references to “armed conflict” in Resolutions 2178 and 2396 pertaining to the definition of “foreign terrorist fighters”⁴² may allow States to interpret these provisions in a way that could extend and criminalize related terrorist offences in situations of armed conflict.⁴³ The UNSC resolutions clearly require States to prosecute such offences, which would not be contrary to IHL as it is States’ prerogative to prosecute members of NSAGs for their participation in hostilities and actions undertaken in non-international armed conflicts (NIACs), regardless of their lawfulness under IHL.⁴⁴ However, this development at the UNSC can

of ‘Terrorism’ in the UN Security Council: 1985–2004”, *Chinese Journal of International Law*, Vol. 4, No. 1, 2005.

38 See B. Saul, above note 10, p. 48; B. Saul, above note 37, p. 159.

39 See T. Ferraro, above note 5, p. 29.

40 Hanne Cuyckens and Christophe Paulussen, “The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship between Counter-Terrorism and International Humanitarian Law”, *Journal of Conflict and Security Law*, Vol. 24, No. 3, 2019, p. 11.

41 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 31 October 2011, pp. 48–51, available at: www.icrc.org/en/doc/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm.

42 Preambular paragraph 10 of UNSC Res. 2178 defines foreign terrorist fighters as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”. Operative paragraph 1 of UNSC Res. 2178 also refers to the participation of foreign terrorist fighters in “armed conflict”.

43 See Sandra Krähenmann, “Foreign Fighters, Terrorism and Counter-Terrorism”, in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., Edward Elgar, Cheltenham, 2020.

44 In an international armed conflict, the status of combatant confers immunity and privileges to members of armed forces against prosecution for participation in hostilities. Such a status does not exist in NIACs, and members of NSAGs or civilians may be prosecuted under domestic law for their mere participation in hostilities. See Tristan Ferraro, above note 5, p. 29; ICRC, “Immunities”, *How Does Law Protect in War?*, available at: <https://casebook.icrc.org/glossary/immunities>.

create confusion at the domestic level—including in domestic criminal proceedings—with regard to the applicability of IHL in these cases.⁴⁵

On one end of the spectrum, the requirement for States to prosecute “foreign terrorist fighters” may inhibit certain rules foreseen by customary law in NIACs, including the granting of amnesty at the end of hostilities to those who have participated in the armed conflict without committing any serious violations.⁴⁶ On the other end of the spectrum, the broad terrorist offences related to “foreign terrorist fighters”⁴⁷ in a situation of NIAC may end up encompassing serious violations of the laws and customs of war applicable in NIACs and war crimes under the Rome Statute of the International Criminal Court. While the UNSC compels States to prosecute terrorist offences, the Geneva Conventions have done so regarding war crimes for seven decades. There are a few arguments for the position that prosecuting an individual for “terrorism” when war crimes have been committed poses both legal and political issues. First, legally, this approach may be inconsistent with IHL and international customary law as there is an obligation on States to investigate and prosecute war crimes, which are considered among the most serious international crimes (along with genocide and crimes against humanity).⁴⁸ Absent such investigations and prosecutions, this could sustain the lack of accountability over violations of IHL committed in armed conflicts, including but not limited to Syria, Yemen and Libya. Second, this approach may encourage judges to disregard the legal framework established by the Geneva Conventions to assess conducts in armed conflict, which could lead to a loss of IHL relevancy in national courts. Further, as the criminal responsibility of perpetrators is not fully accounted for and assessed under the relevant legal regimes, this approach is not victim-centred. It does not properly render justice to the victims and survivors of serious international crimes, whose plight is left unaddressed and for which a sense of impunity could perdure.⁴⁹ A lack of accountability for the most serious international crimes may jeopardize transitional justice and future reconciliation processes,⁵⁰ particularly in post-conflict countries such as Iraq, Mali and the

45 See Stéphane Ojeda, “Out of Balance: Global Counter-Terrorism and the Laws of War”, *Humanitarian Law and Policy Blog*, 15 September 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/09/15/out-of-balance-global-counter-terrorism-the-laws-of-war/>.

46 Protocol Additional (II) to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflict, 8 June 1977 (entry into force 7 December 1978), Art. 6(5): “At the end of hostilities, the authorities shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict”; ICRC Customary Law Study, above note 36, Rule 159. Also see the example of the Special Jurisdiction for Peace in Colombia, which has the mandate to grant amnesty to Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) ex-combatants who have not been charged with grave crimes. See Colombia, Law No. 1820 Providing for Amnesty, Pardon and Special Criminal Treatment Provisions and Other Provisions, 30 December 2016.

47 UNSC Res. 2178, 24 September 2014, op. para. 6; UNSC Res. 2396, 21 December 2017, op. para. 17.

48 ICRC Customary Law Study, above note 36, Rule 158.

49 Fionnuala Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/75/337, 3 September 2020.

50 Ali Altiok and Jordan Street, “A Fourth Pillar for the United Nations: The Rise of Counter-Terrorism”, *Saferworld*, June 2020.

Philippines, where national authorities are seeking to reconstruct society and build trust across communities.⁵¹

It is important to note that while these developments at the UNSC can create confusion regarding the applicability of IHL at the domestic level—including in domestic criminal proceedings, as noted above—UNSC Resolution 2396 actually “urges member states to develop and implement appropriate investigative and prosecutorial strategies ... in accordance with domestic and applicable international human rights law and international humanitarian law”.⁵² IHL should thus be taken into consideration in strategies for prosecuting “foreign terrorist fighters” and other individuals for terrorist-related offences, when relevant.

Finally, and most critically, the UNSC has not included any explicit IHL exclusion clause or sectoral humanitarian exemption⁵³ in requiring the criminalization of these terrorist acts and ancillary activities. Since 2004⁵⁴ it has mentioned, mostly in preambular paragraphs, that counterterrorism measures should be adopted in accordance with international law, including human rights, refugee and humanitarian law, but it has not provided guidance or directed States towards adopting a clear exception.⁵⁵ Council members have only recently made an attempt to reclaim some of the space for IHL, particularly regarding humanitarian activities, in adopting relevant provisions under the Chapter VII UNSC Resolution 2462. This resolution calls, in operative paragraph 5, for domestic law and regulations to be “consistent with obligations under international law, including humanitarian law”, and in operative paragraph 6 “[d]emands that Member States ensure that all measures taken to counter terrorism ... comply with their obligations under international law, including international humanitarian law”. This is the first time that such language demanding compliance in *all* measures for countering terrorism has been featured in operative paragraphs of a counterterrorism resolution.⁵⁶ Further, operative paragraph 24 of the same resolution

[u]rges States, when designing and applying measures to counter the financing of terrorism, *to take into account* the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are

51 Conversely, see the example of the Special Jurisdiction for Peace in Colombia, which has jurisdiction over war crimes and is part of the transitional justice component of the 2016 Peace Agreement between the government of Colombia and the FARC. See Gwen Burnyeat, Par Engstrom, Andrei Gomez Suarez and Jenny Pearce, “Justice after War: Innovations and Challenges for Colombia’s Special Jurisdiction for Peace”, *London School of Economics Blog*, 3 April 2020 available at: <https://blogs.lse.ac.uk/latamcaribbean/2020/04/03/justice-after-war-innovations-and-challenges-of-colombias-special-jurisdiction-for-peace/>.

52 UNSC Res. 2396, 21 December 2017, op. para. 18.

53 For the conceptual uncertainty surrounding the use of these terms, see above note 32.

54 Starting with UNSC Res. 1535, 26 March 2004, preambular para. 4.

55 See, for instance, UNSC Res. 2178, 24 September 2014, preambular para. 7; UNSC Res. 2396, 21 December 2017, preambular para. 7; UNSC Res. 2368, 20 July 2017, preambular para. 11.

56 Note that this is not the first time IHL is mentioned in an operative paragraph. For example, operative paragraph 5 of UNSC Res. 2178 provides that “Member States shall, consistent with ... international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of” foreign terrorist fighters.

carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.⁵⁷

Despite being an achievement, this language reflects a compromise.⁵⁸ Urging States to “take into account” the effect of counterterrorism measures on humanitarian activities does not constrain them to interpret this provision as a sectoral humanitarian exemption.⁵⁹ Instead, how to implement this paragraph and to “take into account the potential effects” remain subject to States’ own interpretations, which vary considerably.⁶⁰ While some States, like Switzerland⁶¹ and the Philippines,⁶² have introduced a humanitarian exception in their legislation dealing with terrorist activities, others have established multi-stakeholder dialogues “that bring together relevant government agencies with representatives of the non-profit sector to discuss issues relating to humanitarian activities in high-risk jurisdictions”.⁶³ Overall, however, “only a few States have developed a specific response to the potential impact of the counter-financing of terrorism on exclusively humanitarian activities”.⁶⁴ While the inclusion of operative paragraph 24 should open the way for more States to “take into account the effect of” countering financing of terrorism measures on humanitarian action, its implementation will continue to vary across States.

57 Emphasis added. Note that UNSC Res. 2482, 19 July 2019, contains in operative paragraph 16 broader language targeting all “counter-terrorism measures” and not only “measures to counter the financing of terrorism”. This resolution was not adopted under Chapter VII of the UN Charter, however. The same provision was part of a draft Chapter VII UNSC resolution (UN Doc. S/2020/852) that failed to be adopted in August 2020. Operative paragraph 13 of the draft resolution read: “[The UNSC] [u]rges Member States to ensure that all measures taken to counter terrorism comply with their obligations under international law, including humanitarian law, international human rights law and international refugee law, and urges States to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.”

58 For some background on the negotiation of UNSC Res. 2462, see UNSC, “What’s in Blue: Combatting Financing of Terrorism Open Debate”, *Security Council Report*, 27 March 2019, available at: www.securitycouncilreport.org/whatsinblue/2019/03/combating-financing-of-terrorism-open-debate.php.

59 Some legal experts have argued that although they are not as prescriptive as an exception, taken together these three legally binding provisions (operative paragraphs 5, 6 and 24) could ensure that humanitarian activities are safeguarded and not impeded. See Nathalie Weizmann, “Painting Within the Lines: The UN’s Newest Resolution Criminalizing Financing for Terrorists – Without Imperiling Humanitarian Activities”, *Just Security*, 29 March 2019, available at: www.justsecurity.org/63442/painting-within-the-lines-the-uns-newest-resolution-criminalizing-financing-for-terrorists-without-imperiling-humanitarian-activities/; ICRC, “ICRC Submission: Call for Input – UN Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (CT) – Thematic Report to the 75th Session of the UN General Assembly”, available at: www.ohchr.org/Documents/Issues/Terrorism/SR/GA75/ICRC-GA75CT.docx.

60 UNSC Res. 2462, 28 March 2019, op. para. 24.

61 Switzerland, Amendment of Art. 260ter(2) of Penal Code, Federal Decree of 25 September 2020, available at: www.parlament.ch/centers/eparl/curia/2018/20180071/Texte%20pour%20le%20vote%20final%201%20SN%20F.pdf.

62 Philippines, Republic Act No. 11479, 3 July 2020, Section 13, available at: www.officialgazette.gov.ph/downloads/2020/06jun/20200703-RA-11479-RRD.pdf.

63 UNSC, *Joint Report of the Counter-Terrorism Committee Executive Directorate and the Analytical Support and Sanction Monitoring Team Pursuant to Resolution 1526 (2004) and 2253 (2015)*, UN Doc S/2020/493, 3 June 2020, p. 24.

64 *Ibid.*

CTED reiterates in its latest documents the need for States to comply with IHL obligations, in furtherance of relevant UNSC resolutions,⁶⁵ but it does not suggest any specific ways in which States can do so domestically; instead, it recognizes that States have different legal approaches, have “differing understandings with respect to the incorporation of ... international humanitarian law standards into domestic law”⁶⁶ and are bound by different legal frameworks, including regional ones, which vary across jurisdictions.⁶⁷ While some UN member States recognize the need for humanitarian action to be safeguarded in the fight against terrorism,⁶⁸ the UNSC has remained divided over this issue, and this has so far prevented the adoption of an explicit and legally binding safeguard.⁶⁹

In requesting the criminalization of broad terrorist offences without an IHL or humanitarian exception, the UNSC has created a potential clash with obligations under IHL, which may bear judicial repercussions for individuals in situations of armed conflict. In failing to harmonize these two frameworks, the Council has *de facto* left it up to States to define the interaction between the two frameworks. In the next section, this paper will thus focus on domestic cases in order to survey how national courts deal with legal and illegal activities under IHL when these also fall under the scope of counterterrorism legal frameworks.

Domestication of UNSC terrorist-related offences and prosecution of terrorist acts in relation to armed conflicts in national courts

With some guidance by CTED – as a member of the Global Counter-Terrorism Coordination Compact⁷⁰ – States have transposed UNSC resolutions and criminalized the offences according to their own interpretations, obligations and legal traditions.⁷¹ More than 140 countries have adopted counterterrorism laws

65 See UNSC, above note 18, in particular pp. 10, 144–145.

66 *Ibid.*, p. 10.

67 Dustin A. Lewis, Naz K. Modirzadeh and Jessica Burniske, *The Counter-Terrorism Committee Executive Directorate and International Humanitarian Law: Preliminary Considerations for States*, legal briefing, Harvard Law School Program on International Law and Armed Conflict, March 2020, p. 21; United Nations Office on Drugs and Crime, “Defining Terrorism”, available at: www.unodc.org/en/terrorism/module-4/key-issues/defining-terrorism.html.

68 See statements of member States during the teleconference on “Threats to International Peace and Security Caused by Terrorist Acts: International Cooperation in Combating Terrorism 20 Years after the Adoption of Resolution 1373 (2001)”, 12 January 2021; UNSC, *Letter Dated 14 January 2021 from the President of the Security Council Addressed to the Secretary-Members, and the Permanent Representatives of the Members of the Security Council*, UN Doc. S/2021/48, 15 January 2021, available at: <https://undocs.org/en/S/2021/48>.

69 Émilie Max, *Room for Manoeuvre? Promoting International Humanitarian Law and Accountability while at the United Nations Security Council: A Reflection on The role of Elected Members*, Academy Briefing No. 17, Geneva Academy, October 2020, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Briefing%2017.pdf.

70 See Marc Porret, “The Role of the United Nations Global Counter-Terrorism Compact Task Force, the UN Office of Counter-Terrorism and Its Counter-Terrorism Centre”, in B. Saul (ed.), above note 43.

71 See Law Library of Congress, “Treatment of Foreign Fighters in Selected Jurisdictions”, December 2014, available at: <https://tile.loc.gov/storage-services/service/ll/lglrd/2014504233/2014504233.pdf>; Center for

since 2001 to comply with UNSC Resolution 1373,⁷² and at least fifty others have enacted or amended domestic laws since 2015 to comply with UNSC Resolution 2178 on foreign terrorist fighters.⁷³ This is the case, for instance, with Australia, which has adopted the 2014 Foreign Fighters Act,⁷⁴ as well as Indonesia, which amended its Counterterrorism Law in 2018.⁷⁵ The domestication process of UNSC offences – particularly the most recent ones, such as those listed in Resolution 2462 – is ongoing. For instance, the Philippines adopted the Anti-Terrorist Act in July 2020, which includes a limited humanitarian exemption⁷⁶ within the spirit of Resolution 2462, operative paragraph 24.⁷⁷ Given the various interpretations of the UNSC resolutions by States, the transposition of the required UNSC terrorist and ancillary offences has not aligned counterterrorism legislations around the world, or the ways in which national courts adjudicate over these, with regard to IHL.⁷⁸

This section undertakes an initial comparison of domestic case studies to survey how domestic courts have adjudicated over offences which fall under both IHL and counterterrorism legislation (influenced by UNSC resolutions). The section compiles observations about national courts' mixed legal practices in prosecuting "terrorist" activities (according to domestic legislation) that have occurred in situations of armed conflict. Most defendants mentioned were operating on the side of NSAGs designated as "terrorist" during a NIAC. The section first surveys trials dealing with conduct that could amount to serious violations of the laws and customs of war applicable in NIAC and war crimes

Strategic and International Studies, *Aligning Security with Civic Space: Database of Legislation on the Definition of Terrorism*, February 2018, available at: <https://tinyurl.com/44nvxmyn>. Examples of anti-terror legislative framework include: Thailand, Criminal Code, Sections 135/1-135/4; Malaysia, Penal Code, Chap. VI; France, Criminal Code of the French Republic, Art. 421-1; United States, United States Code, Title 18, Part 1, Chap. 113b. Examples of dedicated anti-terror act include: in Malaysia, the Anti-Money Laundering and Anti-Terrorism Financing Act (2008) and Special Measures Against Terrorism in Foreign Countries Act (2015); in Singapore, the Internal Security Act (1960), Terrorism (Suppression of Financing) Act (2002), Prevention of Money Laundering and Terrorism Financing Act (2019), Terrorism (Suppression of Misuse of Radioactive Material) Act (2017) and Terrorism (Suppression of Bombings) Act (2007); in Afghanistan, the Law on Combat against Terrorism Offences (2008); and in the United States, the Patriot Act (2001).

72 Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide Since September 11, 29 June 2012*, available at: www.refworld.org/docid/4ff6bd302.html.

73 See S. Krähenmann, above note 43; Human Rights Watch, "Foreign Terrorist Fighter" Laws, December 2016, available at: www.hrw.org/sites/default/files/news_attachments/ftf_essay_03feb2017_final.pdf.

74 Australia, Counter-Terrorism Legislation Amendment (Foreign Fighters) Act, No. 116, 2014, available at: www.legislation.gov.au/Details/C2014A00116.

75 Indonesia, Counterterrorism Law, 2003, Amended by Law No. 5, 2018.

76 Philippines, Republic Act No. 11479, above note 62, Section 13.

77 See Permanent Mission of the Republic of the Philippines to the UN and Other International Organizations in Geneva, *Response from the Government on JOL PHL 4/2020 Dated 29 June 2020 Concerning the Anti-Terror Act*, Doc. NV-EPG-331-2020, 27 August 2020, available at: <https://spcommreports.ohchr.org/TMRResultsBase/DownloadFile?gld=35537>.

78 It should be noted, however, that different factors play out in domestication of offences by States, including their international and regional obligations. Further, various factors influence domestic legal proceedings vis-à-vis IHL, including national legal frameworks (whether they have jurisdiction over international crimes such as war crimes and/or terrorism offences), national legal traditions (whether courts can assess a conduct under both IHL and domestic counterterrorism legislation), and procedural barriers (including availability of and access to evidence).

under the Rome Statute, and then focuses on activities that are not prohibited under IHL, namely humanitarian action and non-prohibited conducts in NIAC. The common point between the vast majority of these cases is that defendants have been charged and convicted for terrorism-related offences, regardless of the (il)legality of their conduct under IHL. In most cases, States have not sufficiently developed “prosecutorial strategies ... in accordance with ... international humanitarian law”.⁷⁹

Prosecuting terrorist acts that could amount to war crimes

There is an obligation for States to investigate and prosecute war crimes, which are considered to be among the most serious international crimes (alongside genocide and crimes against humanity).⁸⁰ UNSC Resolution 2396 also reaffirms that “those responsible for committing or otherwise responsible for terrorist acts, and violations of international humanitarian law or violations or abuses of human rights in this context, must be held accountable”.⁸¹ When war crimes have allegedly been committed by members of NSAGs designated as terrorists in an armed conflict, State practice has been twofold: they have either used dual legal qualification to judge an individual under both domestic counterterrorism legislation and IHL, or they have charged the defendants solely for terrorist crimes (with no other incrimination). No cases were observed of individuals associated with designated terrorist groups who were only incriminated for war crimes.⁸²

Dual legal qualification

There has been a growing trend in Western Europe to assess the conduct of an individual and adjudicate it under both domestic counterterrorism legislation and IHL. Dual legal qualification has also been referred to as cumulative prosecution or cumulative charging.⁸³ This, however, is different from cumulative prosecution, defined as the double prosecution of the same act, which would pose rule of law issues, including with regard to the rules of double jeopardy and of fair trial procedure.⁸⁴ Bringing

79 UNSC Res. 2396, 21 December 2017, op. para. 18.

80 ICRC Customary Law Study, above note 36, Rule 158.

81 UNSC Res. 2396, 21 December 2017, op. para. 19.

82 Except in countries where “membership” of a terrorist organization is not a criminal offence, such as Sweden (because “membership” and “support” have been the main types of terrorist-related indictments), and in cases of dual legal qualification where the terrorist offence could not be established. See, for instance, German Higher Regional Court of Frankfurt am Main, *Prosecutor v. Aria L*, Case No. 5-3 StE 2/16-4-1/16, Judgment, 12 July 2016; International Criminal Database, “Prosecutor v. Aria Ladjedvardi”, available at: www.internationalcrimesdatabase.org/Case/3276; District Court of The Hague, *Prosecutor v. Ahmad al Khedr*, Case No. 09/748001-18, 16 July 2021, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:7533>.

83 Genocide Network and Eurojust, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences*, The Hague, May 2020, p. 16, available at: <https://tinyurl.com/pj26n2s7>.

84 See International Covenant on Civil and Political Rights, 16 December 1966, Art. 14(7); Optional Protocol No. 7 of the European Convention on Human Rights, 22 November 1984, Art. 4.

terrorism charges in addition to war crimes charges fulfils different functions: first of all, it ensures that the criminal responsibility of perpetrators is fully accounted for and assessed under the relevant legal regimes. As such, it also “delivers more justice to victims”,⁸⁵ and finally, it often results in higher sentences.⁸⁶

So far, only the national courts of some European Union (EU) member States have developed jurisprudence regarding dual legal qualification.⁸⁷ In Germany, for instance, war crimes are regarded as a manifestation of terrorism, which intrinsically implies the use of IHL and domestic criminal law in the same judgment.⁸⁸ In other jurisdictions, such as the Netherlands and France, dual legal qualification is possible provided that all relevant facts of the act are not exhaustively judged under one set of legislation.⁸⁹ Some examples of dual legal qualification include the cases in the Netherlands of *Oussama A*⁹⁰ and in Germany of *Abdelkarim El B*,⁹¹ who were both convicted for the war crime of “humiliating and degrading treatment of a protected person”⁹² and for membership of a terrorist organization. Another example is that of Abdul Jawad Al-Khalaf in Germany, who was convicted for the war crime of killing persons protected under IHL⁹³ and for membership of a terrorist organization⁹⁴ More recently in France, an investigation was opened against Ahmed Hamdane El Aswadiin for war crimes and murder in connection with a terrorist enterprise.⁹⁵ Accompanying this trend of dual legal qualification is the merging of several specialized anti-terrorist prosecutorial entities with war crimes entities, including

85 Council of the European Union, *Presidency Discussion Paper on Aspects of Terrorism*, WK 12157/2929 INIT, 23 November 2020, p. 6, available at: <https://tinyurl.com/jyix46ae>.

86 CTED, *Analytical Brief: The Prosecution of ISIL-Associated Women*, 2020, available at: www.un.org/securitycouncil/ctc/content/cted-analytical-brief-%E2%80%93-prosecution-isil-associated-women.

87 *Ibid.*

88 “According to section 129a paragraph 1 number 1 of the German Criminal Code a terrorist organization is a firmly organized group of persons who inter alia intend to commit international crimes defined by the Germany International Crimes Code, including war crimes.” Christian Ritscher, “Panel Discussion: State Response to Foreign Fighters”, *Proceedings of the 17th Bruges Colloquium*, 2016, p. 128.

89 Genocide Network and Eurojust, above note 83, p. 16.

90 District Court of The Hague, *Prosecutor v. Oussama A*, Case No. 09/748003-18V and 09/748003-19, Verdict, 23 July 2019, available at: www.eurojust.europa.eu/sites/default/files/2020-09/2019-07-23_NL-Rechtbank-Den-Haag_Case09-748003-18V_3.pdf.

91 German Higher Regional Court of Frankfurt am Main, *Prosecutor v. Abdelkarim EL B*, Case No. 5-3 StE 4/16-4-3/16, Judgment, 8 November 2016.

92 In both cases, these courts have determined that the body of a dead soldier can be regarded as a “protected person” under IHL, referring to existing judgments including the *Brđanin* case at the ICTY, Rule 113 of the ICRC Customary Law Study, and the International Criminal Court’s *Elements of Crimes*. This has enabled the courts to convict the defendants for the war crime of “humiliating and degrading treatment of a protected person” under Article 3 common to the four Geneva Conventions, based on pictures or video extracted from mobile phones, or found on social media, of the defendants posing with or recording the mutilation of dead soldiers’ bodies. See C. Ritscher, above note 88, p. 128.

93 As defined in the German Code of Crimes against International Law, 30 June 2002, Section 8(6)(3).

94 Stefan Talmon and Tobias Wiass, “Sentencing a Member of the Syrian Opposition for War Crimes against Persons”, *German Practice in International Law*, March 2020, available at: <https://gpil.jura.uni-bonn.de/2020/03/sentencing-a-member-of-the-syrian-opposition-for-war-crimes-against-persons/>.

95 TRIAL International, *Universal Jurisdiction Annual Review 2021*, 12 April 2021, p. 37, available at: https://trialinternational.org/wp-content/uploads/2021/04/TRIAL_International_UJAR-2021.pdf.

the Parquet National Antiterroriste in France (in 2019),⁹⁶ the Special Crime and Counter-Terrorism Division of the UK's Crown Prosecution Service (in 2016),⁹⁷ the Office of the German Federal Public Prosecutor in Germany,⁹⁸ and the Office of the Attorney-General of Switzerland.⁹⁹ Dual legal qualification is discussed as a good practice in the section below entitled "Good Practices at the Domestic Level".

Terrorism charges only (even when conduct may amount to war crimes)

In certain cases, national courts have brought terrorist offence charges only, although the offences were apparently committed in a situation of armed conflict and could allegedly have amounted to serious violations of the laws and customs of war applicable in NIAC and war crimes under the Rome Statute. The absence of incrimination for war crimes may be due to a lack of jurisdiction, diverging legal interpretations and traditions of the courts, legal and judicial barriers (including lack of evidence¹⁰⁰) or a lack of training of the judiciary in dealing with international crimes. For example, the lack of jurisdiction over war crimes in Turkey¹⁰¹ and Iraq¹⁰² has prevented courts in these countries from pressing charges of this nature. Consequently, one of the British jihadis who brutalized and beheaded several hostages in Syria, Aine Lesley David, was convicted in

96 Government of France, "Le parquet national anti-terroriste est créé", 1 July 2019, available at: www.gouvernement.fr/le-parquet-national-anti-terroriste-est-cree.

97 See Crown Prosecution Service, "Special Crime and Counter Terrorism Division (SCCTD)", available at: www.cps.gov.uk/special-crime-and-counter-terrorism-division-sctd.

98 See: www.generalbundesanwalt.de/EN/Home/home_node.html.

99 See, for instance, Julia Crawford, "International Crimes: Spotlight on Switzerland's War Crimes Unit", *Justiceinfo.net*, 15 February 2019, available at: www.justiceinfo.net/en/40328-international-crimes-spotlight-on-switzerland-s-war-crimes-unit.html.

100 There is a challenge to collecting sufficient evidence from areas of armed conflict, or battlefield evidence, in order to secure convictions for war crimes and terrorism offences alike. See, for example, the case of the two Iraqi twin brothers in Finland who were suspected of being involved in the ISIL massacre of Iraqi soldiers and cadets at Camp Speicher in Tikrit, Iraq, and who were finally acquitted by the Court of Appeal "on the ground that there was not sufficient evidence for a conviction": TRIAL International, above note 95. Some cases of cumulative charging point to the use of innovative endeavours, including the initiation of partnerships with UN entities, in order to gather sufficient evidence. Certain UN entities, including the International, Impartial and Independent Mechanism related to Syria (IIIM) and the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), have supported States in the collection of evidence and in their domestic proceedings. UNITAD, which has been mandated by the UNSC to support domestic proceedings in Iraq and in third States, has notably cooperated with the Finnish authorities in facilitating the hearing of eight witnesses' testimonies for the case on appeal related to the Camp Speicher massacre. To overcome the challenge pertaining to the lack of access to evidence, several guidelines have been developed, including Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, September 2019; CTED, *Guidelines to Facilitate the Use and Accessibility as Evidence in National Criminal Courts of Information Collected, Handled, Preserved and Shared by the Military to Prosecute Terrorist Offences*, December 2019.

101 Law Library of Congress, "Genocides, Crimes against Humanity and War Crimes Jurisdiction", November 2016, available at: <https://tile.loc.gov/storage-services/service/lil/lglrd/2016590022/2016590022.pdf>.

102 *Ibid.* Also see UN Assistance Mission for Iraq and Office of the UN High Commissioner for Human Rights, *Human Rights in the Administration of Justice in Iraq: Trials under the Anti-Terrorism Law and Implications for Justice, Accountability and Social Cohesion in the Aftermath of ISIL*, January 2020.

Turkey on terrorism charges,¹⁰³ and the vast majority of cases pertaining to ISIL in Syria and Iraq which have been prosecuted in Iraq have resulted in convictions for terrorism charges.¹⁰⁴ The legal tradition of some countries, such as France and the United States, has led to the indictment and conviction of individuals operating in situations of NIAC under terrorist-related offences.¹⁰⁵ In France, for instance, most foreign fighters have been convicted for “association of wrongdoers in relation to a terrorist enterprise”,¹⁰⁶ even in cases directly linked to the armed conflict in Syria and when serious violations of the laws and customs of war applicable in NIAC seem to have been committed. This is because the offence of “association of wrongdoers in relation to a terrorist enterprise” provides a high certainty of prosecutorial success (as “there is no requirement that the individual contributes materially to the commission of the terrorist act in itself, nor that the terrorist plan is executed. ... [T]he mere participation in a group that has a plan to commit a terrorist act, with the knowledge that the group has a plan to commit such an act, is enough to qualify as a terrorism-related crime”¹⁰⁷) and can induce long penalties of over ten years.¹⁰⁸ In 2018, for instance, the French Court of Cassation convicted Mounir Diawara and Rodrigue Quenum on charges of “association of wrongdoers in relation to a terrorist enterprise”¹⁰⁹ although they “had appeared in photos in combat fatigues in Syria, Kalashnikov in hands, one of them brandishing a severed head”.¹¹⁰ Note that in other European domestic courts, such a piece of evidence was used to charge defendants for war crimes (after the courts assessed that the act took place in a situation of armed

103 Martin Chulov, “British Jihadi Aine Davis Convicted in Turkey on Terror Charges”, *The Guardian*, 9 May 2017, available at: www.theguardian.com/world/2017/may/09/british-jihadist-aine-davis-convicted-in-turkey-on-terror-charges.

104 Note, however, that “the [Iraqi] Council of Representatives continues to consider legislation to establish a legal basis for the prosecution of ISIL members in Iraq for war crimes, crimes against humanity and genocide”. See *Sixth Report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant*, UN Doc. S/2021/419, 3 May 2021, available at: www.unitad.un.org/sites/www.unitad.un.org/files/general/s.2021.419_-_sixth_unitad_report_en.pdf.

105 In regard to France, see Sharon Weill, “French Foreign Fighters: The Engagement of Administrative and Criminal Justice in France”, *International Review of the Red Cross*, Vol. 100, No. 907–909, available at: https://international-review.icrc.org/sites/default/files/reviews-pdf/2019-10/100_12.pdf. In regard to the United States, see Karen J. Greenberg (ed.), *The American Exception: Terrorism Prosecutions in the United States: The ISIS Cases*, Center on National Security, 2017, available at: <https://news.law.fordham.edu/wp-content/uploads/2017/09/TheAmericanException9-17.pdf>.

106 France, Criminal Code of the French Republic, Art. 421-2-11.

107 *Ibid.*, Art. 223

108 S. Weill, above note 105, p. 223.

109 French Court of Cassation, Decision No. 16-82.692 (Criminal Chamber), 12 July 2016, cited in Sharon Weill, “Transnational Jihadism and the Role of Criminal Judges: An Ethnography of French Courts”, *Journal of Law and Society*, Vol. 47, No. S1, 2020, p. 39.

110 TRIAL International, *Universal Jurisdiction Annual Review 2020*, 2020, p. 11, available at: https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf. See also S. Weill, above note 119, p. 39. The latter article highlights that the case of Mounir Diawara and Rodrigue Quenum is important because of the jurisprudence it produced wherein the Court of Cassation ruled that “membership of a group whose purpose is the preparation of felonies can be classified as an [association of wrongdoers in relation to a terrorist enterprise] in the form of a felony, without the need to demonstrate any effective participation in the execution of the crimes or their preparation”.

conflict).¹¹¹ The trend may be changing in France, however, with the El-Aswadi case, which is the “first case to be investigated jointly by the anti-terrorism and the specialized unit [for the prosecution of genocide, crimes against humanity, war crimes and torture]”.¹¹² In the United States, where material support violation is the most common incrimination for foreign fighters,¹¹³ no individual has been prosecuted and convicted under the War Crimes Act so far. For instance, Alexandra Kotev and El Shaffee Elsheikh – two high-profile ISIL members involved in the kidnapping and beheading of twenty-seven hostages, including four Americans, in Syria between 2012 and 2015 – were indicted for hostage-taking and terrorist-related crimes, but not for war crimes.¹¹⁴ Other examples include Egypt, where international crimes have not been used in domestic courts and where detained individuals¹¹⁵ associated with Wilayat Sinai (a branch of the Islamic State in Iraq and Syria (ISIS) in the Sinai Peninsula) have been tried and convicted for terrorist activities by military courts.¹¹⁶ In Nigeria, between 2017 and 2018, more than 1,500 individuals were prosecuted for providing support to Boko Haram under the Terrorism Prevention Amendment Act.¹¹⁷ In some cases, there is a concern that terrorism offences (particularly related to “support” and “participation”, which may be encapsulated in “membership”) have become catch-all offences which provide more certainty of prosecutorial success due to the often low threshold of burden of evidence needed to secure conviction.¹¹⁸ These convictions may not reflect the full extent of the crimes committed, when those crimes could amount to serious violations of the laws and customs of war applicable in NIAC and war crimes under the Rome Statute.

111 See above notes 90, 91 and 92.

112 TRIAL International, above note 95.

113 Beth Van Schaack, “National Courts Step Up: Syrian Cases Proceeding in Domestic Courts”, February 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327676; K. J. Greenberg (ed.), above note 105.

114 District Court for the Eastern District of Virginia, *United States of America v. Alexandra Amon Kotev and El Shafee Elsheikh*, Criminal No. 1:20-Cr-239, Indictment, 6 October 2020, available at: www.justice.gov/opa/press-release/file/1325721/download. Also see Beth Van Schaack and Julia Brooks, “‘With a Little Help from Our Friends’: Prosecuting the ISIL ‘Beatles’ in U.S. Courts”, *Just Security*, 22 October 2019, available at: www.justsecurity.org/66653/with-a-little-help-from-our-friends-prosecuting-the-isil-beatles-in-u-s-courts/.

115 Human Rights Watch, *If You Are Afraid for Your Lives, Leave Sinai! Egyptian Security Forces and ISIS-Affiliate Abuses in North Sinai*, 28 May 2019, available at: www.hrw.org/report/2019/05/28/if-you-are-afraid-your-lives-leave-sinai/egyptian-security-forces-and-isis.

116 Samy Magdy, “Egypt Sentences 37 to Death Including Top Militant Leader”, *AP News*, 2 March 2020.

117 Human Rights Watch, *Nigeria: Flawed Trials of Boko Haram Suspects*, 17 September 2018, available at: www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects.

118 Contrary to States where “support” or “membership” is a rather easy offence or felony to substantiate, such as France and the United States, in some countries, such as Thailand, the “intent” to commit a terrorist offence has to be proven in order to indict an individual on charges of terrorism. This is much more challenging to substantiate and often results in the prosecution of terrorist offences as general criminal offences. In these cases, the UN recommends that member States swiftly update their national legislation to be in line with UNSC Resolutions 2178 and 2396 in order to ensure jurisdiction over the full range of conducts relating to “foreign terrorist fighters”, including preparatory acts and inchoate offences. See Madrid Guiding Principles, above note 31, Guiding Principle 22.

Prosecuting as “terrorist” conduct which is lawful under IHL

In the past decade, some opinions and decisions have emerged from national courts in favour of designating and criminalizing certain acts and activities as “terrorist” despite their lawfulness under IHL. These have included impartial humanitarian activities and non-prohibited conducts of NSAGs in NIAC.

Impartial humanitarian activities

As the “terrorism” and “support to terrorism” offences have increasingly been broadly interpreted – both in domestic legislation and by national courts – they have grown to encompass the provision of training and education to “terrorist” groups,¹¹⁹ providing humanitarian assistance and medical care to these groups,¹²⁰ or simply being present in designated “terrorist” areas.¹²¹ In particular, Buissonière, Woznick and Rubinstein have found that across sixteen countries surveyed, “practices in at least ten countries appear to suggest that the authorities interpret support to terrorism to include the provision of healthcare”.¹²² If these laws do not exclude impartial humanitarian activities from their scope of application, this can lead to the prosecution of humanitarian actors, including medical personnel. There have been a number of cases of medical professionals being put on trial for providing assistance to members of NSAGs regarded as “terrorist” after 2001. These legal proceedings were pursued in domestic courts, for “supporting terrorism in the course of armed conflict”.¹²³

In 2009, a doctor who provided medical and surgical services to members of the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) was convicted in Colombia.¹²⁴ He had “managed referral to specialized clinics that he thought medically necessary”.¹²⁵ In this case, the Court “reasoned that those referral services fell outside of the scope of medical activities protected by IHL (as incorporated into Colombian law) and into the crime of

119 See, for example, United States Code, Title 18, Sections 2339A, 2339B; Supreme Court of the United States, *Holder v. Humanitarian Law Project*, Case No. 08-1498, 2010.

120 See, for example, Kingdom of Saudi Arabia, Law on Countering the Financing of Terrorism, Art. 38; US Court of Appeal (Second Circuit), *United States v. Farhane*, 634 F.3d 127, 4 February 2011.

121 UK Counter-Terrorism and Border Security Act, 2019, Chap. 1, Section 4; Australia, Criminal Code Act, No. 12, 1995, Part 5.3, Section 119.2 on entering or remaining in declared areas, available at: www.legislation.gov.au/Details/C2019C00043/Html/Volume_1 (both laws are subject to a number of exceptions, including providing aid of a humanitarian nature). A similar amendment is currently being discussed in the Netherlands by the Senate. For more on the latter, see Christopher Paulussen and Emanuela-Chiara Gillard, *Staying in an Area Controlled by a Terrorist Organization: Crime or Operational Necessity?*, International Center for Counter-Terrorism, 11 January 2021, available at: <https://icct.nl/publication/staying-in-an-area-controlled-by-a-terrorist-organisation-crime-or-operational-necessity/>.

122 Marine Buissonière, Sarah Woznick and Leonard Rubinstein, *The Criminalization of Healthcare, Safeguarding Health in Conflict*, June 2018, p. 19.

123 Dustin A. Lewis, Naz K. Modirzadeh and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, Harvard Law School Program on International Law and Armed Conflict, September 2015; M. Buissonière, S. Woznick and L. Rubinstein, above note 122.

124 Supreme Court of Justice of Colombia (Criminal Cassation Chamber), Case No. 27227, 21 May 2009.

125 M. Buissonière, S. Woznick and L. Rubinstein, above note 122, p. 15.

rebellion”.¹²⁶ Further, the Court noted that the medical activities “strengthened the guerrilla group since healed members of the group would subsequently return to fight against the government armed forces”,¹²⁷ which was “enough to condemn the accused for the crime of rebellion”.¹²⁸

Several indictments and convictions in the United States of health personnel¹²⁹ have fallen under the “material support” legislation,¹³⁰ including in relation to “providing medical support to wounded jihadists knowing that they have engaged in terrorist activity”.¹³¹ In these cases, the courts have reasoned that the defendants’ allegiance to designated foreign terrorist organizations, such as ISIL and Al-Qaeda, turned their medical activities into material support in the form of “advice or assistance derived from scientific, technical or other specific knowledge”.¹³² One of the courts “indicated that a different conclusion might have been reached in the case of independent humanitarian workers ‘act[ing] entirely independently of [a] foreign terrorist organization’”.¹³³ Buissonière, Woznick and Rubinstein refer to other cases of medical staff who have been investigated, prosecuted and in some cases convicted for offences related to assisting or supporting terrorism, including in Iraq, Syria and Australia.¹³⁴

To comply with their obligations under IHL, and more recently, with the spirit of UNSC Resolution 2462, some States have adopted a sectoral humanitarian exemption. This is the case for Switzerland,¹³⁵ the UK,¹³⁶ some EU member States (pursuant to Recital 38 of EU Directive 2017/541 on combating terrorism),¹³⁷ Australia,¹³⁸ New Zealand,¹³⁹ the Philippines,¹⁴⁰ Chad and

126 *Ibid.*

127 Supreme Court of Justice of Colombia, above note 124, p. 12, cited in D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 123, p. 116, and Ekaterina Ortiz Linares and Marisela Silva Chau, “Reflections on the Colombian Case Law on the Protection of Medical Personnel against Punishment”, *International Review of the Red Cross*, Vol. 95, No. 890, 2013, p. 263.

128 E. O. Linares and M. S. Chau, above note 127, p. 263.

129 Including District Court of New York, *U.S. v. Shah*, 474 F.Supp.2d 492, 30 January 2007; District Court of Minnesota, *US v. Warsame*, 651 F.Supp.2d 978 (2009), 24 August 2009; US Court of Appeals (Second Circuit), *United States v. Farhane*, 634 F.3d 127, 4 February 2011.

130 United States Code, Title 18, Sections 2339A, 2339B.

131 D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 123, p. 135.

132 United States Code, Title 18, Section 2339A(b)(3), cited in D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 123, pp. 123–137.

133 M. Buissonière, S. Woznick and L. Rubinstein, above note 122, p. 21, citing District Court of New York, *U. S. v. Shah*, 474 F.Supp.2d 492, 30 January 2007.

134 M. Buissonière, S. Woznick and L. Rubinstein, above note 122, pp. 19–22.

135 Switzerland, above note 61.

136 UK Counter-Terrorism and Border Security Act, 2019, Chap. 1, Section 4(5)(a).

137 European Commission, *Report from the Commission to the European Parliament and Council Based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA*, COM(2020) 619 Final, Brussels, 30 September 2020, available at: <https://perma.cc/FAW7-ABQM>.

138 Australia, Criminal Code Act, above note 121, Part 5.3, including Section 83.3 on military-style training involving a foreign government principal, Section 119.2 on entering, or remaining in declared areas, and Section 119.5 on allowing use of buildings, vessels and aircraft to commit offences.

139 New Zealand, Terrorist Suppression Act, 2002, Section 10, available at: www.legislation.govt.nz/act/public/2002/0034/latest/whole.html.

140 Philippines, Republic Act No. 11479, above note 62, Section 13.

Ethiopia,¹⁴¹ among others. Humanitarian exceptions, and their nuances, are discussed as a good practice in the section below entitled “Good Practices at the Domestic Level”.

Non-prohibited conducts in NIAC

As noted above, in an armed conflict, an act of violence committed by a designated “terrorist” NSAG against the opposing State’s armed forces which constitute a military target would not be illegal according to IHL if the attacker respected the principles of distinction, proportionality and precaution, along with all other applicable rules of IHL.¹⁴² It should be noted, however, that there is no immunity for members of NSAGs in domestic law, under which they can be prosecuted for their mere participation in hostilities.¹⁴³ Some States, like New Zealand¹⁴⁴ and EU member States such as the Netherlands and Belgium (in accordance with EU Directive 2017/541, which replaced Framework Decision 2005/671/JHA),¹⁴⁵ have resorted to an IHL carve-out in determining that their counterterrorism legislation would not apply to “the actions of armed forces during an armed conflict”.¹⁴⁶ Courts’ interpretations of what constitutes armed forces vary, however, as some States may solely invoke this clause in favour of States’ armed forces and some NSAGs.¹⁴⁷ In Belgium, for instance, while this exclusion was accepted in regard to the Kurdistan Workers’ Party (Partiya Karkerên Kurdistanê, PKK), the clause was rejected when invoked in relation to designated terrorist groups such as Al-Shabaab, IS and Jabhat Al-Nusra.¹⁴⁸ Indeed, the prosecutor determined that these groups were “not ‘armed forces’ in the sense of IHL”, in part because they committed terrorist attacks and were terrorist groups.¹⁴⁹

The examples below show that terrorist offences have been used to prosecute individuals for their participation in hostilities, without necessarily assessing the legality of their conduct under IHL. Although it remains the prerogative of States to do this, it may ultimately give the impression that participation in hostilities is in itself a terrorist offence.¹⁵⁰

In the case of *Regina v. Mohammed Gul*,¹⁵¹ the UK Court of Appeal provided a broad interpretation of the UK’s Terrorism Act, arguing that attacks by NSAGs against governmental armed forces “with the requisite intention set in

141 ICRC, above note 59.

142 See T. Ferraro, above note 5, p. 29.

143 See above note 44.

144 New Zealand, Terrorist Suppression Act, above note 139, Art. 19.

145 European Commission, above note 137.

146 Belgian Criminal Code, 8 June 1867, as modified by the Law on Terrorist Crimes, 19 December 2003.

147 See, for instance, District Court of the Hague, *Prosecutor v. Imane B et al.*, Case No. 09/842489-14, 10 December 2015, para. 7.36.

148 See Thomas Von Poecke, “The IHL Exclusion Clause, and Why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences”, *EJIL: Talk!*, 20 March 2019, available at: www.ejiltalk.org/the-ihl-exclusion-clause-and-why-belgian-courts-refuse-to-convict-pkk-members-for-terrorist-offences/. See also the article by Thomas Van Poecke, Frank Verbruggen and Ward Yperman in this issue of the *Review*.

149 *Ibid.*

150 On this see H. Cuyckens and C. Paulussen, above note 40.

151 UK Court of Appeal, *Regina v. Mohammed Gul*, Case No. 2011/01697/C5, Judgment, 22 February 2012.

the [Terrorism] Act could qualify as acts of terrorism”.¹⁵² In *Prosecutor v. Imane B et al.*,¹⁵³ the Court in the Netherlands held that “participation in the armed struggle in Syria on the side of these jihadi armed groups always entails the commission of terrorist crimes”.¹⁵⁴ The Court held that “in a non-international armed conflict IHL is not exclusively applicable”¹⁵⁵ and that “participation in the armed conflict in Syria, therefore, is also punishable under Dutch law”.¹⁵⁶ The Court also considered that “not a single act of war performed by a member of an organized armed group is legitimate”.¹⁵⁷ With the same rationale,¹⁵⁸ in *Prosecutor v. Maher H* in the Netherlands,¹⁵⁹ the defendant was confirmed guilty on appeal for “preparatory acts with a view to committing murder and manslaughter with a terrorist purpose”.¹⁶⁰ The accused “participated in the armed Jihadi campaign in Syria with a terrorist objective”, and “it can be inferred that the suspect’s intent was to ... commit a terrorist offence or a crime that facilitates the commission of a terrorist offence”.¹⁶¹ In these cases, it is interesting to note that defendants were charged with preparatory terrorist offences for their participation in hostilities.¹⁶² Indeed, counterterrorism doctrines put strong emphasis on prevention in criminalizing preparatory acts such as the financing of attacks or training for the commission of an attack, as outlined in UNSC Resolutions 2178 and 2396.¹⁶³

Other cases where the link to armed conflict is comparatively more limited than the cases analyzed above are still worth noting, including the case of *R v. Mashudur Choudhury* in the UK (2014),¹⁶⁴ where the defendant was convicted of “one count of engaging in conduct in preparation for acts of terrorism” for his travel to Syria in 2013. More recently, a first case was reportedly filed under the Philippines Anti-Terror Act concerning “preparation for the commission of terrorism” by the wives of Abu Sayaf members in Jolo, Sulu.¹⁶⁵ As States

152 ICRC, “Regina v. Mohammed Gul, Court of Appeal, 22 February 2012”, *National Implementation of IHL*, available at: <https://tinyurl.com/cx9v3734>.

153 District Court of the Hague, *Imane B*, above note 147.

154 N. Boister, above note 1, p. 119.

155 District Court of the Hague, *Imane B*, above note 147, para. 7.17.

156 *Ibid.*, para. 7.29.

157 *Ibid.*, para. 7.41.

158 Court of Appeal of the Hague, *Prosecutor v. Maher H*, Case No. 22-005306-14, Judgement, 7 July 2016, cited in H. Cuyckens and C. Paulussen, above note 40, p. 10.

159 Court of Appeal of the Hague, *Prosecutor v. Maher H*, Case No. 22-005306-14, 7 July 2016.

160 *Ibid.*, para. 13.

161 *Ibid.*, para. 13.

162 In France, while the same rationale was applied in a case before the 16th Criminal Chamber of the Paris Court of First Instance, the tribunal acquitted a person charged with “association of wrongdoers in relation to a terrorist enterprise” for joining the armed group Ahrah Al-Sham in Syria in 2015, because the group could not be qualified as terrorist, according to the judge. See Paris Court of First Instance, Case No. 13099000941, Judgment (16th Criminal Chamber), 28 September 2018, cited in S. Weill, above note 105, p. 225.

163 UNSC Res. 2178, 24 September 2014, op. para. 6(a); UNSC Res. 2396, 21 December 2017.

164 International Criminal Database, “R v. Mashudur Choudhury”, available at: www.internationalcrimesdatabase.org/Case/3286.

165 Senate of the Philippines, “‘Potential Test Case’, Lacson: Suspected Indonesian Suicide Bomber Faces Charges for Violating Anti-Terrorism Act of 2020”, press release, 14 October 2020, available at: http://legacy.senate.gov.ph/press_release/2020/1014_lacson1.asp.

continue to domesticate UNSC Resolutions 2178 and 2396, a surge in the use of terrorism charges to prosecute foreign fighters who participate in hostilities can be expected.¹⁶⁶ As noted above, while not technically wrong this may ultimately convey the message that participation in hostilities is in itself a terrorist offence.¹⁶⁷

Good practices at the domestic level

If more systematically used and developed (by the legislature and by judicial authorities respectively), the two good practices outlined below – (1) IHL and humanitarian exemptions in counterterrorism legislation, and (2) dual legal qualification – could help harmonize IHL and the counterterrorism frameworks at the national level.

IHL exclusion clauses and humanitarian safeguards

The incorporation of an IHL exclusion clause in national counterterrorism legislation is regarded as a good practice. Among others, this is foreseen by the New Zealand Terrorism Suppression Act,¹⁶⁸ by the Belgium Penal Code¹⁶⁹ and more recently in EU Directive 2017/541 on combating terrorism.¹⁷⁰ These exclusion clauses have different wordings. The EU Directive excludes “activities of armed forces during periods of armed conflict, which are governed by international humanitarian law ... , and ... activities of the military forces of a State in the exercise of their official duties”.¹⁷¹ The Belgian exclusion clause applies “to the actions of armed forces during an armed conflict as defined in and subject to IHL [and] to the actions of the armed forces of a State during the exercise of their official duties”.¹⁷² The New Zealand clause excludes certain offences of the 1961 Crimes Act, including those which relate to jurisdiction in respect of crimes on ships or aircraft beyond New Zealand.¹⁷³ These clauses first and foremost aim at excluding activities of States’ military forces from the application of the counterterrorism legislation.¹⁷⁴ Depending on the exclusion clause and its interpretation by domestic courts, the clause may exempt certain NSAGs’ activities in situations of armed conflict, as the case of the exception

166 Particularly in South East Asia – see Emma Broches, “Southeast Asia’s Overlooked Foreign Fighter Problem”, *Lawfare*, 5 June 2020, available at: www.lawfareblog.com/southeast-asias-overlooked-foreign-fighter-problem.

167 On this, see H. Cuyckens and C. Paulussen, above note 40, p. 10.

168 New Zealand, Terrorism Suppression Act, above note 139, Art. 19.

169 Belgian Criminal Code, above note 146.

170 See Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism, and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, Recital 37, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0541>.

171 See, for instance, *ibid.*, Recital 37.

172 Belgian Criminal Code, above note 146, Art. 141bis.

173 New Zealand, Terrorism Suppression Act, above note 139, Art. 19.

174 See, for instance, District Court of the Hague, *Imane B*, above note 147.

provided by a Belgian court to the PKK shows.¹⁷⁵ The adoption and interpretation of IHL exclusion clauses to the benefit of NSAGs is controversial, however, as States' judicial authorities retain the right to prosecute members of NSAGs for their mere participation in hostilities, regardless of the legality of their conduct under IHL.

Another good practice is the adoption of humanitarian safeguards, sometimes referred to as humanitarian exceptions or sectoral humanitarian exemptions,¹⁷⁶ which “grant immunity from counter-terrorism measures in respect to those individuals and entities involved in (principled) humanitarian action”.¹⁷⁷ These ensure that humanitarian activities governed by IHL do not fall within the scope of, and are not punishable under, given counterterrorism legislations. Several countries, including Switzerland,¹⁷⁸ Australia,¹⁷⁹ the UK,¹⁸⁰ the Philippines,¹⁸¹ Chad and Ethiopia,¹⁸² have adopted sectoral humanitarian exemptions in their counterterrorism legislative frameworks. The EU has also adopted a humanitarian exception in its counterterrorism directive,¹⁸³ but its transposition remains at member States' discretion.¹⁸⁴ There are various models of sectoral humanitarian exemptions.¹⁸⁵

Some of these exceptions apply to all principled humanitarian organizations, like Recital 38 of EU Directive 2017/541.¹⁸⁶ On the other hand, others only apply to some humanitarian organizations. For instance, the humanitarian exemption of the Philippine Anti-Terrorist Act is limited to “activities undertaken by the ICRC, the Philippine Red Cross and other State-recognized impartial humanitarian partners or organizations in conformity with IHL”.¹⁸⁷ The bill currently under review in the Dutch Senate, similarly, only foresees that “the prohibition to stay [in an area controlled by a terrorist organization] is not applicable if a person is there on behalf of the state or an inter-governmental organisation, or if the person is a representative of the Dutch Red Cross or the International Committee of the Red Cross”.¹⁸⁸ Further, some of the sectoral humanitarian exemptions apply in relation

175 See Brussels Court of Appeal, Case No. 2017/2911, Decision (Chamber of Indictment), 14 September 2017.

176 See above note 32.

177 Dustin A. Lewis, “Humanitarian Exemptions from Counter-Terrorism Measures: A Brief Introduction”, *Proceedings of the 17th Bruges Colloquium*, 2016, p. 144.

178 Switzerland, above note 61.

179 See above note 138.

180 UK Counter-Terrorism and Border Security Act, 2019, Section 4(4–6).

181 Philippines, Republic Act. No. 11479, above note 62, Section 13.

182 Cited in the ICRC, above note 59.

183 See Directive (EU) 2017/541, above note 170, Recital 38.

184 European Commission, above note 137.

185 See D. A. Lewis, above note 177.

186 Directive (EU) 2017/541, above note 170, Recital 38, states that “the provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do[es] not fall within the scope of this Directive”.

187 Philippines, Republic Act. No. 11479, above note 62, Section 13. On this, see Fionnuala Ní Aoláin *et al.*, comment on the Anti-Terrorism Act of 2020, UN Doc. OL PHL 4/2020, 29 June 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25384>; and the Philippine government's reply to this comment, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25384>.

188 C. Paulussen and E.-C. Gillard, above note 121.

to the entire counterterrorism framework (like in Switzerland¹⁸⁹ and the EU¹⁹⁰), while others, like in New Zealand,¹⁹¹ Australia¹⁹² and the UK,¹⁹³ concern only some terrorist offences (including entry into a “declared area” or providing resources to a foreign fighter).¹⁹⁴

Humanitarian safeguards/exemptions/exceptions – particularly as they relate to the entire domestic counterterrorism framework and encompass all principled humanitarian actors – remain the best explicit option for preventing humanitarian activities from being punished under counterterrorism law and for helping to mitigate indirect impacts of counterterrorism legislation on humanitarian actions, including de-risking and an overall “chilling effect”.¹⁹⁵

Dual legal qualification

A second good practice has been for judicial authorities to assess conducts and adjudicate them simultaneously under domestic counterterrorism legislation and IHL. For now, only national courts of some EU member States have used these two legislative frameworks to apply to the same case. In Europe, dual legal qualification has enabled States to develop some interactions between the two bodies of law in order to deal with the same case. As noted above, dual legal qualification is allowed either by a legal framework which intrinsically connects the definition of terrorism to the commission of international crimes, such as in Germany,¹⁹⁶ or “provided that all relevant facts of the act are not exhaustively judged under one set of legislation”,¹⁹⁷ such as in the Netherlands. Such practice has enabled States to comply with their obligation to investigate and prosecute war crimes under IHL, and to respond to the obligations imposed by the UNSC. Dual legal qualification ensures that the criminal responsibility of perpetrators is fully accounted for and assessed under the relevant legal regimes.

Conclusion

The UNSC has so far failed to harmonize IHL and the counterterrorism framework. The various interpretations of the UNSC terrorist and ancillary offences by States and their ongoing domestication have not created any coherence among

189 Switzerland, above note 61.

190 Directive (EU) 2017/541, above note 170, Recital 38.

191 New Zealand, Terrorism Suppression Act, above note 139, Section 10(3).

192 See above note 138.

193 See UK Counter-Terrorism and Border Security Act, 2019, Section 4(4–6).

194 See C. Paulussen and E.-C. Gillard, above note 121; M. Buissonière, S. Woznick and L. Rubinstein, above note 122, p. 21; Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, “Legislating against Humanitarian Principles: A Case Study on the Humanitarian Implications of Australian Counterterrorism Legislation”, *International Review of the Red Cross*, Vol. 97, No. 897–898, 2016.

195 N. Weizmann, above note 60.

196 See above note 88.

197 Genocide Network and Eurojust, above note 83.

counterterrorism legislations around the world, nor about the way national courts adjudicate over violations of these with regard to IHL.

A cross-cutting trend has been observed at the domestic level: individuals have been charged and indicted for terrorist offences with regard to activities committed during armed conflict, without prior assessment of the legality or illegality of these activities according to IHL. Across the cases surveyed, it seems that States have not sufficiently developed appropriate prosecutorial strategies in accordance with IHL, as required by UNSC Resolution 2396.¹⁹⁸ Twenty years after 9/11, the consequences of UNSC binding decisions on counterterrorism vis-à-vis IHL have started to resonate in domestic courts. Without a change of approach, this will have further legal and political implications in the long run.

At the national level, States should develop the appropriate legislative and regulatory framework to ensure that they can comply with their obligation to investigate and, if appropriate, prosecute war crimes.¹⁹⁹ States which do not have the jurisdiction to repress war crimes should adapt their legislative and regulatory frameworks, including in activating the principle of universal jurisdiction.²⁰⁰ Further, States should systematically adopt sectoral humanitarian exemptions to safeguard principled humanitarian activities from repressive counterterrorism frameworks.

When national legislative frameworks allow for it and when relevant, dual legal qualification should be preferred over the prosecution of terrorist offences alone (without any other incrimination), particularly when dealing with serious violations of the laws and customs of war and war crimes under the Rome Statute. In order to overcome procedural barriers to prosecution—including access to evidence—States should actively support and cooperate with evidence collection mechanisms and initiatives.²⁰¹

Finally, an IHL exclusion clause could be adopted in counterterrorism legislations to ensure that conducts which are not prohibited under IHL are not prosecuted as terrorist offences. Indeed, when no serious violations of laws and customs of war have been committed in armed conflict, members of NSAGs should be prosecuted in domestic courts for mere “participation in hostilities” or be granted amnesty at the end of hostilities.²⁰² As this recommendation remains controversial, States could identify the policy considerations and implications of this practice, depending on contexts, in relevant fora at the UN or with civil society initiatives.²⁰³

198 UNSC Res. 2396, 21 December 2017, op. para. 18.

199 ICRC Customary Law Study, above note 36, Rule 158.

200 Delegation of the ICRC to the United Nations, “Information and Observations on the Scope and Application of the Principles of Universal Jurisdiction: General Assembly Resolution 74/192”, April 2020.

201 Including UN mechanisms such as the IIIM and UNITAD (see above note 100), as well as non-UN entities such as specialized non-governmental organizations.

202 See the example of the Special Jurisdiction for Peace in Colombia, which has the mandate to grant amnesty to FARC ex-combatants who have not been charged with grave crimes. See Colombia, Law No. 1820 Providing for Amnesty, Pardon and Special Criminal Treatment Provisions and Other Provisions, 30 December 2016.

203 Views and practices can be shared across various formal or informal fora at the UN. This can take place in the form of an Arria-Formula (an informal meeting of the UNSC requested by one or more members of the Council to engage on matters within the competence of the Council but on which there may not be any

In parallel to changes at the national level, efforts should be made by the UN system (including the UNSC, but also the Secretariat and subsidiary organs of the UNSC) and mandated bodies such as the ICRC to support harmonization between IHL and counterterrorism frameworks. To start with, future UNSC counterterrorism resolutions should include humanitarian safeguards requiring States to exempt humanitarian activities from their counterterrorism frameworks at the national level. Stronger language should also be adopted to go further than the UNSC Resolution 2462 provision to “take into account”²⁰⁴ the effects of counterterrorism measures on humanitarian activities; the UNSC should require States to mitigate these effects.²⁰⁵ In addition, upcoming UNSC resolutions on counterterrorism could include language on States’ obligation to investigate and prosecute activities which may amount to war crimes, regardless of the designation of the perpetrator as “terrorist”.²⁰⁶ This would put emphasis on the obligation of States under IHL to investigate and prosecute war crimes, even in counterterrorism contexts. Further, language emphasizing that the broad criminalization of “terrorism” may limit the scope of political engagement in conflict resolution and peace processes and transitional justice could be adopted to highlight these political risks.²⁰⁷

In the meantime, until the language of UNSC counterterrorism resolutions is improved, relevant entities of the UN system should provide practical guidance for the implementation of the existing language.²⁰⁸ Guidance could be developed by Inter-Agency Working Groups of the Counter-Terrorism Compact – including the Inter-Agency Working Group on Criminal Justice and Legal Responses (chaired by the UN Office on Drugs and Crime and co-chaired by CTED) and the Inter-Agency Working Group on Promoting and Protecting Human Rights and the Rule of Law – in consultation with the Inter-Agency Standing Committee and the ICRC.²⁰⁹ Finally, CTED, which is mandated to assist States in implementing requirements under UNSC resolutions in line with their

agreement, or to engage with high representatives of government, multilateral organizations, non-State actors, experts, etc.) or a meeting of a relevant Group of Friends (an informal congregation of States working in cooperation to further specific thematic issues). Such a convening could also take place beyond the UN, in being initiated and organized by States (in the form of a retreat, a series of dialogues or a study with the purpose of circulating good practices), or can be led by civil society.

204 See UNSC Res. 2462, 28 March 2019, op. para. 24; UNSC Res. 2482, 19 July 2019, op. para. 16.

205 See the precedential language in operative paragraph 22 of UNSC Res. 2368, renewing and updating the ISIL and Al-Qaeda Sanctions Regime, which calls to “protect non-profit organizations, from terrorist abuse, using a risk-based approach, while working to *mitigate* the impact on legitimate activities” (emphasis added).

206 Operative paragraph 19 of UNSC Res. 2396 “reaffirms that those responsible for committing or otherwise responsible for terrorist acts, and violations of international humanitarian law or violations or abuses of human rights in this context, must be held accountable”.

207 Ali Altiok and Jordan Street, “A Fourth Pillar for the United Nations: The Rise of Counter-Terrorism”, *Saferworld*, June 2020.

208 Including all iterations requiring complying with IHL as well as with operative paragraphs 5, 6 and 24 of UNSC Res. 2462, and operative paragraph 18 of UNSC Res. 2396.

209 Guidance is regularly developed by Inter-Agency Working Groups of the Counter-Terrorism Compact; see, for instance, United Nations, *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters*, November 2018, available at: www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf.

obligations under IHL, could continue to bolster its IHL expertise and capacity so as to better support States in their interpretation and implementation of those resolutions.²¹⁰

The codification, interpretation and practices of States regarding the adjudication of terrorist-related offences committed in situations of armed conflict will influence the development of customary international law. Although these considerations may seem politically ludicrous when dealing with ISIL and affiliated groups, there is a need to caution against practices that could hamper IHL frameworks along with prospects for peace in the long run. As Ben Saul puts it, “[d]espite the shifting and contested meanings of ‘terrorism’ over time, the peculiar semantic power of the term, beyond its literal signification, is its capacity to stigmatize, delegitimize, denigrate, and dehumanize those at whom it is directed, including legitimate political opponents”²¹¹ – and such an agenda has the power to erode the protection norms upheld by the laws of war. It is thus fundamental not to develop practices that may seem like a solution to contemporary terrorism but which are detrimental in the long run. Indeed, such practices may erode the carefully crafted balance between humanitarian considerations and military necessities as reflected in IHL and, in turn, shape future NIACs and risk hampering their resolution. Conducts and crimes occurring during and in connection with an armed conflict should be assessed in accordance with IHL, regardless of their “terrorist” label.

210 Concerns exist, however, on the issue of bolstering CTED’s mandate in regard to IHL. See D. A. Lewis, N. K. Modirzadeh and J. Burniske, above note 67.

211 B. Saul, above note 10, p. 3.

Terrorist offences and international humanitarian law: The armed conflict exclusion clause

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Abstract

While armed conflicts are principally governed by international humanitarian law (IHL), activities of members of non-State armed groups and their affiliates may also qualify as terrorist offences. After explaining why the concurrent application of IHL and criminal law instruments on terrorism causes friction, this article analyzes the chief mechanism for dissipating this friction: a clause excluding activities governed by IHL from the scope of criminal law instruments on terrorism. Such armed conflict exclusion clauses exist at the international, regional and national level. This article explains how an exclusion clause can best avoid friction between IHL and criminal law instruments on terrorism.

Keywords: international humanitarian law, terrorism, criminal law, exclusion clause, non-State armed group, non-international armed conflict.

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Introduction

A group of individuals operating from a European country collects money and recruits fighters for a non-State armed group (NSAG) that is a party to an armed conflict in the Middle East. In their home country, the individuals are prosecuted for a range of terrorist offences. In their defence, the accused submit that, as their activities relate to an armed conflict, they are excluded from prosecution for terrorist offences. How should the criminal court address such an argument?

Of course, situations of armed conflict are pre-eminently governed by international humanitarian law (IHL). At the same time, many of the activities of members of NSAGs and their affiliates in relation to armed conflicts qualify as terrorist offences under “criminal law instruments on terrorism”. The latter notion is used here to refer to international and regional legal instruments that oblige States to criminalize terrorist activities, as well as to domestic criminal law sanctioning terrorist offences. This article will look at the international sectoral terrorism conventions¹ and a range of regional conventions on terrorism.² Another relevant instrument is European Union (EU) Directive 2017/541 on combating terrorism,³ which all EU member States have implemented in their national criminal codes.⁴

IHL and criminal law instruments on terrorism are based on different rationales. The first section of this paper will show how their concurrent application to situations of armed conflict and related activities causes friction. One can eliminate or at least reduce this friction by clarifying whether and to what extent criminal law instruments on terrorism apply to situations of armed conflict. Indeed, some international and regional instruments contain a clause excluding activities governed by IHL from their scope of application. The second

1 There are nineteen international legal instruments: twelve conventions and seven protocols/amendments. See UN Office of Counter-Terrorism, “International Legal Instruments”, available at: www.un.org/counterterrorism/international-legal-instruments (all internet references were accessed in August 2021).

2 For references, see below note 24.

3 Directive (EU) 2017/541 of the European Parliament and of the Council on Combating Terrorism, 15 March 2017, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L 88/6.

4 European Commission, *Report from the Commission to the European Parliament and the Council Based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA*, COM(2020) 619 final, Brussels, 30 September 2020. Barring France and Italy, all member States adopted specific legislation to transpose Directive 2017/541. However, the Commission does note several transposition issues.

section discusses the exclusion clauses that exist at the international and regional level.

Thirdly, this article analyzes and compares some exclusion clauses in domestic criminal legislation. To our knowledge, only very few countries have adopted such clauses. Based on a literature review, they have been identified in the laws of Belgium, Canada, Ireland, New Zealand, South Africa, Switzerland and the United States.

The Belgian, Canadian and New Zealand exclusion clauses are the most encompassing. They apply not just to specific terrorist offences, but to all terrorist offences, including offences relating to (mere) participation in a terrorist group. Furthermore, their scope is not limited to a particular type of armed conflict. To better understand the practical effects of these clauses, the interesting case law from Belgium and Canada is analyzed in the fourth section.

In the penultimate section, the said case law is used to clarify the personal, material and geographical scope of application of the exclusion clause and compare it with the scope of application of IHL. The final section contains suggestions on how the exclusion clause should be applied to realize the underlying rationales of IHL and criminal law instruments on terrorism while ensuring that war criminals and terrorists are prosecuted on the basis of the appropriate legal framework.

Friction between IHL and criminal law instruments on terrorism

How IHL approaches terrorism

Combatants participating in international armed conflicts (IACs) enjoy a combatant privilege or immunity,⁵ meaning that criminal law instruments on terrorism cannot serve to criminalize their mere participation in hostilities. In non-international armed conflicts (NIACs), members of NSAGs fight States or fight each other without such combatant privilege. Hence, IHL does not preclude States from prosecuting acts committed by members of NSAGs, even if permitted under IHL, as terrorist offences.⁶ For there to be a NIAC, it is required that (1) the relevant violence is of sufficient intensity, and (2) the NSAG involved is sufficiently organized.⁷ The required level of organization of the group can be established by

5 See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 43(2); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), p. 384, Rule 106, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

6 See, for example, Kimberley N. Trapp, "The Interaction of the International Terrorism Suppression Regime and IHL in Domestic Criminal Prosecutions: The UK Experience", in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, TMC Asser Press, The Hague, 2014, pp. 177–178.

7 See, notably, International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70; ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj*

a range of indicative criteria, notably including “the existence of a command structure and disciplinary rules and mechanisms within the group” that enable it to implement IHL.⁸ Factors other than intensity and organization, such as the aim of the NSAG, are irrelevant.⁹ Thus, NSAGs designated as “terrorist” can also be a party to an armed conflict.¹⁰ Put differently, IHL deals with (alleged) terrorist groups involved in an armed conflict irrespective of the “terrorist” label.¹¹

Furthermore, IHL addresses terrorist acts committed in the context of an armed conflict. It specifically prohibits acts of terrorism against civilians who are in the power of a party to the conflict.¹² In the conduct of hostilities, “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” are prohibited.¹³ Apart from these specific prohibitions, general IHL rules prohibit most other acts that could be classified as terrorism in peacetime, like attacking civilians or civilian objects.¹⁴ As serious violations of IHL constitute war crimes, these IHL prohibitions can – and must – be enforced through criminal law.¹⁵ On the other hand, IHL does permit certain activities that are forbidden and criminal in peacetime, like attacking combatants and military objectives.¹⁶

How the use of criminal law instruments on terrorism affects IHL

Overall, IHL provides parties to an armed conflict with a neutral code of conduct regardless of the aim they pursue.¹⁷ The notion of terrorism, on the other hand,

and *Lahi Brahima*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, paras 49, 60; ICTY, *The Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, paras 175–205.

8 ICTY, *Haradinaj*, above note 7, para. 60; see also ICTY, *Bošković*, above note 7, paras 194–205.

9 ICTY, *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 170; confirmed by International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), paras 447–451, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>.

10 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, Geneva, November 2019, pp. 58–59, available at: www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts.

11 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 495.

12 For IACs, see Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 33; for NIACs, see Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 4(2)(d).

13 For IACs, see AP I, Art. 51(2); for NIACs, see AP II, Art. 13(2); ICRC Customary Law Study, above note 5, p. 8, Rule 2; recognized as a war crime under customary IHL, see ICTY, *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment (Appeals Chamber), 30 November 2006, para. 98.

14 See, for example, Jelena Pejic, “Armed Conflict and Terrorism: There Is a (Big) Difference”, in Ana María Salinas de Frías, Katja L. H. Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2012, p. 175.

15 ICRC Customary Law Study, above note 5, pp. 568–611, Rules 156–158.

16 *Ibid.*, respectively at p. 3, Rule 1, and p. 25, Rule 7.

17 Elizabeth Chadwick, *Self-Determination, Terrorism and the International Law of Armed Conflict*, Martinus Nijhoff, The Hague, 1996, pp. 7–8.

is a “powerful rhetorical tool”¹⁸ that is “ideologically and politically loaded; pejorative; [and] implies moral, social and value judgment”.¹⁹ Hence, the aim behind acts of terrorism is what distinguishes them from other crimes²⁰ and lies at the heart of attempts to define terrorism.²¹ Due to the disagreement on the definition of terrorism at the international level, the sectoral terrorism conventions generally refrain from taking into account the said aim.²² These conventions oblige States to criminalize certain types of (objective) conduct, like aircraft hijacking.²³ At the regional level, States have agreed on definitions of terrorism. Accordingly, many regional instruments on terrorism do take into account the aim behind the acts they cover.²⁴ Under EU Directive 2017/541 on combating terrorism, a number of acts, like an attack on a person’s life, constitute a terrorist offence if they are committed with at least one of three aims:

- (a) seriously intimidating a population;
- (b) unduly compelling a government or an international organization to perform or abstain from performing any act;
- (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.²⁵

18 K. N. Trapp, above note 6, p. 165. See also David Anderson, “Shielding the Compass: How to Fight Terrorism without Defeating the Law”, *European Human Rights Law Review*, No. 3, 2013, pp. 234–235.

19 Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006, p. 3.

20 *Ibid.*, pp. 7, 10–11, 27, 38–45.

21 Erling Johannes Husabø and Ingvild Bruce, *Fighting Terrorism through Multilevel Criminal Legislation: Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law*, Martinus Nijhoff, Leiden, 2009, p. 135.

22 The exception is the International Convention on the Suppression of the Financing of Terrorism, 2178 UNTS 197, 9 December 1999 (entered into force 10 April 2002) (Terrorist Financing Convention), Art. 2(1)(b), on which see the main text at below note 37.

23 B. Saul, above note 19, pp. 8, 38, 130–142.

24 Arab Convention for the Suppression of Terrorism, 22 April 1998 (entered into force 7 May 1999), Art. 1 (2)–(3); OAU Convention on the Prevention and Combating of Terrorism, 1 July 1999 (entered into force 6 December 2002), Art. 1(3) (see also the African Model Anti-Terrorism Law, Final Draft as endorsed by the 17th Ordinary Session of the Assembly of the African Union, Malabo, 30 June–1 July 2011, Art. 4 (xxxix)); Convention of the Organisation of the Islamic Conference on Combating International Terrorism, 1 July 1999 (entered into force 7 November 2002), Art. 1(2)–(3); Shanghai Cooperation Organization Convention on Combating Terrorism, Separatism and Extremism, 15 June 2001 (entered into force 29 March 2003), Art. 1; Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism, 6 January 2002 (entered into force 12 January 2006), Art. 4(1). Some regional instruments define terrorist offences only by reference to the international sectoral conventions; see Inter-American Convention against Terrorism, 3 June 2002 (entered into force 6 July 2003), Art. 2; ASEAN Convention on Counter Terrorism, 13 January 2007 (entered into force 27 May 2011), Art. 2, but see Art. IX(1); Council of Europe Convention on the Prevention of Terrorism, 16 May 2005 (entered into force 1 June 2007), Art. 1(1), as supplemented by the Additional Protocol to the Convention, 22 October 2015 (entered into force 1 July 2017). See B. Saul, above note 19, pp. 142–168.

25 Directive (EU) 2017/541, above note 3, Art. 3(2). Note that the EU Framework Decision of 13 June 2002 on Combating Terrorism, now Directive 2017/541, also states that the offence must involve acts “which, given their nature or context, may seriously damage a country or an international organization”. Some EU member States, such as Belgium, have interpreted this as an extra requirement for the offence. However, as Borgers points out, it is not clear whether the Framework Decision actually requires this, as the said phrase can also be read as a mere statement rather than an additional requirement. See Matthias Borgers, “Een gevaarzettingvereiste voor terroristische misdrijven?”, in Toine Spapens, Marc Groenhuijsen and Tijs

Directive 2017/541 defines a “terrorist group” as “a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences”.²⁶

It goes without saying that an NSAG involved in an armed conflict against a State commits violent acts with at least one of the aims listed above and thus qualifies as a “terrorist group” under the Directive.²⁷ This qualification may engender the misconception on the part of certain State authorities that “terrorist groups” cannot be a party to an armed conflict or that IHL does not apply to them.²⁸ For example, when ratifying Additional Protocol I (AP I) and the 1980 Convention on Certain Conventional Weapons, the UK attached a reservation stating that “the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation”.²⁹ Another example of this misconception is the Belgian case law on jihadist groups discussed below, in which courts have essentially denied that the relevant groups were a party to an armed conflict because they met the definition of a terrorist group.

Further friction between IHL and criminal law instruments on terrorism stems from the fact that the latter usually do not distinguish between acts permitted and acts prohibited by IHL, but criminalize both.³⁰ This criminalization undermines the legal incentive for armed groups to comply with IHL.³¹ According to the International Committee of the Red Cross (ICRC), acts permitted by IHL “constitute the very essence of armed conflict and, as such,

Kooijmans (eds), *Universalis: Liber Amicorum Cyrille Fijnaut*, Intersentia, Brussels, 2011. Therefore, other States, such as the Netherlands, have not included this phrase in their national legislation implementing the EU Framework Decision/Directive.

26 Directive (EU) 2017/541, above note 3, Art. 2(3).

27 See, for example, Antonio Coco, “The Mark of Cain: The Crime of Terrorism in Times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in *R v. Mohammed Gul*”, *Journal of International Criminal Justice*, Vol. 11, No. 2, 2013, p. 438.

28 ICRC, above note 10, pp. 58–59.

29 See: www.legislation.gov.uk/ukxi/2001/2559/schedules/made/data.xht?view=snippet&wrap=true.

30 There are some exceptions to this; see the Terrorist Financing Convention, Art. 2(1)(b), and the Canadian, New Zealand, South African and Swiss exclusion clauses, as discussed below.

31 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, EN 31IC/11/5.1.2, Geneva, October 2011 (ICRC Challenges Report 2011), pp. 48–50; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, EN 32IC/15/11, Geneva, October 2015 (ICRC Challenges Report 2015), pp. 17–18; ICRC, above note 10, p. 58; J. Pejic, above note 14, pp. 172, 184–186. See also A. Coco, above note 27, pp. 438–440; Tristan Ferraro, “Interaction and Overlap between Counter-Terrorism Legislation and International Humanitarian Law”, in *Proceedings of the 17th Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law*, 20–21 October 2016, p. 29; Daniel O’Donnell, “International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 868; B. Saul, above note 19, pp. 88, 317–318; Ben Saul, “The Legal Death of Rebellion: Counterterrorism Laws and the Shrinking Legal Freedom of Violent Political Resistance”, in Benjamin J. Goold and Liora Lazarus (eds), *Security and Human Rights*, Hart Publishing, Oxford, 2019, pp. 324, 337–338; Marco Sassòli, “Terrorism and War”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 970; M. Sassòli, above note 11, pp. 277, 467, 597; K. N. Trapp, above note 6, p. 170.

should not be legally defined as ‘terrorist’ under another regime of law’.³² To enhance the implementation of IHL, acts prohibited by IHL should be prosecuted as war crimes and not as terrorist offences.³³ Lastly, in some situations, labelling an NSAG “terrorist” may fuel or at least solidify hostility, and prejudice potential peace and reconciliation efforts.³⁴

Considering the above, there are sound reasons to exclude activities governed by IHL from the scope of criminal law instruments on terrorism.³⁵ That is what a number of international and regional instruments have done.

Exclusion clauses at the international and regional level

There are twelve international conventions on terrorism, two of which contain a unique provision governing their relationship with IHL that does not appear in any of the other conventions. Article 12 of the 1979 Hostages Convention provides that the Convention shall not apply to acts of hostage-taking prohibited by IHL, but only refers to those committed in IACs.³⁶ Article 2(1)(b) of the 1999 Terrorist Financing Convention extends its definition of offences falling within the scope of that Convention to situations of armed conflict, but only for the financing of attacks against civilians or other persons *hors de combat*.³⁷ Hence, the Terrorist Financing Convention does not criminalize the financing of attacks against combatants or military objectives, whether in international or non-international armed conflicts.³⁸

32 ICRC Challenges Report 2015, above note 31, p. 18; see also ICRC Challenges Report 2011, above note 31, p. 50; T. Ferraro, above note 31, p. 30; J. Pejic, above note 14, p. 177.

33 ICRC Challenges Report 2011, above note 31, p. 51; J. Pejic, above note 14, pp. 185, 198.

34 ICRC Challenges Report 2011, above note 31, p. 51; ICRC Challenges Report 2015, above note 31, p. 18; UN Office on Drugs and Crime (UNODC), *Counter-Terrorism in the International Law Context*, Advance Copy, Vienna, 2021, p. 107, available at: www.unodc.org/pdf/terrorism/CTLTC_CT_in_the_Intl_Law_Context_1_Advance_copy.pdf; Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism*, Hart Publishing, Oxford, 2011, p. 163; T. Ferraro, above note 31, p. 29; J. Pejic, above note 14, pp. 196–198; B. Saul, above note 31, p. 338; K. N. Trapp, above note 6, p. 180.

35 Also “exclusively humanitarian activities carried out by impartial humanitarian organizations operating in accordance with IHL” should be excluded from the scope of criminal law instruments on terrorism: see ICRC, “Counter-Terrorism Measures Must Not Restrict Impartial Humanitarian Organizations from Delivering Aid”, statement to United Nations Security Council debate “Threats to International Peace and Security Caused by Terrorist Acts: International Cooperation in Combating Terrorism 20 Years after the Adoption of Resolution 1373 (2001)”, 12 January 2021, available at: www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations#; as well as ICRC Challenges Report 2011, above note 31, pp. 51–53; ICRC Challenges Report 2015, above note 31, pp. 20–21; ICRC, above note 10, pp. 59–61. However, the “standard” exclusion clause, as discussed below, is limited to the “activities of armed forces”. Also irrespective of this limitation on the personal scope of application of the standard exclusion clause, the above-mentioned humanitarian activities may not always (directly) benefit from the exclusion clauses that we discuss here. Hence, they should be the subject of a separate, so-called “humanitarian exemption” clause, e.g. Directive (EU) 2017/541, above note 3, Recital 38. On this topic, see, for example, David McKeever, “International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations”, *International and Comparative Law Quarterly*, Vol. 69, No. 1, 2020.

36 International Convention against the Taking of Hostages, 1316 UNTS 205, 17 December 1979 (entered into force 3 June 1983) (Hostages Convention).

37 Terrorist Financing Convention, Art. 2(1)(b).

38 J. Pejic, above note 14, p. 188.

Here we will focus on the “standard” exclusion clause, which has become the prevalent armed conflict exclusion clause since 1997. At the international level, this clause is included in six of the international conventions on terrorism.³⁹ Furthermore, it is the subject of controversy in the negotiations of the Comprehensive Convention on International Terrorism.⁴⁰

The clause was conceived in the context of the 1997 Terrorist Bombings Convention, and first appeared in Article 19(2) of that Convention. It is part of a two-pronged provision, and reads:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.⁴¹

The second prong deals with the activities of military forces of a State in different situations, like law enforcement or peacekeeping operations not amounting to armed conflict, and is not the issue here. The first prong relates to situations of armed conflict and is the exclusion clause studied here.

The *travaux préparatoires* of the Terrorist Bombings Convention reveal that the provision was controversial from the outset. A number of mostly Western States primarily wanted to exclude the military activities of States from the scope of the Convention.⁴² A number of predominantly Muslim States, on the other hand, were troubled by the exclusion of “State terrorism”. At the same time, many of those States wanted to selectively exclude the application of the

39 In chronological order: (1) Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105, 16 December 1970 (entered into force 14 October 1971), Art. 3*bis* (2) (as introduced by Art. VI of the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, ICAO Doc. 9959, 10 September 2010 (entered into force 1 January 2018)); (2) Convention on the Physical Protection of Nuclear Material, 1456 UNTS 101, 26 October 1979 (entered into force 8 February 1987), Art. 2(4)(b) (as replaced by Art. 1(A) of the Amendment to the Convention on the Physical Protection of Nuclear Material, UNTS Reg. No. 24631, 8 July 2005 (entered into force 8 May 2016)); (3) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 UNTS 201, 10 March 1988 (entered into force 1 March 1992), Art. 2*bis* (2) (as introduced by Art. 3 of the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21, 14 October 2005 (entered into force 28 October 2010)); (4) International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256, 15 December 1997 (entered into force 23 May 2001) (Terrorist Bombings Convention), Art. 19(2); (5) International Convention for the Suppression of Acts of Nuclear Terrorism, 2445 UNTS 89, 13 April 2005 (entered into force 7 July 2007) (Nuclear Terrorism Convention), Art. 4(2); (6) Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, ICAO Doc. 9960, 10 September 2010 (entered into force 1 July 2018), Art. 6(2).

40 See *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN Doc. A/68/37, 8–12 April 2013, Annex II –III, pp. 15–27.

41 Terrorist Bombings Convention, Art. 19(2).

42 See, for example, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN Doc. A/52/37, 31 March 1997, Annex II, Art. 3(1), and Annex IV, pp. 53–55.

Convention to wars of national liberation,⁴³ an approach subsequently adopted for the Organization of African Unity (OAU, now African Union (AU)), Organization of the Islamic Conference (OIC, now Organization of Islamic Cooperation) and Arab regional conventions on terrorism.⁴⁴ Lastly, some States favoured an unambiguous extension of the exclusion clause to the activities of NSAGs. These States usually did so only for activities “in accordance with” IHL.⁴⁵

The result of the negotiations was a relatively ambiguous clause, excluding from the scope of the Convention “activities of armed forces during an armed conflict”. In IHL instruments and parlance, the term “armed forces” is usually reserved for IACs and thus for State armed forces and, in rare situations, national liberation movements.⁴⁶ The armed forces of non-State parties to a NIAC – i.e., NSAGs – are usually referred to as “organized armed groups”.⁴⁷ Moreover, the debates about the exclusion clause in the context of the Terrorist Bombings Convention⁴⁸ and Comprehensive Convention on International Terrorism show that some States do not consider the notion of armed forces to extend to non-State parties to a NIAC.⁴⁹ Conversely, Article 3 common to the four Geneva Conventions refers to the armed forces of non-State parties to NIACs as “armed forces”. Furthermore, in light of the principle of equality of rights and obligations of the parties to an armed conflict, the ICRC believes that the exclusion clause should also cover NSAGs.⁵⁰

43 Most vocal were Pakistan (see, for example, *Report of the Ad Hoc Committee*, above note 42, Annex III, UN Doc. A/AC.252/1997/WP.16; UN General Assembly, Sixth Committee, *Pakistan: Proposed Amendments to the Draft Resolution Proposed by Costa Rica* (A/C.6/52/L.13), UN Doc. A/C.6/52/L.19, 18 November 1997) and the Syrian Arab Republic (see, for example, UN General Assembly, Sixth Committee, *Measures to Eliminate International Terrorism: Report of the Working Group*, UN Doc. A/C.6/52/L.3, 10 October 1997, Annex II, UN Doc. A/C.6/52/WG.1/CRP.4).

44 See Arab Convention for the Suppression of Terrorism, Art. 2(a); OAU Convention on the Prevention and Combating of Terrorism, Art. 3(1) (see also the African Model Anti-Terrorism Law, above note 24, Art. 4 (xl)(b)); Convention of the Organisation of the Islamic Conference on Combating International Terrorism, Art. 2(a).

45 See, notably, the Belgian proposals: UN General Assembly, Sixth Committee, *Report of the Working Group*, above note 43, Annex II, UN Docs A/C.6/52/WG.1/CRP.11, A/C.6/52/WG.1/CRP.29, A/C.6/52/WG.1/CRP.39. See also the proposal by South Africa and Switzerland: *ibid.*, UN Doc. A/C.6/52/WG.1/CRP.27.

46 See AP I, Art. 43; ICRC Customary Law Study, above note 5, p. 14, Rule 4; Mahmoud Hmoud, “Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 1036; E. J. Husabø and I. Bruce, above note 21, pp. 381–383.

47 See AP II, Art. 1(1), on NIACs “in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups” (emphasis added), as stressed by the Court of First Instance of The Hague, *The Prosecutor v. Imane B. et al.*, Case No. 09/842489-14 etc., ECLI:NL:RBDHA:2015:14365 (in Dutch) and ECLI:NL:RBDHA:2015:16102 (English translation), 10 December 2015 (Context case), paras 7.38, 7.40.

48 See, for example, *Report of the Ad Hoc Committee*, above note 42, Annex IV, pp. 53–55.

49 See, for example, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN Doc. A/62/37, 5–15 February 2007, p. 7; cf. Helen Duffy, *The “War on Terror” and the Framework of International Law*, Cambridge University Press, Cambridge, 2015, pp. 35–36, 43–44; J. Pejic, above note 14, p. 189.

50 UN General Assembly, Sixth Committee, Working Group Established Pursuant to General Assembly Resolution 51/210, *Statement by the ICRC*, UN Doc. A/C.6/53/WG.1/INF/1, 6 October 1998, fn. 3. For a similar view, see UNODC, above note 34, p. 104; Sandra Krähenmann, “Legal Framework

Some have argued that since the drafters referred to “armed forces” in the first prong of the provision but to “military forces of a state” in the second prong, “armed forces” must by implication also cover non-State forces.⁵¹ However, this argument is not conclusive. The first prong is about situations governed by IHL and hence refers to “armed forces”, a notion known in IHL. The second prong is not about IHL, but is about all “other rules of international law”. Thus, the drafters opted for “military forces of a state” as a *sui generis* notion, which they defined separately in Article 1(4) of the Terrorist Bombings Convention.⁵² Both notions operate in different legal spheres, and it seems that they should not be read in relation to one another.

During the negotiations on the Comprehensive Convention on International Terrorism, in 2002, the member States of the OIC launched a competing version of the standard exclusion clause that replaces the notion “armed forces” with “parties”.⁵³ In 1998 and 1999, the ICRC made a similar proposal during the negotiations of the Nuclear Terrorism Convention and the Terrorist Financing Convention.⁵⁴ According to Pejic, the term “parties” “is correct as a matter of IHL because that is the term of art used to designate the opposing sides in an armed conflict, whether international or non-international”.⁵⁵ Nevertheless, this term appears to be unacceptably broad for the States favouring the standard clause. It would extend the scope of the exclusion clause to all non-State parties to armed conflicts in their entirety, including civilians belonging to such non-State parties.⁵⁶ We will assume that the standard exclusion clause also covers the armed forces of non-State parties to NIACs.

Quite clearly, the wording of the standard exclusion clause is not, or at least is no longer, accepted across regions. This explains why it is only in Europe that the clause has been copied into regional criminal law instruments on terrorism.⁵⁷ It is

Addressing Terrorism and Counter-Terrorism”, *Proceedings of the 17th Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law*, 20–21 October 2016, p. 21; D. O'Donnell, above note 31, p. 866; J. Pejic, above note 14, pp. 189–193, 203; K. N. Trapp, above note 6, p. 173. Cf. UK Supreme Court (UKSC), *R v. Gul (Appellant)*, Case No. UKSC 2012/0124, Neutral Citation No. [2013] UKSC 64, 23 October 2013, para. 52.

51 See, for example, A. Coco, above note 27, p. 434; Tom Ruys and Sebastiaan Van Severen, “Art. 141bis Sw. – Vervolging tussen hamer en aambeeld van terreurbestrijding en internationaal humanitair recht”, *Rechtskundig Weekblad*, Vol. 82, No. 14, 2018, p. 531.

52 “‘Military forces of a State’ means the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security and persons acting in support of those armed forces who are under their formal command, control and responsibility.” See, for example, *Report of the Ad Hoc Committee*, above note 40, Annex III, p. 25, para. 27.

53 *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, UN Doc. A/57/37, 11 February 2002, Annex IV, p. 17.

54 Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, *Replies Given on 22 March 1999 by the Observer of the International Committee of the Red Cross to the Questions Asked by the Delegations of Belgium and Mexico Regarding the Implications of Article 2, Paragraph 1(b)*, UN Doc. A/AC.252/1999/INF/2, 26 March 1999, p. 3.

55 J. Pejic, above note 14, p. 192; see also p. 203. See also T. Ferraro, above note 31, p. 30.

56 Cf. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 31–35.

57 A slight exception is Art. 4(xl)(c) of the African Model Anti-Terrorism Law, above note 24, which contains a variation of the exclusion clause. The provision unambiguously excludes from its definition of “terrorist

included in the 2005 Council of Europe Convention on the Prevention of Terrorism,⁵⁸ and as a recital in the 2002 EU Framework Decision on combatting terrorism⁵⁹ and the 2017 Directive replacing it.⁶⁰ This suggests that at least for EU member States, the exclusion clause forms part of the “acquis” of criminal law instruments on terrorism.

Some argue that nothing in IHL precludes the application of the international sectoral terrorism conventions or, for that matter, regional legal instruments on terrorism. They consider notably that the sectoral conventions’ cooperation regime, involving matters of mutual legal assistance and extradition, should also apply to activities governed by IHL.⁶¹ However, the issue is not whether IHL excludes the application of the sectoral conventions—indeed, save for the bar imposed by the combatant privilege in IACs, it does not. Rather, the issue is whether the sectoral conventions exclude their application to activities governed by IHL. As we have just shown, they do. The advocates of the said view correctly note that the Geneva Conventions and Additional Protocols provide for only a limited regime of international cooperation in relation to war crimes, namely the grave breaches regime, which exists only in IACs.⁶² However, as noted by Trapp, and especially in light of the friction between IHL and criminal law instruments on terrorism discussed above, “it is not ... for the terrorism suppression regime to remedy gaps in IHL criminal law enforcement”.⁶³

The fact that the sectoral conventions do not apply to activities of armed forces governed by IHL does not necessarily make this exclusion mandatory. If the exclusion clause is mandatory, States are obliged to implement it into their national criminal law and are prohibited from qualifying the activities of armed forces governed by IHL as terrorist offences. If it is not, excluding these activities from the reach of domestic criminal law on terrorism is a mere possibility, but not an obligation. In light of the role of IHL discussed above, one could argue that the exclusion clause should be mandatory,⁶⁴ however, it seems that at least as

act” “acts covered by international humanitarian law, committed in the course of an international or non-international conflict by government forces or members of organized armed groups”.

58 Council of Europe Convention on the Prevention of Terrorism, Art. 26(5).

59 EU Framework Decision on Combating Terrorism, above note 25, Recital 11.

60 Directive (EU) 2017/541, above note 3, Recital 37.

61 Alejandro Sánchez Frías, “Bringing Terrorists to Justice in the Context of Armed Conflict: Interaction between International Humanitarian Law and the UN Conventions against Terrorism”, *Israel Law Review*, Vol. 53, No. 1, 2020, pp. 88–89, 98; Dan E. Stigall and Christopher L. Blakesley, “Non-State Armed Groups and the Role of Transnational Criminal Law During Armed Conflicts”, *George Washington International Law Review*, Vol. 48, No. 1, 2015, pp. 34–42.

62 A. Sánchez Frías, above note 61, pp. 84–88; D. E. Stigall and C. L. Blakesley, above note 61, p. 39. For the grave breaches regime, see Geneva Convention I, Arts 49–50; Geneva Convention II, Arts 50–51; Geneva Convention III, Arts 129–130; Geneva Convention IV, Arts 146–147; AP I, Arts 85–89. As noted by K. N. Trapp, above note 6, p. 178, AP II does not create a criminal law enforcement regime for IHL violations in NIACs, precisely because it “leaves States free to criminalise any and all conduct during the course of a NIAC, including attacks against military objectives”.

63 K. N. Trapp, above note 6, pp. 174–175; see also p. 181.

64 See, for example, A. Coco, above note 27, pp. 431–435, 439–440; K. N. Trapp, above note 6, pp. 172–181.

a matter of law, “the exclusionary clauses are by nature options and not mandatory exceptions”.⁶⁵ This is also the view adopted by the UK Supreme Court in *R v. Gul*⁶⁶ and the Court of Justice of the EU in the *LTTE* case.⁶⁷ As stressed by Dutch courts, this optional nature goes especially for the EU legal instruments, which include the exclusion clause only in a non-binding recital.⁶⁸ Nevertheless, a few States have, in varying ways, transposed the exclusion clause into their domestic legislation.

Exclusion clauses at the national level

We will discuss States’ domestic exclusion clauses from the least to the most encompassing. We mainly differentiate between States that only have one or more “offence-specific” clauses (Switzerland, the United States and Ireland) and States that (also) have a “general” clause (South Africa, Canada, New Zealand and Belgium). Offence-specific clauses usually follow the wording of the sectoral convention or regional criminal law instrument on terrorism that they implement, and attach to one or more specific domestic terrorist offences (e.g. terrorist bombing). General clauses apply to all terrorist offences in a State’s criminal legislation, including group offences like participation in the activities of a terrorist group.

Secondly, we differentiate between exclusion clauses that only cover acts “in accordance with” IHL (South Africa, Canada and New Zealand; Switzerland, the United States and Ireland for terrorist financing) and those that follow the wording of the standard exclusion clause and cover all acts “governed by” IHL (Belgium; United States and Ireland for offences other than terrorist financing). “Acts in accordance with IHL” comprise only those acts that are permitted by IHL, whereas “acts governed by IHL” include all acts that are contemplated by IHL rules, regardless of whether they comply with them or not. As they follow the wording of the standard exclusion clause, clauses covering all “acts governed

65 E. J. Husabø and I. Bruce, above note 21, p. 395. See also UNODC, above note 34, p. 105; T. Ruys and S. Van Severen, above note 51, p. 531.

66 UKSC, *Gul*, above note 50, para. 53. On this case, see A. Coco, above note 27; Alan Greene, “The Quest for a Satisfactory Definition of Terrorism: *R v Gul*”, *Modern Law Review*, Vol. 77, No. 5, 2014; K. N. Trapp, above note 6, pp. 175–180.

67 Court of Justice of the EU, *A, B, C, D v. Minister van Buitenlandse Zaken*, Case No. C-158/14, ECLI:EU:C:2017:202, 14 March 2017, para. 95. On this case, see Luca Pantaleo, “To Be Or Not To Be (a Terrorist): Understanding the Interplay between EU Anti-Terrorism Legislation and International Humanitarian Law in Light of Recent EU Case Law”, *Revista General de Derecho Europeo*, Vol. 44, 2018; Michael Wimmer, “Counter-Terrorism Sanctions, Non-International Armed Conflicts and Tamil Tigers: *A and Others*”, *Common Market Law Review*, Vol. 55, No. 5, 2018.

68 Court of First Instance of the Hague, *Context* case, above note 47, para. 7.36. On this case, see Hanne Cuyckens and Christophe Paulussen, “The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship between Counter-Terrorism and International Humanitarian Law”, *Journal of Conflict and Security Law*, Vol. 24, No. 3, 2019, pp. 549–550. See also Court of Appeal of the Hague, *The Prosecutor v. Thiruna E. et al.*, Case No. 22-005123-11, ECLI:NL:GHDHA:2015:1082, 30 April 2015, para. 10.5; on this case, see Ward Ferdinandusse and Pieter Rademakers, “The Prosecution of Sanction Busters”, in Larissa van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar, Cheltenham, 2017, pp. 385–388.

by IHL” limit their personal scope of application to the activities of “armed forces” during an armed conflict. The clauses only covering “acts in accordance with IHL” do not contain a limitation on their personal scope of application.

Lastly, the South African clause is the only one that exclusively applies to wars of national liberation. The other clauses do not contain such a limitation.

Offence-specific clauses: Switzerland, the United States and Ireland

Until recently, the only terrorist offence in the Swiss Criminal Code was terrorist financing. The relevant provision states that there is no such offence if the financing is directed at acts in accordance with IHL.⁶⁹ This approach corresponds to the specific provision included in the 1999 Terrorist Financing Convention. A new Swiss law (2020) now criminalizes participation in and support of a terrorist group, as well as recruitment and training for, and travel for the purposes of, a terrorist act. It does not contain any exclusion clause.⁷⁰

In the United States, the standard exclusion clause is attached to the offence of acts of nuclear terrorism and that of terrorist bombings.⁷¹ The standard exclusion clause is indeed included in the 2005 Nuclear Terrorism Convention and the 1997 Terrorist Bombings Convention. The fact that the United States copied the exclusion clause from the relevant conventions when implementing them is illustrated also by the fact that the offence of terrorist financing includes the specific provision of the 1999 Terrorist Financing Convention.⁷² However, as noted by the UK Supreme Court in the *Gul* case, the position of the United States on the exclusion clause in domestic criminal law is “ambivalent”, as some of its provisions on terrorism are “widely drawn without the exclusion”.⁷³

In Ireland, the standard exclusion clause is attached to the criminal law provision on “terrorist offences” and to the “offence of terrorist bombing”.⁷⁴ Much like for the United States, this mode of implementation can be explained by Ireland’s literal implementation of the relevant international and European instruments.⁷⁵ Ireland also transposed the specific provisions of the 1979 Hostages Convention and the 1999 Terrorist Financing Convention into its

69 Swiss Criminal Code, 21 December 1937 (as of 1 July 2020), Art. 260^{quinquies}, unofficial English translation available at: www.fedlex.admin.ch/eli/cc/54/757_781_799/en.

70 Swiss Confederation, Arrêté fédéral portant approbation et mise en œuvre de la Convention du Conseil de l’Europe pour la prévention du terrorisme et de son Protocole additionnel et concernant le renforcement des normes pénales contre le terrorisme et le crime organisé, 25 September 2020, *Recueil Officiel* 2021 360, pp. 5–6, available at: www.fedlex.admin.ch/eli/oc/2021/360/fr.

71 18 US Code Ch. 113B – Terrorism, §2332i(d) and §2332f(d), available at: www.law.cornell.edu/uscode/text/18/part-I/chapter-113B.

72 *Ibid.*, §2339C.

73 UKSC, *Gul*, above note 50, para. 51.

74 Justice (Terrorist Offences) Act 2005, *Iris Oifigiúil*, No. 2, 2005, Secs 6(4), 10(6), available at: www.irishstatutebook.ie/eli/2005/act/2/enacted/en/html.

75 The provision on “terrorist offences” implements the 2002 EU Framework Decision, and hence copied the exclusion clause from its 11th recital. The provision on the “offence of terrorist bombing” implements the 1997 Terrorist Bombings Convention, and copied the exclusion clause from Article 19(2) of that Convention.

domestic law.⁷⁶ Especially, the exclusion clause attached to the provision on “terrorist offences” covers a broad range of acts. Nevertheless, this clause falls short of being general because it does not affect the definition of terrorist activity or hence, notably, the definition of a terrorist group,⁷⁷ which depends on the definition of terrorist activity.

General clauses: South Africa, Canada, New Zealand and Belgium

In line with the OAU/AU – as well as the Arab and OIC – conventions, the South African clause only covers wars of national liberation. Furthermore, it only applies to acts in accordance with IHL.⁷⁸

The Canadian Criminal Code’s definition of “terrorist activity” provides that it “does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict”.⁷⁹ The Code also contains the specific provision of the 1999 Terrorist Financing Convention for the offence of terrorist financing.⁸⁰

The situation in New Zealand is similar. The Terrorism Suppression Act of 2002⁸¹ defines a “terrorist act” in three ways.⁸² First, there is a general definition, which excludes an act that “occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict”.⁸³ Second, the definition of a terrorist act includes an “act against a specified terrorism convention”, if such an act is not excluded from the relevant convention.⁸⁴ That concerns the exclusion clause. Third, the definition includes “a terrorist act in armed conflict”, which in turn comprises only attacks against civilians or other persons *hors de combat*, echoing the specific provision of the 1999 Terrorist Financing Convention.⁸⁵

76 See Justice (Terrorist Offences) Act, above note 74, Secs 9(5), 13(1)(b)(i).

77 *Ibid.*, Secs 4, 5.

78 Protection of Constitutional Democracy against Terrorist and Related Activities Act, Law No. 33, 2004, *Government Gazette*, Vol. 476, No. 27266, February 2005, Sec. 1(4), available at: www.gov.za/sites/default/files/gcis_document/201409/a33-04.pdf.

79 Canadian Criminal Code, RSC 1985, c C-46 (as of 26 July 2021), Sec. 83.01(1), available at: <https://laws-lois.justice.gc.ca/eng/acts/c-46/index.html>. This exclusion clause is also specifically attached to offences relating to nuclear material and terrorist bombings; *ibid.*, Secs 82.7, 431.2(3).

80 *Ibid.*, Sec. 83.02(b).

81 Terrorism Suppression Act, Public Act 2002 No. 34, 17 October 2002 (reprint as at 24 October 2019), available at: www.legislation.govt.nz/act/public/2002/0034/latest/DLM151491.html. Note that at the time of writing, amendments to the Terrorism Suppression Act by means of Counter-Terrorism Legislation Bill 29-1, 2021, available at: www.legislation.govt.nz/bill/government/2021/0029/latest/LMS479298.html, are being considered; these include changes to the definition of a terrorist act in Section 5 of the Act. There is currently no proposal to modify the exclusion clause itself. However, the Bill aims to “extend the terrorism finance offence framework to criminalise wider forms of material support for terrorist activities or organisations” (Counter-Terrorism Legislation Bill 29-1, 2001, p. 1). The proposed amendments to Section 4 of the Act include a definition of “material support” that contains a humanitarian exemption (*ibid.*, p. 7).

82 Terrorism Suppression Act, above note 81, Sec. 5(1).

83 *Ibid.*, Sec. 5(1)(a), read together with Sec. 5(2), 5(4).

84 *Ibid.*, Sec. 5(1)(b), read together with Sec. 4(1).

85 *Ibid.*, Sec. 5(1)(c), read together with Sec. 4(1).

As they apply to the definition of a terrorist act or activity, both Canada and New Zealand's main exclusion clauses affect group offences like participation in terrorist groups.⁸⁶ However, they do not cover group offences entirely, as in both countries, terrorist groups are defined not solely in relation to the notion of terrorist acts, but also as "listed" or "designated" entities.⁸⁷ Such listing takes place in the context of "administrative" counterterrorism sanctions regimes and does not depend on "criminal" law definitions that contain the exclusion clause.⁸⁸

Belgium approached the matter in a different way. It copied the exclusion clause as conceived in the context of the 1997 Terrorist Bombings Convention and later transposed in the 2002 EU Framework Decision on combating terrorism into its Criminal Code.⁸⁹ The clause excludes the activities of armed forces governed by IHL completely from the application of the Code's entire chapter on terrorist offences, which includes the offence of participation in the activities of a terrorist group. The clause does so irrespective of whether the activities are in accordance with IHL or not. This is remarkable, as the proposals that Belgium submitted during the negotiations of the 1997 Terrorist Bombings Convention only excluded acts "in accordance with" IHL.⁹⁰

Even if it applies only to the activities of "armed forces", overall the Belgian clause is the broadest: it is general (not offence-specific), it covers all acts governed by IHL (not just acts in accordance with IHL), and it covers all situations of armed conflict (notably, it is not limited to wars of national liberation). The Canadian and New Zealand clauses are not limited to the activities of armed forces, but only cover acts in accordance with IHL. Canada and Belgium provide the most interesting case law on the exclusion clause, to which we now turn.

National case law

The Canadian *Khawaja* case

Momin Khawaja is a Canadian citizen who in 2002–04 was part of a relatively small jihadist group dubbed the "Kyam group". This group operated from the UK and had loose links with Al-Qaeda. Khawaja was involved in the creation of a device for detonating explosives remotely (the "hi-fi digimonster"). He also travelled to

86 See, respectively, Canadian Criminal Code, above note 79, Sec. 83.18(1); Terrorism Suppression Act, above note 81, Sec. 13.

87 Belgian Criminal Code, above note 79, Sec. 83.01(1); Terrorism Suppression Act, above note 81, Secs 12–13.

88 We focus on the exclusion clause and hence on the criminal law definition of terrorist activities. This entails that for countries which define terrorist (group) offences based on a combination of such a criminal law definition *and* the administrative listing of terrorist groups, like Canada and New Zealand, at least technically, our argumentation only applies to the limb of the offence concerning the criminal law definition. Of course, nothing prevents those countries from taking into account the criminal law definition when listing terrorist groups.

89 Belgian Criminal Code, 8 June 1867 (as of 24 February 2021), Art. 141*bis*, consolidated text available at: www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1867060801&table_name=wet.

90 For references to these Belgian proposals, see above note 45.

Pakistan to receive training to fight in Afghanistan, but in the end never directly participated in any hostilities.⁹¹ In 2005, he was charged with a range of terrorist offences under the Canadian Criminal Code.⁹² The defence argued that Khawaja only wanted to participate in the armed conflict in Afghanistan, and that due to the exclusion clause, his acts fell outside the definition of terrorist activity.⁹³ This argument was dismissed at first instance by the Ontario Superior Court of Justice, deciding per Judge Rutherford, and on appeal by the Court of Appeal for Ontario and eventually the Supreme Court of Canada.⁹⁴

The courts did not qualify the armed conflict in Afghanistan. On an abstract level, Judge Rutherford took “judicial notice” of the conflict situation in Afghanistan,⁹⁵ an approach accepted by the higher courts.⁹⁶ The judge then held that the exclusion clause “simply had no bearing on the case”. He found that Khawaja and his affiliates were not “soldiers or part of an armed force or involved in any armed conflict or in a place where an armed conflict was underway” and that the exclusion clause “should not be extended to their non-combatant activity”.⁹⁷ According to the judge, the clause is intended to cover acts which are committed in the course of an armed conflict, by those actually engaged in it.⁹⁸ He also put emphasis on the geographical aspect, finding that there was no “armed conflict in Canada, the United Kingdom or in Pakistan where the acts with which Khawaja is charged, were carried out”.⁹⁹ This territorial limitation is remarkable, as Canada and the UK were involved in the post-9/11 armed conflict in Afghanistan (notably against the Taliban), which first constituted an international and subsequently (from June 2002 onwards) a non-international armed conflict.¹⁰⁰

Furthermore, Judge Rutherford held that Khawaja knew that the Kyam group “was far more than just a support mechanism for front line armed combat in accordance with the international rules of war”. Khawaja knew of the group’s broader terrorist activity, which went beyond support and preparation for violent jihad in Afghanistan or elsewhere. Notably, Khawaja did not seem to care where his device(s) would be used.¹⁰¹

91 For a summary of the facts of the case, see Ontario Superior Court of Justice, *R v. Khawaja*, File No. 04-G30282, Canadian Legal Information Institute Citation No. 2008 CanLII 92005 (ON SC), 29 October 2008, paras 4–72.

92 *Ibid.*, para. 1.

93 *Ibid.*, para. 109.

94 The three relevant judgments are Ontario Superior Court of Justice, *Khawaja*, above note 91; Court of Appeal for Ontario, *R v. Khawaja*, File Nos C50298–C50299, Neutral Citation No. 2010 ONCA 862, 17 December 2010; Supreme Court of Canada, *R v. Khawaja*, Case No. 34103, Neutral Citation No. 2012 SCC 69, 14 December 2012.

95 Ontario Superior Court of Justice, *Khawaja*, above note 91, paras 113–125. A judge can take “judicial notice” of a fact that is widely known and accepted to be true and which therefore does not need to be contested or proven.

96 Court of Appeal for Ontario, *Khawaja*, above note 94, paras 170–176; Supreme Court of Canada, *Khawaja*, above note 94, para. 99.

97 Ontario Superior Court of Justice, *Khawaja*, above note 91, paras 127–129.

98 *Ibid.*, para. 127.

99 *Ibid.*, para. 128.

100 See further below on the geographical scope of application of IHL.

101 Ontario Superior Court of Justice, *Khawaja*, above note 91, paras 130–131.

The Court of Appeal largely followed, but disagreed with Judge Rutherford's "narrow construction" of the geographical scope of the exclusion clause. It found that the accused's acts or omissions need not be carried out within the territorial limits of the armed conflict. Rather, they only have to be committed "during" an armed conflict, and be in accordance with IHL.¹⁰²

Subsequently, the Court of Appeal agreed with Judge Rutherford that there was no evidence that either Khawaja or the insurgents in Afghanistan had acted in accordance with IHL. On the contrary, Khawaja's statements showed that he made no distinction between civilians and combatants and that he "supported the indiscriminate and random murder of civilians".¹⁰³ Lastly, like Judge Rutherford, the Court considered that Khawaja's actions did not solely relate to the insurgency in Afghanistan but extended beyond it.¹⁰⁴ The Supreme Court agreed. As it put succinctly, Khawaja's "conduct cannot be said to have been taken solely in support of an armed conflict, nor was it in accordance with applicable international law".¹⁰⁵

Belgian case law on "jihadist" groups¹⁰⁶

Initially, in Belgium, the exclusion clause was only invoked, yet never applied, in cases regarding individuals who had supported or joined groups that for reasons of simplicity can be called "jihadist". The *Sharia4Belgium* case constitutes a representative example.¹⁰⁷ Sharia4Belgium was a radical Islamic group based in Antwerp that recruited youngsters to join the ranks of Jabhat Al-Nusra and Majlis Shura Al-Mujahideen and fight in Syria. Forty-six individuals, nearly all of whom actually went to Syria and joined one of these two groups, were charged with participation in the activities or the direction of a terrorist group for conduct committed in Belgium and Syria from 2010 to 2014. The accused argued that because of the exclusion clause, they could not be convicted for terrorist offences.

The courts held that at no point had there been an armed conflict in Belgium, so the exclusion clause could not be invoked for activities committed by

102 Court of Appeal for Ontario, *Khawaja*, above note 94, para. 165.

103 *Ibid.*, paras 166–167.

104 *Ibid.*, para. 168.

105 Supreme Court of Canada, *Khawaja*, above note 94, para. 100.

106 Parts of the discussion of Belgian case law already appear in Jan Wouters and Thomas Van Poecke, "Van strijdkrachten, terroristen en het Belgisch strafrecht", *Rechtskundig Weekblad*, Vol. 81, No. 41, 2017; Thomas Van Poecke, "The IHL Exclusion Clause, and Why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences", *EJIL: Talk! – Blog of the European Journal of International Law*, 20 March 2019, available at: www.ejiltalk.org/the-ihl-exclusion-clause-and-why-belgian-courts-refuse-to-convict-pkk-members-for-terrorist-offences.

107 The three decisions in the *Sharia4Belgium* case were Court of First Instance of Antwerp, *The Prosecutor v. FB et al.*, File No. FD35.98.47-12 etc., 11 February 2015, available at: www.rechtbankkeerstaanlegantwerpen.be/index.php/83-persinformatie/110-terro; appeal against which was rejected by Court of Appeal of Antwerp, *The Prosecutor v. FB et al.*, Judgment No. C/101/2016, 27 January 2016; appeal against which was rejected by Belgian Court of Cassation, *MEY et al. v. ORV et al.*, Judgment No. P.16.0244.N, ECLI:BE:CASS:2016:ARR.20160524.5, 24 May 2016, available at: https://juportal.be/JUPORTAwork/ECLI:BE:CASS:2016:ARR.20160524.5_NL.pdf.

members of Sharia4Belgium in Belgium.¹⁰⁸ Once more, given Belgium's involvement in the NIAC with the so-called Islamic State group (IS), this categorical statement is questionable.¹⁰⁹ The courts then accepted the existence of a NIAC in Syria *in abstracto*, without discussing the intensity requirement or identifying the parties to this conflict.¹¹⁰ Subsequently, they analyzed whether Jabhat Al-Nusra and Majlis Shura Al-Mujahideen constituted armed forces in the sense of IHL and ruled that neither did.

We use the Court of Appeal's arguments about Jabhat Al-Nusra to illustrate the Belgian courts' flawed assessment of jihadist groups. As the Court had accepted the existence of a NIAC with sufficient intensity, it had to answer the question of whether Al-Nusra was sufficiently organized to constitute an armed force or armed group in the sense of IHL. However, the Court stressed several elements that seem irrelevant to determining whether a group is sufficiently organized for the purposes of IHL or not, like the fact that there were various foreign fighters in the ranks of the group, that it regularly posted statements on jihadist forums, and that the group's leader operated under a *nom de guerre*.¹¹¹ Furthermore, the Court stressed that Al-Nusra was responsible for almost 600 attacks (out of which thirty were suicide attacks), as well as kidnappings, hostage-takings and executions. However, while a high number of IHL violations may be indicative of a lack of organization, this is not necessarily so. As long as the armed group has the organizational *ability* to comply with IHL, even a pattern of IHL violations does not mean that it fails to meet the organization criterion.¹¹² At the time, Al-Nusra was an armed group with thousands of fighters, an identified leadership, a clear strategy, a strict military organization and its own court system, and should therefore have been treated as a party to an armed conflict in Syria.¹¹³ Nevertheless, the judges held that Al-

108 Court of First Instance of Antwerp, *Sharia4Belgium*, above note 107, p. 31; Court of Appeal of Antwerp, *Sharia4Belgium*, above note 107, p. 50.

109 See further below on the geographical scope of application of IHL.

110 Court of First Instance of Antwerp, *Sharia4Belgium*, above note 107, p. 31 (explicitly); Court of Appeal of Antwerp, *Sharia4Belgium*, above note 107, pp. 51–52 (implicitly). See also Julien Tropini, "La rupture de l'équilibre juridique de l'article 141bis du code pénal belge par la jurisprudence sur les 'combattants étrangers' – La remise en cause de la répartition des compétences entre le droit international humanitaire et le droit antiterroriste", *Military Law and the Law of War Review*, Vol. 57, No. 1, 2018, pp. 170–171; Marine Wéry, "La jurisprudence relative à la clause d'exclusion prévue à l'article 141bis du Code pénal: La difficile application du droit international humanitaire par les cours et tribunaux belges", *Military Law and the Law of War Review*, Vol. 57, No. 1, 2018, p. 111.

111 See ICTY, *Limaj*, above note 9, para. 132; J. Tropini, above note 110, pp. 172–173; M. Wéry, above note 110, pp. 132–135.

112 ICTY, *Boškoski*, above note 7, paras 204–205.

113 See, for example, Jennifer Cafarella, *Jabhat al-Nusra in Syria: An Islamic Emirate for al-Qaeda*, Middle East Security Report No. 25, Institute for the Study of War, Washington, DC, December 2014, pp. 13, 22–23, available at: www.understandingwar.org/sites/default/files/JN%20Final.pdf; Mikael Ekman (ed.), *Syria 2017*, ILAC Rule of Law Assessment Report, International Legal Assistance Consortium, Solna, March 2017, available at: www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf; Terry D. Gill, "Classifying the Conflict in Syria", *International Law Studies*, Vol. 92, 2016, p. 374; Rule of Law in Armed Conflicts (RULAC), "Non-International Armed Conflicts in Syria", Geneva Academy of International Humanitarian Law and Human Rights, Geneva, 29 May 2021, available at: www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse4accord.

Nusra did not have a responsible command, that disciplinary rules to ensure compliance with IHL could not be enforced, and that therefore it did not constitute an armed force in the sense of IHL.¹¹⁴

Arguably, the courts' reluctance to qualify Jabhat Al-Nusra and Majlis Shura Al-Mujahideen as armed forces was primarily inspired not by these groups' (alleged) lack of organization, but rather by ideological considerations that come with the notion of terrorism.¹¹⁵ Not only in their assessment under the relevant criminal law provisions on terrorism but also in their assessment under IHL, both courts stressed that the groups belonged to the international terrorist network of Al-Qaeda and were waging a sectarian fight against Shia Muslims, secular people, democratic values, human rights and IHL. Furthermore, the courts stressed that the groups engaged in terrorist activities like suicide attacks that destabilized the region and created unrest among the population.¹¹⁶ Overall, it seems that the courts did not want to qualify the groups as armed forces *because* they were terrorist groups. This flies in the face of the IHL tenet that the aim of a group is irrelevant for its qualification under IHL. Nevertheless, the Court of Cassation, which is the Belgian Supreme Court, confirmed the appeals judgment.¹¹⁷ Forty-four individuals were convicted of participation in the activities or the direction of a terrorist group. The *Sharia4Belgium* case is but one illustration taken from years of jurisprudence in which Belgian courts kept ruling that the exclusion clause was inapplicable to jihadist armed groups because they were not armed forces.¹¹⁸

The Belgian *PKK* case

Belgian courts applied the exclusion clause for the first time in a case concerning alleged members of the Kurdistan Workers' Party (Partiya Karkerên Kurdistanê, PKK),¹¹⁹ a militant political organization mainly active in and against Turkey. Much like in the *Sharia4Belgium* case, forty individuals and two media

114 Court of Appeal of Antwerp, *Sharia4Belgium*, above note 107, pp. 53–54; cf. J. Tropini, above note 110, pp. 173–175; and M. Wéry, above note 110, pp. 127–132.

115 On these ideological considerations, see the main text at above note 19; cf. J. Tropini, above note 110, pp. 176–179; and M. Wéry, above note 110, pp. 124–127.

116 Court of First Instance of Antwerp, *Sharia4Belgium*, above note 107, p. 36; Court of Appeal of Antwerp, *Sharia4Belgium*, above note 107, p. 52.

117 Belgian Court of Cassation, *Sharia4Belgium*, above note 107.

118 For a discussion of this similar case law, see, for example, J. Tropini, above note 110, pp. 169–176.

119 The decisions in the *PKK* case were Court of First Instance of Brussels (Correctional Pre-Trial Chamber), *The Prosecutor v. SU et al.*, File No. FD.35.98.54/09 etc., 3 November 2016; Court of Appeal of Brussels (Chamber of Indictment), *The Prosecutor v. SU et al.*, Judgment No. 2017/2911, 14 September 2017; partly annulled for lack of motivation by Belgian Court of Cassation, *The Prosecutor v. SU et al.*, Judgment No. P.17.1023.N.8, ECLI:BE:CASS:2018:ARR.20180213.2, 13 February 2018, available at: https://juportal.be/JUPORTAwork/ECLI:BE:CASS:2018:ARR.20180213.2_NL.pdf; again decided by, but sitting in a different composition, Court of Appeal of Brussels (Chamber of Indictment), *The Prosecutor v. SU et al.*, Judgment No. 2019/939, 8 March 2019; appeal against which was rejected by Belgian Court of Cassation, *The Prosecutor v. SU et al.*, Judgment No. P.19.0310.N, ECLI:BE:CASS:2020:ARR.20200128.6, 28 January 2020, available at: https://juportal.be/JUPORTAwork/ECLI:BE:CASS:2020:ARR.20200128.6_NL.pdf.

companies affiliated with the Belgian branch of the PKK were charged with participation in the activities or direction of a terrorist group. The acts underlying the charges were committed in Belgium from 2004 to 2014, and consisted, for example, of organizing events to finance the PKK, recruiting members and spreading propaganda for the organization.

The courts now explicitly determined that the violence between Turkey and the PKK was of a sufficient intensity and that the PKK was sufficiently organized, and that hence there was a NIAC between the two.¹²⁰ However, at first instance and during the first appeal, the courts once more mistakenly took into account the armed group's aim in order to qualify it under IHL, albeit in the opposite way from the *Sharia4Belgium* case. The Court of Appeal stressed that the PKK's aim is to establish an independent State, and not to terrorize the civilian population.¹²¹ The judges used this argument to disqualify the PKK as a terrorist group and to qualify it as an armed force.¹²²

The Court's finding that the PKK does not act with a terrorist aim implies that it does not constitute a terrorist group under the Belgian Criminal Code. Consequently, mere participation in its activities is not a terrorist offence either, and one could have expected the Court to conclude that the exclusion clause did not even have to be considered. The Court did, however, apply the clause, which was a rather superfluous exercise.¹²³ Overall, the Belgian courts' reasoning was undermined by their failure to accept that the qualification as an armed force under IHL should not depend on the group's aim. This approach threatened to render the Belgian exclusion clause superfluous, as it could not be meaningfully applied. However, the Court of Cassation annulled (most of) the Court of Appeal's judgment for lack of motivation.¹²⁴ This offered the latter – sitting in a different composition – a second chance to rule on the case.

In 2019, the Brussels Court of Appeal broke the conundrum. The Court started with the observation that the PKK *could* fit the Belgian Criminal Code's definition of a terrorist group. Therefore, it had to examine whether the exclusion clause applied.¹²⁵ The prosecution claimed that a distinction should be made between armed forces, being those who directly participate in hostilities in a

120 Court of First Instance of Brussels, *PKK*, above note 119, pp. 10–11; Court of Appeal of Brussels, *PKK*, 2017, above note 119, pp. 11–22 (and Court of Appeal of Brussels, *PKK*, 2019, above note 119, pp. 20–26).

121 Court of Appeal of Brussels, *PKK*, 2017, above note 119, pp. 16–17; cf. Court of First Instance of Brussels, *PKK*, above note 119, p. 11.

122 As argued by the Federal Public Prosecutor's Office in Belgian Court of Cassation, *PKK*, 2018, above note 119, p. 11, the Court only considered one of the three alternative "terrorist aims" of the Belgian Criminal Code, above note 89, Art. 137(1) (which implements Directive (EU) 2017/541, above note 3, Art. 3(2)), namely (1) seriously intimidating a population; the Court failed to address the two others, namely (2) unduly compelling a government or an international organization to perform or abstain from performing any act, and (3) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization, which may very well have been present (on these aims, see the main text at above notes 25–27).

123 Court of Appeal of Brussels, *PKK*, 2017, above note 119, p. 22.

124 Belgian Court of Cassation, *PKK*, 2018, above note 119. The lack of motivation and annulment were related to a different issue that is not discussed here.

125 Court of Appeal of Brussels, *PKK*, 2019, above note 119, pp. 15–16.

continuous way, and civilians, being those who are not members of the armed forces.¹²⁶ It argued that the exclusion clause only applies to armed forces whose activities have a nexus to the armed conflict. Since the PKK affiliates standing trial were civilians and their activities had no nexus to the armed conflict, the prosecutor concluded that these activities were not governed by IHL.¹²⁷ The Court disagreed. It replied that the definition of a terrorist group in Article 139 of the Belgian Criminal Code requires that the group operates to commit terrorist acts as listed in Article 137. Article 137 criminalizes as terrorist offences certain physical acts—most of them violent, such as murder—which are committed in a terrorist context and with a terrorist aim.¹²⁸ The Court argued that as the acts listed in Article 137 which have been committed by the PKK have a nexus to the armed conflict and fall under the exclusion clause, the PKK is not a terrorist group in the sense of Article 139. Consequently, mere participation in its activities is not a terrorist offence.¹²⁹ This time, appeal against the judgment of the Court of Appeal was rejected by the Court of Cassation.¹³⁰ The case against the alleged members of the PKK was dismissed.

Like the Canadian jurisprudence in *Khawaja*, the Belgian *PKK* case raises important questions about how the scope of the exclusion clause relates to the personal, material and geographical scope of application of IHL, which we analyze in the next section.

The scope of the exclusion clause vis-à-vis the scope of IHL

Personal scope

There is no principled limitation to IHL's personal scope of application. *Khawaja* or the alleged members of the Belgian branch of the PKK are individually bound by, at least, the criminalized rules of IHL and can be held individually responsible for such violations provided their conduct has a nexus to the armed conflict.¹³¹ However, the personal scope of the standard exclusion clause is more limited. As stressed by the Belgian Federal Public Prosecutor's Office in the *PKK* case, the clause only applies to activities of members of the "armed forces".¹³² While Judge Rutherford made a similar argument,¹³³ the wording of the Canadian clause does not provide for this limitation,¹³⁴ which is probably why the higher courts focused on the fact that

126 Cf. N. Melzer, above note 56, Recommendation II, pp. 16, 27–36.

127 Court of Appeal of Brussels, *PKK*, 2019, above note 119, p. 33.

128 Article 137 implements the EU Framework Decision on Combating Terrorism, above note 25, Art. 1, as replaced by Directive (EU) 2017/541, above note 3, Art. 3.

129 Court of Appeal of Brussels, *PKK*, 2019, above note 119, pp. 33–34; see also Belgian Court of Cassation, *PKK*, 2020, above note 119, p. 10.

130 Belgian Court of Cassation, *PKK*, 2020, above note 119.

131 M. Sassòli, above note 11, p. 198.

132 See main text at above note 127.

133 See main text at above notes 97–98.

134 Canadian Criminal Code, above note 79, Sec. 83.01(1); see main text at above note 79.

Khawaja did not act in accordance with IHL rather than on the fact that he was not a member of any armed forces. Defendants like those in the *PKK* case did not directly participate in the hostilities and do not have a continuous combat function, and were hence not part of the armed forces.¹³⁵ By implication, they were civilians who cannot directly benefit from the standard exclusion clause. Nevertheless, the accused in the *PKK* case were able to benefit from it indirectly.

Material scope

Judge Rutherford warned that the scope of the exclusion clause “should not be extended to ... non-combatant activity”.¹³⁶ Along the same lines, in the *PKK* case, the Belgian Federal Public Prosecutor’s Office argued that for the exclusion clause to apply, the actual activities that are the subject of the charges (e.g., organizing events to finance the *PKK*) must “*in concreto*, objectively and effectively” be governed by IHL.¹³⁷ To this argument, the Belgian Court of Cassation replied that it is “not required to determine for every concrete act of an armed force during an armed conflict that that act *in concreto*, objectively and effectively falls under IHL”.¹³⁸ Thus, the Court seems to agree with Van Steenberghe’s argument that for the purpose of the exclusion clause, IHL should be considered to govern not only direct military operations, but rather the whole of hostile activities or activities harmful to the enemy. Once it has been determined that a person is a member of the armed forces, that person’s activities of assistance to an armed group, which may not be expressly permitted or prohibited by IHL (e.g., cooking or cleaning), should also be considered to be governed by IHL.¹³⁹ But what about activities like collecting money for an (alleged) terrorist group, committed by civilians, as is the case here?

Many terrorist offences are “indirect”, in the sense that they may not require a link with a specific physical or “direct” terrorist offence like a terrorist murder or bombing.¹⁴⁰ Such indirect offences include participation in the activities of a terrorist group, and other ancillary offences like the financing of terrorism.¹⁴¹ These offences appear to fall beyond the material scope of IHL. For

135 N. Melzer, above note 56, Recommendation II, pp. 16, 27–36.

136 Ontario Superior Court of Justice, *Khawaja*, above note 91, paras 127–129.

137 Belgian Court of Cassation, *PKK*, 2018, above note 119, pp. 7–8; Belgian Court of Cassation, *PKK*, 2020, above note 119, pp. 10–12. Note that whether or not the nexus requirement coincides with IHL’s material scope of application, and hence whether or not this argument of the prosecution on the material scope of application of IHL is different from its argument regarding the nexus (see main text at above note 127), is debated; see M. Sassòli, above note 11, pp. 200–203.

138 Belgian Court of Cassation, *PKK*, 2020, above note 119, pp. 11–12 (authors’ translation).

139 Raphaël Van Steenberghe, “Droit international humanitaire et législation belge antiterroriste: L’article 141bis du Code pénal dans les dossiers syriens et kurdes”, *Revue Belge de Droit International*, vol. 51, No. 1, 2018, pp. 282–284, 291–293.

140 See, for example, Directive (EU) 2017/541, above note 3, Art. 13.

141 See, notably, Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, Paris, 2012–21 (updated June 2021), p. 13, Recommendation 5, available at: www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf; “Countries ... should criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or

example, the collection and funnelling of money by Belgian PKK affiliates for the organization can hardly be said to be governed by IHL.¹⁴² How, then, could the courts in the *PKK* case come to the conclusion that such activities benefit from the exclusion clause?

It is worth recalling that the exclusion clause was conceived in the context of the Terrorist *Bombings* Convention. At least at conception, the clause had an “offence-specific” nature and applied to a direct, physical act (“detonating an explosive or other lethal device”)¹⁴³ that is typically also committed by armed forces in armed conflict. However, the Canadian Criminal Code, New Zealand Terrorism Suppression Act and EU Framework Decision on combating terrorism, as implemented into the Belgian Criminal Code, gave the exclusion clause a “general” nature. They linked it also to indirect, non-violent terrorist activity, like the behaviour encompassed by “participation in the activities of a terrorist group”.¹⁴⁴ While the *group* must still act “in concert to commit [direct] terrorist offences”,¹⁴⁵ persons participating in the activities of a terrorist group do not need to commit a physical act that would constitute a direct terrorist offence. In the *PKK* case, the Belgian courts reasoned that by cutting the direct connection with a physical act like a terrorist bombing, murder or kidnapping, the above instruments also no longer require the direct connection with the “activities of armed forces governed by IHL” to which the exclusion clause was intended to apply. Nevertheless, an indirect connection remains: the clause applies to the physical acts which armed forces commit in the context of an armed conflict and which are governed by IHL. This exclusion in turn affects the indirect offences.

Geographical scope

Judge Rutherford in *Khawaja* and the Belgian courts in *Sharia4Belgium* held that to the extent that the activities of the accused were committed in countries where no armed conflict was taking place, they fell outside the scope of the exclusion clause. In *Khawaja*, the higher courts rejected this narrow construction because

acts.” This has been endorsed by the UN Security Council in several resolutions: see D. McKeever, above note 35, p. 61, fn. 124.

142 Cf. J. Pejic, above note 14, p. 188. Moreover, such activities may often not entail (accessory) individual criminal responsibility for war crimes (or other international crimes), notably due to the lack of a causal link with such crimes. In particular, aiding and abetting generally requires a *substantial* contribution to or effect on the crime: see Manuel J. Ventura, “Aiding and Abetting”, in Jérôme de Hemptinne, Robert Roth and Elies van Sliedregt (eds), *Modes of Liability in International Criminal Law*, Cambridge University Press, Cambridge, 2019.

143 Terrorist Bombings Convention, Art. 2(1).

144 EU Framework Decision on Combating Terrorism, above note 25, Art. 2; Directive (EU) 2017/541, above note 3, Art. 4; Belgian Criminal Code, above note 89, Arts 139–140; Canadian Criminal Code, above note 79, Sec. 83.18; Terrorism Suppression Act, above note 81, Sec. 13. A predecessor of these offences can be found in the Terrorist Bombings Convention, Art. 2(3)(c), which criminalizes contribution to the commission of a terrorist bombing by a group acting with a common purpose: E. J. Husabø and I. Bruce, above note 21, pp. 193–194.

145 See the provisions at above note 144 for the EU and Belgium; cf. Canadian Criminal Code, above note 79, Sec. 83.01(1)(a); and Terrorism Suppression Act, above note 81, Sec. 13(1)(b) (but see also the caveat made at above note 88).

the clause only requires that the activities are committed “during” an armed conflict and does not state that they have to take place within the conflict zone. The finding in *Sharia4Belgium* on the geographical scope was, in turn, similarly contradicted by the judgments in the *PKK* case, as the judges focused on where the physical acts that allegedly made the PKK a terrorist group had taken place.

The prosecution argued that the PKK had also committed terrorist offences outside the area of armed conflict. It submitted convictions of PKK members for terrorist offences from Italy, France, Denmark and Germany. The Court agreed that the geographical scope of application of IHL is limited to the territory controlled by the parties to the conflict and spillover incidents in neighbouring States.¹⁴⁶ To the extent that acts constituting direct terrorist offences attributable to the PKK were committed in Western European countries, the PKK could in principle be qualified as a terrorist group.¹⁴⁷ However, many foreign judgments invoked by the prosecution concerned indirect terrorist offences, such as participation in the activities of a terrorist group. The Court dismissed these judgments as irrelevant for the qualification of the PKK as a terrorist group. That qualification depends exclusively on the (intended) commission of direct terrorist offences as listed in Article 137 of the Belgian Criminal Code. Some foreign judgments did concern acts constituting such offences, like a kidnapping or attacks with Molotov cocktails. Here, the Court chiefly found that it was not established that these acts could be attributed to the PKK. Overall, it could not conclude that the PKK had committed or planned to commit acts constituting direct terrorist offences outside the area of armed conflict that delimited the geographical scope of application of IHL. Hence, it was not a terrorist group in the sense of the Belgian Criminal Code.¹⁴⁸

Although the result seems odd, it makes sense. It is true that the Court applied the exclusion clause to persons who are not members of armed forces, and whose activities fall outside the material and geographical scope of application of IHL. However, if the main (direct) offences benefit from the application of the exclusion clause, ancillary (indirect) offences should as well.¹⁴⁹ Even then, as implied by the findings of the Canadian courts in *Khawaja* and the Court of Appeal in the *PKK* case, there are limits to the scope of the exclusion clause.

The limits to the scope of the exclusion clause

In *Khawaja*, the Canadian courts held that the accused could not benefit from the exclusion clause for two reasons. First, his conduct was not in accordance with IHL.

¹⁴⁶ Relying on ICTY, *Tadić*, above note 7, paras 67–70; ICRC Commentary on GC I, above note 9, paras 455–464.

¹⁴⁷ Court of Appeal of Brussels, *PKK*, 2019, above note 119, p. 36.

¹⁴⁸ *Ibid.*, pp. 37–42.

¹⁴⁹ See also A. Coco, above note 27, p. 435; Christopher K. Penny, “De-Conflicting Canada’s Anti-Terrorism Legislation: *Khawaja* and the Ongoing Challenges of the ‘Armed Conflict’ Exclusion”, *Windsor Yearbook of Access to Justice*, Vol. 27, No. 2, 2009, p. 426.

As the Belgian clause covers all activities of armed forces “governed by” IHL, this argument is irrelevant in the Belgian context.¹⁵⁰ A second reason why Khawaja did not benefit from the clause was that his conduct and the activities of the Kyam group not only related to the armed conflict in Afghanistan, but also involved the planning of terrorist attacks outside of that context.

In the *PKK* case, the Court of Appeal limited the scope of the exclusion clause in a similar way, but its argumentation hinged more explicitly and exclusively on the *geographical* scope of application of IHL. It held that if members of the relevant armed group commit acts that constitute direct terrorist offences (also) outside the area of armed conflict, these acts, and by consequence the group, no longer benefit from the exclusion clause. It seems that the Court anticipated future cases involving armed groups, like IS, that do not limit themselves to committing violent acts within the area of an armed conflict.

The Court of Appeal’s focus on the geographical scope of application of IHL in the *PKK* case is not without its challenges. As outlined above, Belgian courts adhere to the traditional position that in NIACs, IHL only applies to the territory controlled by the parties to the conflict and spillover incidents. Following this position, any actual terrorist acts committed outside of that area could serve to qualify the relevant armed group as a terrorist group. The ICRC would add that the geographical scope of application of IHL extends to States involved in an extraterritorial NIAC.¹⁵¹ As Canada was involved in an armed conflict with the Taliban, and Belgium in an armed conflict with IS, this approach would entail that acts by members of the Taliban or IS’s armed forces with a nexus to the conflict committed on Canadian or Belgian territory would still benefit from the exclusion clause.¹⁵² Authors like Sassòli go further than the ICRC and argue that there is no principled limitation to the geographical scope of application of IHL in NIACs.¹⁵³ IHL then applies globally, to any act that has a sufficient nexus to the conflict. Still, “conduct to be regulated must have a stronger nexus with the NIAC the further away from the NIAC it occurs”.¹⁵⁴ If the conduct has no nexus to the armed conflict, it falls not under IHL but under

150 Nevertheless, case law on jihadist groups has incorrectly relied on the fact that the relevant armed groups did not respect IHL in order to disqualify them as armed forces (see main text at above note 112).

151 ICRC Challenges Report 2015, above note 31, p. 14.

152 See also C. K. Penny, above note 149, pp. 424–425, on Canada’s involvement in the conflict in Afghanistan and the UK’s involvement in the conflict in Iraq.

153 M. Sassòli, above note 11, pp. 187–190. See also Noam Lubell and Nathan Derejko, “A Global Battlefield? Drones and the Geographical Scope of Armed Conflict”, *Journal of International Criminal Justice*, Vol. 11, No. 1, 2013; Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict”, in Nigel D. White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum*, Edward Elgar, Cheltenham, 2013, pp. 288–292; Sasha Radin, “Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts”, *International Law Studies*, Vol. 89, 2013; Michael N. Schmitt, “Charting the Legal Geography of Non-International Armed Conflict”, *International Law Studies*, Vol. 90, 2014. For a restrictive view of the geographical scope of application of IHL in NIACs, see Martha M. Bradley, “Expanding the Borders of Common Article 3 in Non-International Armed Conflicts: Amending Its Geographical Application through Subsequent Practice?”, *Netherlands International Law Review*, Vol. 64, No. 3, 2017.

154 M. Sassòli, above note 11, p. 190.

the “human rights-centred ‘law enforcement’ paradigm” of which criminal law instruments on terrorism are a part.¹⁵⁵ Assuming the relevant acts have a sufficient nexus to the conflict, the view that the geographical scope of application of IHL is in principle unrestricted largely undermines the geographical limit which the Court of Appeal set to the exclusion clause. It is unlikely that the Belgian courts would ever adopt this view.¹⁵⁶

Where to draw the line?

IHL does not prohibit States from prosecuting activities committed by NSAGs, whether as terrorist or common criminal law offences. It seems that, at least as a matter of international law, neither does any exclusion clause. However, once States implement an exclusion clause into their domestic legislation, which we believe they should, the clause regulates the relationship between the State’s domestic criminal law provisions on terrorism and IHL in a compulsory way. The clause limits the extent to which activities committed in relation to armed conflicts can constitute terrorist offences. It does not affect the possible qualification of these activities as international crimes or common criminal law offences under domestic law.

That being said, we agree with the Brussels Court of Appeal that an NSAG which exclusively commits violence in the context of an armed conflict is not a terrorist group for the purposes of criminal law instruments on terrorism.¹⁵⁷ Due to the exclusion clause, the group’s conduct should be assessed only under IHL. Acts permitted by IHL should not be prosecuted as terrorist offences. Acts prohibited by IHL should be prosecuted as war crimes or, if the conditions are met, as other international crimes like crimes against humanity or genocide. Activities of assistance committed by members of armed forces should also be considered to be governed by IHL. If they are sufficiently connected to war

155 Yuval Shany, “Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror”, in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, pp. 13–15. If only for technical reasons, there is no need to delve into the broader *lex specialis* debate here; we are discussing the armed conflict *exclusion* clause, the application of which precludes the concomitant application of criminal law instruments on terrorism and IHL.

156 This is so, *inter alia*, because the Belgian courts rely on established case law of the ICTY stating that in NIACs, IHL applies throughout the territory of the parties to the conflict: for example, Court of Appeal of Brussels, *PKK*, 2019, above note 119, pp. 35–36, refers to ICTY, *Tadić*, above note 7, paras 67–70. While this case law is authoritative, it is largely irrelevant when discussing the possible extraterritorial application of IHL in NIACs, as the ICTY’s jurisdiction was geographically restricted. See Louise Arimatsu, “Territory, Boundaries and the Law of Armed Conflict”, *Yearbook of International Humanitarian Law*, Vol. 12, 2009, p. 187: “the only ‘geography question’ that required clarification was to ascertain the reach of the law *within* the state; the extra-territorial reach of the rules was simply not considered”. See also S. Radin, above note 153, p. 719. The Court of Appeal also referred to the ICRC Commentary on GC I, above note 9, paras 455–464, which deals with “internal non-international armed conflicts” and is about the extent to which IHL extends beyond the theatre of hostilities *within* the territory of the State concerned, rather than about whether IHL applies *beyond* that State’s territory.

157 Court of Appeal of Brussels, *PKK*, 2019, above note 119.

crimes, they can be punished as such – for example, under the mode of liability of aiding and abetting.¹⁵⁸ Those who may not have physically committed the crime but still bear responsibility for it should not escape justice either. International criminal law uses broad forms of liability like joint criminal enterprise, co-perpetration or command responsibility. These allow prosecutors to cast a wide net and to include those who “delegate” or “outsource” the more gruesome criminal activity. Overall, this approach preserves the integrity of IHL by ensuring that the activities of NSAGs are excluded from prosecution as terrorist offences while violations of IHL are prosecuted and punished as such.¹⁵⁹

We also agree with the Brussels Court of Appeal that if the main conduct benefits from the exclusion clause, ancillary activities cannot be qualified as terrorist offences either.¹⁶⁰ If an armed group only commits the violent acts that could constitute direct terrorist offences in the context of an armed conflict, mere participation in the activities of this group is not a terrorist offence. Activities without a nexus to the conflict that cannot be attributed to the group, such as terrorist attacks outside the geographical area of the conflict by members of the group acting on their own, are not governed by IHL and are not exempt. If such acts are attributable to the group, we enter into a different scenario.

We agree with the Canadian courts in *Khawaja* and the Court of Appeal in the *PKK* case that the protection of the exclusion clause stops where a group commits or intends to commit violence “outside the context of armed conflict”, be it in a geographical sense (in which case the assessment depends on one’s approach to the geographical scope of application of IHL), or because the acts do not have a nexus to the armed conflict, or both. First, this entails that if groups like the Kyam group or Sharia4Belgium act in concert to commit (direct) terrorist offences outside the context of armed conflict as well, they are terrorist groups. For the same reason, an NSAG like IS that is a party to an armed conflict is *also* a terrorist group and has a “dual nature”.¹⁶¹ In our opinion, this is the case for the group “as such” or “as a whole”, unless the group committing terrorist acts outside the context of armed conflict can be separated from the group only operating within that context. It remains the case that activities governed by IHL should not be assessed under criminal law instruments on terrorism, above all to prevent acts permitted under IHL from being prosecuted as terrorist offences.¹⁶² As argued above, acts prohibited by IHL should be prosecuted as war crimes rather than as terrorist offences.¹⁶³

Activities, not governed by IHL, relating to groups with a dual nature can constitute terrorist offences. Notably, as they are (also) terrorist groups, the financing of and recruitment of members for such groups are (indirect) terrorist

158 R. Van Steenberghe, above note 139, pp. 282–284, 291–293, but see the caveat made at above note 142: many activities underlying indirect terrorist offences may not be connected to international crimes closely enough to entail individual criminal responsibility.

159 Cf. S. Krähenmann, above note 50, p. 21.

160 Court of Appeal of Brussels, *PKK*, 2019, above note 119.

161 Cf. H. Cuyckens and C. Paulussen, above note 68, p. 562.

162 *Ibid.*

163 See main text and references at above note 33.

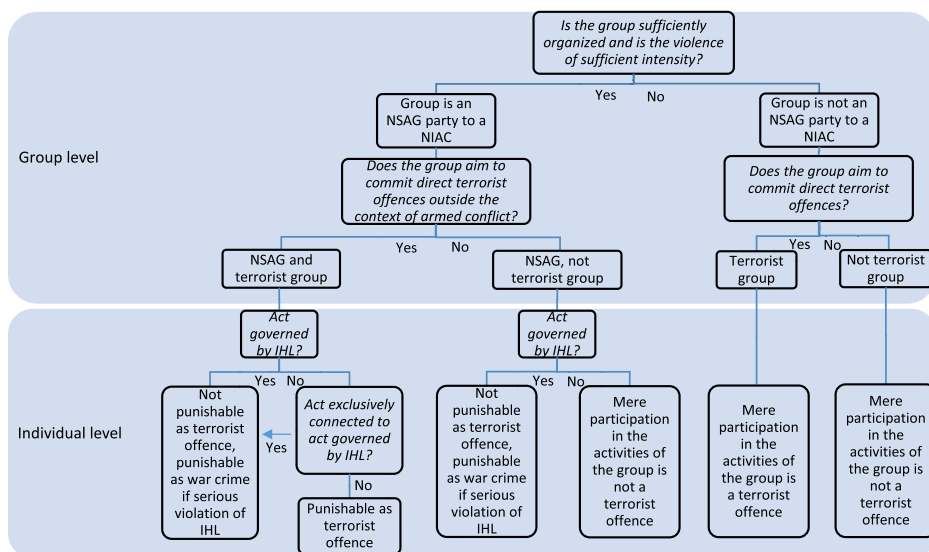


Figure 1. The application of the exclusion clause.

offences. There can only be an exception if the activities are exclusively connected to activities governed by IHL. If they are, and if such activities are permitted under IHL, those who contribute should not be prosecuted for terrorist offences. If they contribute exclusively to acts prohibited by IHL, these persons can be prosecuted for war crimes. A flowchart showing the application of the exclusion clause is provided in Figure 1.

If perpetrators have committed war crimes (or other international crimes), they should be prosecuted for those actual crimes rather than for indirect terrorist offences. As argued above, this enhances the implementation of IHL. Furthermore, “recognising and naming these crimes for what they are”¹⁶⁴ allows courts to establish the full criminal responsibility of the perpetrators and impose tailored sentences, expose the atrocities that have been committed, and identify and engage with the victims of these crimes.¹⁶⁵ However, in Belgium for example, the exclusion clause has unfortunately not been accompanied by an effective enforcement of IHL through the prosecution of war crimes, notably in the context of the conflict in Syria.¹⁶⁶ As a consequence, the clause risks being perceived as precluding the prosecution of alleged terrorist offences simply

164 Eurojust and Network for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes (Genocide Network), *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences*, The Hague, May 2020, p. 3, available at: www.eurojust.europa.eu/cumulative-prosecution-foreign-terrorist-fighters-core-international-crimes-and-terrorism-related.

165 *Ibid.*, pp. 3–5, 26; compare with the argument for a “tailored approach” proposed by H. Cuyckens and C. Paulussen, above note 68.

166 I.e., IHL as implemented by the Belgian Criminal Code, above note 89, Title *Ibis*. See also T. Ruys and S. Van Severen, above note 51, p. 538; R. Van Steenberghe, above note 139, pp. 292–293.

because of their link with an armed conflict. This “shield” function of the clause may be particularly frustrating for prosecutors, as many indirect terrorist offences (e.g., participation in the activities of a terrorist group) are relatively easy to prove. Moreover, investigations into terrorist offences often open up a range of broader investigatory powers, which may make national criminal law on terrorism “more attractive than war crimes law as a way of dealing with terrorist offenders”.¹⁶⁷ War crimes, on the other hand, are frequently much more difficult to prove, as they are committed on a (distant) battlefield that is inaccessible and the conditions for evidence gathering are notoriously difficult.¹⁶⁸ Nevertheless, efforts in a number of European States in relation to the conflict in Syria show that the prosecution of war crimes is possible despite these challenging circumstances,¹⁶⁹ if States make an additional effort (extra time, expertise, means and human resources).

Lastly, we would like to assess which clause is preferable: the standard exclusion clause, as implemented by Belgium, or the Canadian and New Zealand alternative? First, while the standard clause extends only to activities of “armed forces”, the alternative clause does not restrict its personal scope of application. Certainly, the activities of armed forces are the most important to exclude from the scope of criminal law instruments on terrorism. Nevertheless, we believe that as IHL does not limit its personal scope of application, neither should the exclusion clause. This means that civilians whose activities are governed by IHL would also benefit from the application of the clause. The requirement that the relevant conduct must have a sufficient nexus to the armed conflict, which is much less readily satisfied by civilians,¹⁷⁰ ensures that activities which should fall under criminal law instruments on terrorism still do so. Furthermore, avoiding the term “armed forces” in the exclusion clause also avoids the ambiguity of the term that we have highlighted above.

Second, while the Belgian clause applies to all activities “governed by” IHL, the Canadian and New Zealand clauses require that activities are “in accordance with” IHL. Once more, activities in accordance with IHL are certainly the most important to exclude from the scope of criminal law instruments on terrorism. Nevertheless, this requirement risks creating confusion about whether members of NSAGs, whom IHL does not grant a right to participate in hostilities, can act

¹⁶⁷ UNODC, above note 34, p. 104.

¹⁶⁸ T. Ruys and S. Van Severen, above note 51, pp. 532–533; R. Van Steenberghe, above note 139, pp. 283–284, 293. See also Christophe Paulussen and Kate Pitcher, “Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges”, ICCT Research Paper, International Centre for Counter-Terrorism, The Hague, January 2018, pp. 26–30, available at: <https://icct.nl/publication/prosecuting-potential-foreign-fighters-legislative-and-practical-challenges>.

¹⁶⁹ See, for example, Eurojust and Genocide Network, above note 164, pp. 16–24.

¹⁷⁰ See, for example, ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23 & IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 59: “In determining whether or not the act in question is sufficiently related to the armed conflict, [one] may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.”

“in accordance with” IHL.¹⁷¹ Even if it is accepted that they can, such a clause might shift the discussion to whether or not the relevant armed group complies with IHL. Strictly speaking, minor IHL violations committed by the group could suffice to argue that it should not benefit from the application of the exclusion clause.¹⁷² However, as explained above, what matters under IHL is whether the group has the organizational ability to comply with IHL. If it has the capability but does not comply, those responsible can and should be prosecuted for war crimes rather than terrorist offences.

We conclude that the scope of the exclusion clause should not be limited to activities of armed forces, like in Belgium, nor to activities in accordance with IHL, like in Canada and New Zealand. In other words, criminal law instruments on terrorism should contain an exclusion clause providing that they do not apply to activities governed by IHL.

171 See, for example, Court of First Instance of the Hague, *Context* case, above note 47, paras 7.19–7.44.

172 C. K. Penny, above note 149, pp. 418–419.

Respecting international humanitarian law and safeguarding humanitarian action in counterterrorism measures: United Nations Security Council resolutions 2462 and 2482 point the way

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Abstract

United Nations, regional and domestic counterterrorism measures have generated a cascade of adverse effects for impartial humanitarian activities in areas where designated groups are present. Certain humanitarian activities, diverted supplies and incidental payments can fall foul of broadly worded counterterrorism regulation proscribing or criminalizing financial and other support to designated groups. Donors to humanitarian organizations set strict conditions and financial

* The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations (UN).

institutions decline transactions, hampering impartial humanitarian activities in the very instances in which international humanitarian law (IHL) requires that they be allowed. Recognizing this, United Nations Security Council (UNSC) resolutions 2462 and 2482 adopted in 2019 have spelled out more explicitly than ever before the need for counterterrorism measures to comply with IHL and safeguard impartial humanitarian action in line with IHL. This article sets out those IHL obligations that govern humanitarian and medical activities and the types of safeguards that States have put in place to ensure their counterterrorism measures comply with IHL and allow for these activities. The UNSC's latest steer in resolutions 2462 and 2482 provides a foundation for States' exclusion of impartial humanitarian and medical activities from the scope of application of their counterterrorism measures. This can be an effective way of averting adverse consequences for these activities where designated entities are present.

Keywords: counterterrorism, international humanitarian law, humanitarian action, United Nations Security Council resolutions.

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Introduction

States today increasingly acknowledge that there is no dissonance between their counterterrorism measures and their support for humanitarian action.¹ Yet significant concerns remain about the barriers that counterterrorism measures – and in particular measures to counter the financing of terrorism – have created for impartial humanitarian activities in situations of armed conflict that involve groups designated as terrorist.

As foreseen under international humanitarian law (IHL), such humanitarian activities can include assistance to civilians under a designated group's control, medical care for the group's wounded or sick members, or assistance and protection to the group's members in detention. In turn, certain humanitarian activities, incidental financial transactions, and diverted humanitarian supplies can fall foul of broadly worded counterterrorism regulation proscribing or criminalizing financial and other forms of support to designated groups. Conscious of this legal risk, through their own processes to comply with counterterrorism measures, donors to humanitarian organizations set strict conditions and financial institutions decline transactions, hampering impartial humanitarian activities in the very instances in which IHL requires that they be allowed.

Recognizing this, United Nations Security Council (UNSC) resolutions 2462 and 2482 adopted in 2019 have spelled out more explicitly than ever before

1 UN Security Council Virtual Open Debate on International Cooperation in Combating Terrorism 20 Years After the Adoption of Resolution 1373, S/2021/48, 15 January 2021, available at: <https://www.securitycouncilreport.org/un-documents/document/s-2021-48.php> (all internet references were accessed in June 2021).

the need for counterterrorism measures to comply with IHL and safeguard impartial humanitarian action in line with IHL.² In requiring States to ensure that their counterterrorism measures comply with their IHL obligations and urging them to take into account the potential effect of these measures on humanitarian activities, the UNSC has given a clear steer for States to safeguard humanitarian activities foreseen under IHL when exercising measures to counter the financing or other forms of support to terrorism.

This article lays out the principal types of counterterrorism measures that are at the root of a range of impediments to impartial humanitarian activities in situations of armed conflict in which designated armed groups are present. After briefly describing these adverse effects, the article lays out the provisions of UNSC resolutions 2462 and 2482 that aim to ensure that all counterterrorism measures comply with IHL and to safeguard humanitarian activities in a manner consistent with IHL. It then spells out those IHL obligations that govern humanitarian and medical activities and the types of safeguards that States have put in place to ensure that their counterterrorism measures comply with IHL and allow for impartial humanitarian activities. The article posits that this latest steer by the UNSC in resolutions 2462 and 2482 provides a foundation for States' exclusion of impartial humanitarian and medical activities foreseen under IHL from the scope of application of counterterrorism measures. Explicit exclusions can be an effective way of avoiding adverse consequences that hamper impartial humanitarian and medical activities where designated entities are present.

The interplay between counterterrorism measures and impartial humanitarian activities in armed conflict

United Nations (UN), regional and domestic counterterrorism measures have generated a cascade of adverse effects for impartial humanitarian action in areas where designated groups are present. This part will first provide an overview of the key counterterrorism sanctions and criminalization measures that intersect with humanitarian activities before illustrating some of the most salient negative effects that these measures have had on humanitarian activities.

United Nations, regional and domestic counterterrorism regulation that can adversely affect impartial humanitarian activities

Countering the financing of terrorism: United Nations Security Council regulation

The UNSC has adopted a long sequence of legally binding decisions under chapter VII of the UN Charter³ to counter terrorism financing. The sequence begins with the

2 UNSC Resolution 2462, 28 March 2019; UNSC Resolution 2482, 19 July 2019.

3 UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

sanctions regime established under UNSC Resolution 1267 in 1999 in connection with the U.S. embassy bombings by Al-Qaeda in Tanzania and Kenya in 1998, and Resolution 1373 adopted a few days after the attacks of 11 September 2001.⁴

Resolution 1267 first imposed an asset freeze and air embargo against the Taliban which was allowing territory under its control to be used to shelter and train terrorists and plan terrorist acts.⁵ In 2000, the UNSC extended the asset freeze to Al-Qaeda,⁶ and in 2002 it imposed an asset freeze, arms embargo and travel ban on both the Taliban and Al-Qaeda, as well as other individuals, groups, undertakings and entities associated with them.⁷ In 2011, the UNSC adopted two resolutions – 1988 and 1989 – to split measures against the Taliban (falling under Resolution 1988) and against Al-Qaeda (falling under Resolution 1989). In 2015, the UNSC adopted Resolution 2253 to extend the latter regime to the Islamic State in Iraq and the Levant (ISIL).⁸ This sanctions regime against Al-Qaeda and ISIL will be referred to as the 1267 regime.

Under the 1267 regime, the UNSC imposes a travel ban, an arms embargo and a freeze of listed entities' funds and other financial assets or economic resources and a requirement to ensure that no funds, financial assets or economic resources are made available, directly or indirectly, for their benefit.⁹ Economic resources include tangible or intangible assets of every kind that can potentially be used to obtain funds, goods or services.¹⁰

The sanctions under the 1267 regime are “preventative in nature and are not reliant upon criminal standards set out under national law”;¹¹ they require no mental element of intention or knowledge by the person carrying out a prohibited transaction and are a matter of strict liability. They apply alongside the broad preventative and criminalizing measures required in UNSC Resolution 1373 and reaffirmed in subsequent resolutions establishing a global counterterrorism regime.

In Resolution 1373, the UNSC decided, *inter alia*, that all States shall prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of terrorist organizations or individuals for any purpose, even in the absence of a link to a specific terrorist act.¹² This is typically translated into regional and domestic sanctions, as will be described below.

Resolution 1373 also requires that States criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their

4 UNSC Resolution 1373, 28 September 2001.

5 UNSC Resolution 1267, 15 October 1999.

6 UNSC Resolution 1333, 19 December 2000.

7 UNSC Resolution 1390, 28 January 2002.

8 UNSC Resolution 2253, 17 December 2015.

9 UNSC Resolution 2368, 20 July 2017; UNSC Resolution 2255, 22 December 2015.

10 For explanation of terms at the Al-Qaida Sanctions Committee, see *Assets Freeze: Explanation of Terms*, 24 February 2015, available at: https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_assets_freeze_-_english.pdf.

11 UNSC Resolution 2368, above note 9, para. 64.

12 UNSC Resolution 2368, above note 9, para. 20 and UNSC Resolution 2462, above note 2, para. 3.

territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts. This is typically translated into regional and domestic criminal legislation, as shown below.

Resolution 1373 and subsequent resolutions reinforce and complement the criminalizing provisions of the 1999 International Convention for the Suppression of the Financing of Terrorism,¹³ which states that a person commits an offence if by any means, directly or indirectly, unlawfully and wilfully, that person provides or collects funds with the intention that they should be used or in the knowledge that they are to be used in order to carry out a terrorist act.¹⁴ It is not necessary to prove that the funds were actually used to carry out a terrorist act.

In 2019, the UNSC adopted Resolution 2462 and broadened the requirement to criminalize the financing of terrorism. It decided that all States shall criminalize:

the wilful provision or collection of funds, financial assets or economic resources ... directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose ... even in the absence of a link to a specific terrorist act.¹⁵

The words “*for any purpose ... even in the absence of a link to a specific terrorist act*” make the criminal act much broader than what is required under Resolution 1373 and the 1999 Convention, both of which require a link to a terrorist act.¹⁶

Four months after adopting Resolution 2462, the UNSC adopted Resolution 2482 on linkages between international terrorism and organized crime. It recommended measures to address various facets of organized crime such as trafficking in persons, arms, drugs and cultural property, the illicit trade in natural resources and wildlife, and other criminal activities. While the interplay between these measures and humanitarian activities is less apparent, this resolution is highlighted here because of its explicit reference to compliance with IHL and humanitarian activities, as described below.

Alongside States’ domestic implementation of the 1267 sanctions regime, States have generally translated their other UNSC and 1999 Convention obligations to prohibit and to criminalize the financing of terrorism into two categories of regional or domestic regulation: first, sanctions consisting of asset freezes and the prohibition of making funds and economic resources available to individuals and groups designated as terrorist (even in the absence of any intent to support them); and second, the criminalization of financial support to such

13 International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002) (ICSFT).

14 ICSFT, *ibid.*, Art. 2.

15 UNSC Resolution 2462, para. 5.

16 On the rationale, see Financial Action Task Force, *Guidance on Criminalizing Terrorist Financing*, October 2016, Recommendation 5, paras 19–20, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Criminalising-Terrorist-Financing.pdf>. See also, for example, UNSC Resolution 2253, 17 December 2015, para. 17; UNSC Resolution 2322, 12 December 2016, para. 6; UNSC Resolution 2368, above note 9, para. 18.

individuals and groups. For both sanctions and criminalization purposes, States will decide, through a regional body or individually, whom to designate as terrorist. As some examples below illustrate, domestic criminal regulation can be broader than what UN instruments require.

Without attempting to provide an exhaustive picture, below is an illustrative sampling of some regional and domestic counterterrorism measures that can trigger adverse effects for humanitarian activities in areas where designated groups are present. Some of these measures are taken by States in which humanitarian operations are carried out, while others are established far from where humanitarian activities take place, giving States a long reach, including through broad jurisdiction or implementation in donor agreements with humanitarian organizations.

Countering the financing of terrorism: Regional and domestic sanctions

A UN report published in 2020 found that more than sixty-five States had established domestic financial sanctions mechanisms pursuant to Resolution 1373; however, more than sixty States had not designated any individuals or entities or frozen any assets.¹⁷ While a number of domestic sanctions regimes have been described elsewhere,¹⁸ two in particular are highlighted here because their far reach and the role that they play in funding humanitarian operations can have important adverse consequences for humanitarian activities.

To implement Resolution 1373, the European Union (EU) adopted Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism.¹⁹ It requires the European Community to “ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for the benefit of persons, groups and entities listed in the Annex”.²⁰

17 UNSC, Letter dated 3 June 2020 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism and the Chair of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities addressed to the President of the Security Council, UN Doc. S/2020/493, 3 June 2020, available at: <https://www.undocs.org/en/S/2020/493>, p. 9.

18 Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, July 2013, available at: https://www.unocha.org/sites/unocha/files/CounterTerrorism_Study_Full_Report.pdf, pp. 26–28.

19 Council of the EU, “Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism”, 2001/931/CFSP, *Official Journal of the European Communities*, L 344/93, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001E0931&from=EN>.

20 *Ibid.*, Art. 3. This is implemented by Council of the EU, “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”, *Official Journal of the European Communities*, L 344/70, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R2580&from=GA>, which, in turn, is implemented by Council of the EU, “Council Implementing Regulation (EU) No 2021/138 of 5 February 2021 Implementing Article 2(3) of Regulation (EC) No 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, and

In addition to this sanctions regime implementing UNSC Resolution 1373, EU counterterrorism sanctions comprise the 1267 regime²¹ as well as a distinct autonomous financial sanctions regime against persons and entities associated with or supporting Al-Qaeda and ISIL.²² This autonomous regime also requires that “[n]o funds, other financial assets or economic resources shall be made available, directly or indirectly to or for the benefit of the natural or legal persons” who are listed.

These EU sanctions have a long reach: they directly apply in EU territory, to any EU national, and to any legal person incorporated or constituted under the law of an EU Member State or doing business within the EU.²³ Some EU countries may also have their own distinct domestic sanctions and lists of persons and entities connected with terrorism that they implement on top of EU ones.²⁴

In the United States (US), “specially designated global terrorists” (SDGTs) are designated by the Department of State and the Department of Treasury pursuant to Executive Order 13224,²⁵ which was adopted days after the attacks on 11 September 2001 and subsequently amended. These counterterrorism sanctions implement the 1267 sanctions regime as well as the financial transaction prohibitions of UNSC Resolution 1373.

A SDGT’s assets are frozen and it is prohibited to transact or deal in their assets, which includes making any contribution of funds, goods or services to or for the benefit of a SDGT.²⁶ This prohibition also has a long reach: It applies to any transaction in the US and to any US citizen, permanent resident alien, entity organized under the laws of the US including foreign branches, and any person in the US.²⁷

Countering the financing of terrorism: Regional and domestic criminalization

While some criminal jurisdictions require intention or knowledge that the funds will be used to carry out a terrorist act, others require intention or knowledge that they

Repealing Implementing Regulation (EU) 2020/1128”, *Official Journal of the European Union*, L 43/1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R0138>.

21 See Council of the EU, *Council Decision (CFSP) 2016/1693 of 20 September 2016 Concerning Restrictive Measures Against ISIL (Da’esh) and Al-Qaeda and Persons, Groups, Undertakings and Entities Associated with Them and Repealing Common Position 2002/402/CFSP*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016D1693-20201021>; Council of the EU, *Council Regulation (EC) No 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with the ISIL (Da’esh) and Al-Qaida Organisations*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02002R0881-20210414>.

22 Council Decision (CFSP) 2016/1693, *ibid.*, Art. 3(3) and (4); Council of the EU, *Council Regulation (EU) 2016/1686 of 20 September 2016 Imposing Additional Restrictive Measures Directed Against ISIL (Da’esh) and Al-Qaeda and Natural and Legal Persons, Entities or Bodies Associated with Them*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R1686-20200730>.

23 Council Regulation (EC) No 2580/2001, above note 20, Art. 10; Council Regulation (EC) No 881/2002, above note 21, Art. 11; Council Regulation (EU) No 2016/1686, *ibid.*, Art. 18.

24 For some examples, see K. Mackintosh and P. Duplat, above note 18.

25 U.S. Department of State, Bureau of Counterterrorism, Executive Order 13224, 23 September 2001, section 2(a), available at: <https://www.state.gov/executive-order-13224/>.

26 *Ibid.*

27 *Ibid.*, section 3.

are to be used for the benefit of terrorist organizations or individual terrorists for any purpose.²⁸ In a number of jurisdictions, the scope of the criminal offence will also extend beyond financial support to cover all forms of material support. As will be discussed in the upcoming section on consequences of counterterrorism regulation on impartial humanitarian activities, humanitarian organizations face real risks of falling foul of legislation that broadly criminalizes financial or material support to designated entities for any purpose.

In Nigeria, section 13 of the *Terrorism (Prevention) (Amendment) Act 2013*²⁹ makes it an offence to provide funds, property or other services by any means to terrorist groups, directly or indirectly, with the intention or knowledge or having reasonable grounds to believe that such funds or property will be used to commit a terrorist offence, even if the funds or property were not actually used to commit the offence.

In the EU, Member States are required to criminalize the following acts, when committed intentionally: supplying information or material resources to a terrorist group, or funding its activities in any way, with knowledge that such participation will contribute to the criminal activities of the terrorist group.³⁰ Individual EU Member States also have their own domestic legislation criminalizing support to terrorism.³¹

In Australia, a person commits an offence if they intentionally make funds available to a terrorist organization, whether directly or indirectly, and the person is simply reckless as to whether the organization is a terrorist organization.³² It is also an offence for any person to intentionally provide to a terrorist organization support or resources that would help it engage in preparing, planning, assisting in or fostering the commission of a terrorist act when the person knows or is reckless to whether the organization is a terrorist organization.³³

In the US, “foreign terrorist organizations” (FTOs) are designated by the Secretary of State under the *Immigration and Nationality Act of 1952* (as amended).³⁴ Once an entity is so designated, it is a crime to knowingly provide material support or resources to it, irrespective of any intention to support the FTO in committing a terrorist act or whether the support or resources actually

28 UNSC, Letter Dated 18 January 2016 from the Chair of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council, UN Doc. S/2016/49, 20 January 2016, para. 415, available at: https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Global-Implementation-Survey-1373_EN.pdf.

29 *Terrorism (Prevention) (Amendment) Act 2013* (Nigeria), available at: http://placng.org/lawsofnigeria/laws/terrorism_bill.pdf.

30 European Parliament and the Council of the EU, “Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA”, *Official Journal of the European Union*, L 88/6, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32017L0541>, Art. 4(b).

31 K. Mackintosh and P. Duplat, above note 18.

32 *Criminal Code Act 1995* (Australia) (Australian Criminal Code), div. 102.6(2), available at: <https://www.legislation.gov.au/Details/C2017C00235>. See K. Mackintosh and P. Duplat, above note 18, p. 45.

33 Australian Criminal Code, *ibid.*, div. 102.7.

34 *Immigration and Nationality Act of 1952*, 8 *United States Code* (USC) § 1189.

help the FTO carry out a terrorist activity.³⁵ “Material support or resources” is defined as “any property, tangible or intangible, or service”, and includes currency or monetary instruments, training, and expert advice or assistance, but not medicine or religious materials.³⁶ This legislation broadly applies to US nationals and residents wherever they are, persons who commit the offence in whole or in part in the US, as well as persons who commit the offence outside the US but subsequently set foot in the US.³⁷

Some additional examples of domestic criminalization of support to terrorism are described below in part II (“International humanitarian law and humanitarian safeguards in United Nations Security Council resolutions 2462 and 2482”).

Preventing, suppressing and criminalizing “foreign terrorist fighters”

Beyond countering the financing of terrorism, in 2014, the UNSC adopted Resolution 2178 requiring that States prevent and suppress the recruiting, organizing, transporting or equipping of “foreign terrorist fighters”, and the financing of their travel and of their activities in a manner consistent with international human rights, refugee and humanitarian law.³⁸ The resolution describes foreign terrorist fighters as individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.³⁹ The resolution also requires States to establish criminal offences to prosecute, *inter alia*, nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for any of these purposes.⁴⁰

States have adopted legislation to criminalize the recruitment of foreign terrorist fighters, as well as their travel, training, and participation in fighting in line with Resolution 2178. For instance, the Australian Criminal Code makes it an offence for a citizen to enter a foreign country and engage in or have the intention of engaging in a terrorist act in that or another foreign country.⁴¹ Some countries have laws in place to prevent persons from leaving the country if they

35 *United States Code* 18 USC § 2339B.

36 *United States Code* 18 USC § 2339A.

37 18 USC § 2339B, above note 35.

38 UNSC Resolution 2178, 24 September 2014, para. 5.

39 *Ibid.*, preamble.

40 *Ibid.*, para. 6.

41 Australian Criminal Code, above note 32, divs 119.1, 117.1 and 100.1; Petra Ball and Yvette Zegenhagen, “Common Article 1 and Counter-Terrorism Legislation”, in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law*, Routledge, Abingdon-on-Thames, 2021, p. 189.

are suspected of travelling to carry out terrorist activities.⁴² Some have also considered incorporating preventive measures in their legislation to revoke travel documents or issue orders to restrict movement and other social activities.⁴³

States have also regulated beyond what is required under Resolution 2178 by creating travel-related offences that do not require any purpose of perpetrating, planning, preparing or participating in terrorist acts, or providing or receiving terrorist training. Criminal legislation that makes it an offence to enter or remain in an area because of a risk of terrorism and does not require any terrorism-related purpose can potentially pose difficult challenges for humanitarians. For instance, in addition to implementing obligations under Resolution 2178, the United Kingdom's (UK) *Counter-Terrorism and Border Security Act 2019* allows the Secretary of State to designate an area outside the UK if it is necessary to restrict nationals and residents from entering or remaining in that area in order to protect the public from a risk of terrorism. It is an offence for such a person to enter or remain in a designated area.⁴⁴ This is understood to be a response to the difficulty of finding the evidence to prosecute nationals who return from Iraq or Syria where they have allegedly carried out terrorist acts.⁴⁵ Australia⁴⁶ and Denmark⁴⁷ have introduced similar offences in their legislation, and the Netherlands has been considering creating one.⁴⁸

As explained in the next section, the adverse consequences of the above-described counterterrorism measures on humanitarian activities can be significant. As will be discussed later in part II ("International humanitarian law and humanitarian safeguards in United Nations Security Council resolutions 2462 and 2482"), some of these and other national measures have incorporated safeguards ensuring that impartial humanitarian activities can be carried out as foreseen by IHL.

42 Jessica Burniske, Dustin Lewis and Naz Modirzadeh, *Suppressing Foreign Terrorist Fighters and Supporting Principled Humanitarian Action: A Provisional Framework for Analyzing State Practice*, 14 October 2015 (Suppressing FTFs), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673502, p. 23.

43 UN Doc. S/2016/49, above note 28, para. 438.

44 *Counter-Terrorism and Border Security Act 2019* (United Kingdom), sections 58B and 58C, available at: <https://www.legislation.gov.uk/ukpga/2019/3/contents/enacted/data.htm>. See also Emanuela-Chiara Gillard and Nathalie Weizmann, "Humanitarian Relief in Situations of Armed Conflict", in Robin Geiss and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security*, Oxford University Press, Oxford, 2021, p. 525.

45 UK Parliament, Commons Chamber, Consideration of Counter-Terrorism and Border Security Bill, Debate, 11 September 2018, available at: <https://hansard.parliament.uk/Commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/Counter-TerrorismAndBorderSecurityBill#contribution-66ACFAF0-3DB0-4D06-8375-22B5CF7A689B>. Note Mr Ben Wallace, Minister for Security and Economic Crime, column 658: "I fear that if we do not legislate, we will not be able to prosecute those people coming back."

46 Australian Criminal Code, above note 32, div. 119.2; P. Ball and Y. Zegenhagen, above note 41, pp. 188–189.

47 *Lov om ændring af straffeloven og om ophævelse af Lov, hvorved det forbydes fra dansk Territorium at understøtte krigsførende Magter* [Act Amending the Penal Code and Repealing the Act Prohibiting Danish Territory from Supporting Warring Powers] (Denmark), Law No. 642 of 9 June 2016, available at: <https://www.retsinformation.dk/eli/lt/a/2016/642>.

48 Christophe Paulussen and Emanuela-Chiara Gillard, "Staying in an Area Controlled by a Terrorist Organisation: Crime or Operational Necessity?", *International Centre for Counter-Terrorism*, 11 January 2021, available at: <https://icct.nl/publication/staying-in-an-area-controlled-by-a-terrorist-organisation-crime-or-operational-necessity/>.

Adverse consequences of counterterrorism regulation on impartial humanitarian activities, including medical activities

Impartial humanitarian activities are regularly carried out in countries where designated groups operate, such as Boko Haram in Nigeria, the Al-Nusrah Front for the People of the Levant in Syria, Abu Sayyef in the Philippines, or Nusrat al-Islam in Mali. Without specifying locations, the International Committee of the Red Cross (ICRC) has explained that it may carry out, among other humanitarian activities,

visits and material assistance to detainees suspected of or condemned for being members of a terrorist organization; facilitation of family visits to such detainees; first aid training; war surgery seminars; IHL dissemination to members of armed opposition groups included in terrorist lists; assistance to provide for the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities to internally displaced persons, where individuals associated with terrorism may be among the beneficiaries.⁴⁹

In the same places where designated groups operate, local medical personnel and humanitarian personnel provide care and treatment for wounded and sick civilians and fighters, including members of designated groups. Despite best efforts to prevent diversion of humanitarian supplies, these might still be diverted to members of designated groups. And, in the course of their operations, humanitarian organizations might need to make incidental payments (such as tolls, taxes, permit and other fees) to designated groups.

Certain humanitarian activities, diverted supplies, and incidental payments can fall under counterterrorism sanctions or criminal measures described above, especially when these have a far reach and are formulated in a broad manner. For humanitarian organizations, there are often multiple layers of counterterrorism sanctions and criminal legislation at play, for instance in the country of operations, the donor country, and the organization's country of registration, in addition to UN and regional measures.

Much has been documented and reported on the adverse consequences of counterterrorism regulation on humanitarian activities and medical care. As the ICRC has described,

[i]mpartial humanitarian actors ... are hindered in their ability to visit persons being detained by 'the other side', recover dead bodies, train armed groups on IHL, restore damaged water supplies and other services for the civilian population, and facilitate mutual detainee releases and swaps.⁵⁰

49 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, October 2015, available at: <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>.

50 ICRC, *Statement to the UNSC Debate: Threats to International Peace and Security Caused by Terrorist Acts: International Cooperation in Combating Terrorism 20 Years After the Adoption of Resolution 1373 (2001)*, 12 January 2021, available at: <https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations>.

Médecins Sans Frontières (MSF) has also described “[i]ncreasing limitations, restrictions and de facto criminalization of providing medical care to all wounded and sick under domestic law and counterterrorism legislation...” and “[r]estrictions on the right to treat all wounded and sick in civilian or humanitarian healthcare facilities...”.⁵¹ Below is a brief overview of the most salient adverse consequences.

Direct application of sanctions and criminal regulation

When UN, regional and domestic sanctions prohibit making any funds, financial assets or economic resources available, even indirectly, to listed entities regardless of the purpose of the contribution and without requiring any intention to support them, these sanctions can capture humanitarian assistance to individuals who are not or no longer fighting and are members of a designated group, as well as incidental payments to listed entities made by humanitarian organizations in the course of their activities. Even with efforts to prevent diversion of humanitarian assets,⁵² these sanctions are also broad enough to cover humanitarian supplies that are diverted to and benefit a designated group.⁵³ European humanitarian non-governmental organizations (NGOs) have reported that the most significant threat to their organizations is the risk of severe legal consequences for “unintentional or ill-informed breaches” of counterterrorism sanctions requirements.⁵⁴

Humanitarian and medical organizations and personnel may also have concerns about themselves being designated under sanctions because of their own activities. For instance, under the 1267 sanctions regime, activities for which an individual or group is eligible for listing include “otherwise supporting” an individual, group, undertaking or entity associated with ISIL or Al-Qaeda. However, listing a humanitarian organization for carrying out humanitarian activities in line with IHL is unlikely under the 1267 regime because the practice of States has been to target an entirely different category of entities and support activities.⁵⁵

51 Françoise Bouchet-Saulnier, Médecins Sans Frontières, *Statement on IHL & Counter-Terrorism: Tensions and Challenges for Medical Humanitarian Organizations*, 2 June 2016, available at: <https://msf-analysis.org/ihl-counter-terrorism-tensions-challenges-medical-humanitarian-organizations/>.

52 Counterterrorism and Humanitarian Engagement Project, *An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations: Research and Policy Paper*, May 2014, available at: <https://reliefweb.int/report/world/analysis-contemporary-anti-diversion-policies-and-practices-humanitarian-organizations>.

53 Emanuela-Chiara Gillard, *Humanitarian Action and Non-State Armed Groups: The International Legal Framework*, Chatham House, London, February 2017, available at: <https://www.chathamhouse.org/sites/default/files/publications/research/2017-02-02-humanitarian-action-non-state-armed-groups-gillard.pdf>, p. 7.

54 Gillian McCarthy, *Adding to the Evidence: The Impacts of Sanctions and Restrictive Measures on Humanitarian Action*, VOICE, March 2021, available at: <https://gisf.ngo/resource/adding-to-the-evidence-the-impact-of-sanctions-and-restrictive-measures-on-humanitarian-aid/>, p. 7.

55 For listing criteria, see UNSC Resolution 2368, above note 9, paras 2–4; Alice Debarre, *Making Sanctions Smarter: Safeguarding Humanitarian Action*, International Peace Institute, 19 December 2019 (A. Debarre, *Making Sanctions Smarter*), available at: <https://www.ipinst.org/2019/12/making-sanctions-smarter-safeguarding-humanitarian-action>, p. 3; Dustin Lewis, Naz Modirzadeh and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law & State Responses to Terrorism*, Harvard Law School Program on International Law and Armed Conflict, September 2015 (Medical

Also present is a risk of humanitarian organizations violating criminal legislation that broadly criminalizes financial or material support to a designated group for any purpose and only requires knowledge that the support is being provided to a designated group. Such a risk is not theoretical. In 2010, the US Supreme Court considered that teaching designed to impart a specific skill to a designated terrorist group – in this case training in IHL – constituted knowingly providing material support.⁵⁶

With respect to the provision of medical care, a report published in 2018 revealed that among sixteen countries surveyed, “practices in at least 10 countries appear to suggest that the authorities interpret support to terrorism to include the provision of healthcare”. It added that “the counter-terrorism framework has purportedly strengthened the legal and moral basis to justify [the criminalization of healthcare]”.⁵⁷ Legal proceedings have been instituted in a number of countries for supporting terrorism through medical activities.⁵⁸ For instance, under Iraqi national law on combating terrorism, charges have been brought against doctors working in hospitals in territories held by Islamic State in Iraq and Syria (ISIS).⁵⁹ In the US, a medical doctor who had volunteered as a medic in the Al-Qaeda military structure to treat injured fighters was convicted of conspiring to provide, and providing or attempting to provide, material support under the direction or control of a terrorist organization.⁶⁰ In Syria, hundreds of doctors and nurses have been arrested for providing medical assistance in an opposition area.⁶¹

Donor conditions

In addition to the risk of humanitarian operations falling foul of counterterrorism sanctions and criminal legislation, humanitarian organizations are often constrained by clauses that donor States include in their funding agreements. To

Care in Armed Conflict), available at: <https://pilac.law.harvard.edu/medical-care-in-armed-conflict-international-humanitarian-law-and-state-responses-to-terrorism>.

56 Supreme Court of the United States, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 22 (2010), available at: <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf>.

57 Marine Buissonniere, Sarah Woznik, Leonard Rubenstein and Julie Hannah, *The Criminalization of Healthcare, Safeguarding Health in Conflict*, Johns Hopkins Bloomberg School of Public Health and University of Essex, June 2018, available at: <https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf>.

58 D. Lewis, N. Modirzadeh and G. Blum, *Medical Care in Armed Conflict*, above note 55, chapter 5; see also Alice Debarre, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework*, International Peace Institute, 17 September 2018, available at: <https://www.ipinst.org/2018/09/safeguarding-humanitarian-action-in-un-counterterrorism-framework>.

59 Human Rights Watch, *Flawed Justice: Accountability for ISIS Crimes in Iraq*, 5 December 2017, available at: <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq>; Maya Alleruzzo and Salar Salim, “Iraq’s IS Trials Bring Swift Verdicts, Almost All Guilty”, *AP*, 30 April 2018, available at: www.apnews.com/25a655d5b3cb47c5a0251f596855c98f/Iraq-s-IS-trials-bring-swift-verdicts-almost-all-guilty.

60 *United States v. Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007), available at: <https://www.courtlistener.com/opinion/2579725/united-states-v-shah/>.

61 Jessica Burniske, Naz Modirzadeh and Dustin Lewis, *Counter-Terrorism Laws and Regulations: What Aid Agencies Need to Know*, Humanitarian Practice Network, London, November 2014, available at: https://odihpn.org/wp-content/uploads/2014/11/NP_79_crc_string_FINAL.pdf, p. 10.

comply with applicable UN, regional and domestic counterterrorism regulation, donor States translate this into stringent conditions so that the funds they transfer to humanitarian organizations do not benefit listed entities.⁶² According to a survey by the humanitarian NGO network VOICE, donor requirements related to counterterrorism sanctions were reportedly stricter in the US than in the EU.⁶³ At times donor conditions are even stricter than what counterterrorism regulation requires.

For instance, the US Agency for International Development (USAID) requires a Certification Regarding Support to Terrorists, by which the funding recipient represents that they “did not, within the previous three years, knowingly engage in transactions with, or provide material support or resources to, any individual or entity who was, at the time, subject to” US counterterrorism or UNSC sanctions.⁶⁴ USAID also incorporates a standard provision in its agreements with US and non-US NGOs, by which the recipient agrees not to “engage in transactions with, or provide resources or support to, any individual or entity that is subject to” US or UN sanctions.⁶⁵ Such clauses require humanitarian organizations to be aware of applicable counterterrorism regulations and take steps to ensure that they comply with them. But, when humanitarian organizations carry out activities where listed groups are present, the requirement to strictly avoid any such transactions or the provision of resources or support can preclude impartial humanitarian activities even when these are explicitly allowed under IHL.

Some donor clauses require that the recipient use its best endeavours or take appropriate steps to ensure that the funds are not used to support listed groups.⁶⁶ Even under this standard, however, a condition that ultimately precludes humanitarian assistance to certain individuals or entities solely based on their designation would not be compatible with IHL rules that explicitly foresee impartial humanitarian services for persons who are not or no longer fighting, and who include all civilians as well as wounded, sick or detained fighters regardless of any terrorist designation. Moreover, such a condition would undermine the impartiality and non-discrimination by which humanitarian organizations are expected to operate under IHL.

62 For examples of such donor conditions, see Counterterrorism and Humanitarian Engagement Project, *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts*, May 2014, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/CHE_Project_-_Counterterrorism-related_Humanitarian_Grant_Clauses_May_2014.pdf.

63 G. McCarthy, above note 54, p. 7. For illustrations of European donor clauses, see Emanuela-Chiara Gillard, Sangeeta Goswami and Fulco van Deventer, “Screening of Final Beneficiaries – A Red Line in Humanitarian Operations. An Emerging Concern in Development Work”, *International Review of the Red Cross*, 2021, in this edition.

64 USAID, *Certifications, Assurances, Representations, and Other Statements of the Recipient*, May 2020, available at: <https://www.usaid.gov/sites/default/files/documents/1868/303mav.pdf>, p. 4. Some exceptions are also laid out.

65 USAID, *Standard Provisions for U.S. Nongovernmental Organizations*, May 2020, available at: <https://www.usaid.gov/sites/default/files/documents/1868/303maa.pdf>, p. 12.

66 K. Mackintosh and P. Duplat, above note 18, pp. 47–70.

As another example, in its funding agreements for humanitarian operations in Nigeria, USAID included a clause aimed at preventing any funds from benefitting Boko Haram. It asked recipients to

obtain the prior written approval of the USAID Agreement Officer before providing any assistance made available under this Award to individuals whom the Recipient affirmatively knows to have been formerly affiliated with Boko Haram or [ISWAP], as combatants or non-combatants.⁶⁷

Requiring such approval would undermine the ability of a humanitarian organization to conduct its operations with independence and neutrality, which are necessary to build trust and acceptance among parties to the conflict, communities and recipients.⁶⁸ Denying approval for persons who are nevertheless entitled to humanitarian assistance under IHL would undermine the organization's ability to conduct operations impartially and without discrimination (i.e. strictly according to needs), and would be incompatible with IHL.

Donor agreements will often require that the obligations they impose be passed on to implementing partners, contractors, or sub-grantees, and require notification when a transaction has been linked to a designated group. Complying with multiple counterterrorism-related donor conditions has entailed time-consuming and costly administrative, legal and risk management processes for humanitarian organizations. Smaller organizations typically do not have the same resources or capacity as bigger ones.⁶⁹

De-risking

Humanitarian organizations rely on banks to receive funds from donors and transfer them to areas of operation. Yet States' counterterrorism regulations, with which banks must equally comply or else risk liability, have led them to decline to provide financial services to humanitarian organizations who carry out activities where designated entities are present – a practice called “de-risking”. For fear of violating the law and being exposed to fines and other legal and reputational repercussions, banks have declined to open accounts, have frozen or closed them, and delayed and blocked financial transactions.⁷⁰ In turn this has led humanitarian organizations to delay, reduce or even cease some activities, and

67 Obi Anyadike, “Aid Workers Question USAID Counter-Terror Clause in Nigeria”, *The New Humanitarian*, 5 November 2019, available at: <https://www.thenewhumanitarian.org/news-feature/2019/11/05/USAID-counter-terror-Nigeria-Boko-Haram>.

68 Under the principle of neutrality, humanitarian actors “must not take sides in hostilities or engage in controversies of a political, racial, religious or ideological nature”. Independence is defined as autonomy “from the political, economic, military, or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented”. Swiss Federal Department of Foreign Affairs, *Humanitarian Access in Situations of Armed Conflict: Practitioner's Manual*, Version 2, December 2014, p. 19.

69 Naz Modirzadeh, *Comment on the Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, March 2017 (Comment on the Pilot Empirical Survey Study), available at: <http://blogs.harvard.edu/pilac/files/2017/03/Comment-on-the-Pilot-Empirical-Survey-Study-2017.pdf>, p. 73; A. Debarre, *Making Sanctions Smarter*, above note 55.

resort to informal money transfer channels for their operations.⁷¹ According to the NGO network VOICE, bank de-risking issues such as blocked or delayed transactions and returned funds were the highest ranking impediments reported by European NGOs as a result of counterterrorism and other types of sanctions.⁷² Similar difficulties have been reported with other parts of the private sector, such as insurance and credit card services,⁷³ or with importing supplies such as medicine into areas where designated entities operate.⁷⁴ In this respect, too, smaller organizations will face greater challenges because they lack the resources to manage related administrative burdens.⁷⁵

Measures against “foreign terrorist fighters”

With the adoption of UNSC Resolution 2178, experts posited that humanitarian organizations might face new restrictions on travel, increased scrutiny over their communications with certain areas, additional donor requirements in relation to humanitarian operations where designated entities have control, or heightened review procedures and reticence from banks to provide financial services.⁷⁶ Of particular risk to humanitarians are travel offences that do not require any terrorism-related purpose and make it an offence to enter or remain in an area because of a risk of terrorism.⁷⁷ Among other concerns for humanitarians, legislation allowing a government to determine for security reasons whether humanitarian personnel can travel to and carry out activities in a certain area can undermine their actual and perceived independence, neutrality and impartiality and preclude impartial humanitarian activities that are allowed under IHL.⁷⁸

Chilling effect

The above-described legal risks, donor conditions and administrative burdens stemming from counterterrorism regulation have generated a “chilling effect”, causing humanitarian organizations to overcorrect by limiting or withdrawing

70 K. Mackintosh and P. Duplat, above note 18; E.-C. Gillard and N. Weizmann, above note 44; Stuart Gordon and Sherine El Taraboulsi-McCarthy, *Counter-Terrorism, Bank De-Risking and Humanitarian Response: A Path Forward*, Humanitarian Policy Group, August 2018, available at: <https://cdn.odi.org/media/documents/12368.pdf>.

71 Report of the Analytical Support and Sanctions Monitoring Team established pursuant to Resolution 1526 (2004), UN Doc. S/2017/35, 13 January 2017, para. 71.

72 G. McCarthy, above note 54, p. 7.

73 A. Debarre, *Making Sanctions Smarter*, above note 55, p. 10.

74 K. Mackintosh and P. Duplat, above note 18.

75 UK HM Treasury and Home Office, *National Risk Assessment of Money Laundering and Terrorist Financing 2020* (Report, December 2020), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945411/NRA_2020_v1.2_FOR_PUBLICATION.pdf, p. 127.

76 J. Burniske, D. Lewis and N. Modirzadeh, *Suppressing FTFs*, above note 42.

77 See E.-C. Gillard and N. Weizmann, above note 44.

78 C. Paulussen and E.-C. Gillard, above note 48.

their activities in areas where designated groups operate even if humanitarian needs are high.⁷⁹ This can deprive people in need of humanitarian services and undermine the ability of humanitarian organizations to operate in an impartial manner.⁸⁰

Over the past decade, humanitarian organizations, academic institutions, think tanks, various components of the UN and States have devoted great effort to raising awareness of the adverse impact of counterterrorism measures on humanitarian activities and advocating for adequate safeguards against it. Academic studies have been conducted,⁸¹ UN and NGO reports and think tank papers published,⁸² and expert meetings,⁸³ high-level and Security Council events convened.⁸⁴ In an effort to correct course and remedy the negative effects described above, as explained in part II (“International humanitarian law and humanitarian safeguards in United Nations Security Council resolutions 2462 and 2482”), the UNSC has begun to incorporate requirements to comply with IHL and safeguards for impartial humanitarian activities, including medical activities, in its counterterrorism resolutions.

79 See N. Modirzadeh, Comment on the Pilot Empirical Survey Study, above note 69.

80 K. Mackintosh and P. Duplat, above note 18, p. 84; A. Debarre, Making Sanctions Smarter, above note 55, p. 3.

81 See Harvard Law School Program on International Law and Armed Conflict series of publications on counterterrorism measures and humanitarian action, available at: <https://pilac.law.harvard.edu/publications#pilac-publications>.

82 See, for example, K. Mackintosh and P. Duplat, above note 18; Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, 12 June 2018, available at: <https://www.nrc.no/resources/reports/principles-under-pressure/>; International Peace Institute, range of publications on sanctions, counterterrorism measures and humanitarian action, available at: <https://www.ipinst.org/tag/humanitarian-affairs>; Emanuela-Chiara Gillard, *Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action*, Chatham House, London, August 2017 (Recommendations for Reducing Tensions); Sara Pantuliano, Kate Mackintosh, Samir Elhawary and Victoria Metcalfe, *Counter-Terrorism and Humanitarian Action: Tensions, Impact and Ways Forward*, HPG Policy Brief 43, Humanitarian Policy Group, London, October 2011, available at: <https://cdn.odi.org/media/documents/7347.pdf>; Fionnuala Ní Aoláin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/75/337, 3 September 2020, available at: <https://undocs.org/A/75/337>.

83 See, for example, International Peace Institute, *Safeguarding the Space for Principled Humanitarian Action in Counterterrorism Contexts*, 23 May 2018, available at: <https://www.ipinst.org/2018/05/poc-counterterrorism-contexts#3>; Permanent Mission of Spain to the United Nations, *Record of the Fourth Retreat on International Humanitarian Law: Safeguarding the Humanitarian Space in the Context of Sanctions Regimes and Counter-Terrorism Measures*, UN Doc. A/74/857 S/2020/403, 2–3 March 2020, available at: <https://digitallibrary.un.org/record/3862098?ln=en>.

84 See, for example, Peter Maurer, ICRC President, “Combating Terrorism Should Not Come at the Expense of Humanitarian Action or Principles” (Speech, UN General Assembly High-Level Side Event on Counter-Terrorism Frameworks and Sanctions Regimes: Safeguarding Humanitarian Space, 26 September 2019), available at: <https://www.icrc.org/en/document/combating-terrorism-should-not-come-expense-humanitarian-action-or-principles>; Briefing by ICRC President Peter Maurer and Professor of Practice at Harvard Law School Naz Modirzadeh, UN Doc. S/PV.8499, 1 April 2019. In 2021, the Counter-Terrorism Committee Executive Directorate will issue a new report on States’ counterterrorism legislation compliance with IHL and the impact of counterterrorism measures on humanitarian activities.

International humanitarian law and humanitarian safeguards in United Nations Security Council resolutions 2462 and 2482

During negotiations on Resolution 2462 on countering the financing of terrorism, a number of States and humanitarian organizations called for a robustly worded provision requiring that States' counterterrorism measures comply with their obligations under IHL and not impede humanitarian activities, including medical activities. This was deemed necessary to adequately counterbalance the risk that humanitarian activities could be prohibited under sanctions or constitute an offence under criminal legislation, and the risk of other adverse effects as laid out above. At the same time, some States wanted to preclude the possibility of funnelling funds to listed entities through NGOs under the pretext of legitimate activities.⁸⁵

In negotiations on Resolution 2482 a few months later on linkages between international terrorism and organized crime, States and humanitarian organizations raised similar concerns to those put forward for Resolution 2462. Two States – Belgium and the UK – broke silence on a draft of the resolution in order to ensure that similar language was incorporated to safeguard humanitarian activities.⁸⁶

In both resolutions, the outcome was the first of its kind.⁸⁷

Compliance or consistency with international humanitarian law

Before the adoption of resolutions 2462 and 2482, several UNSC counterterrorism resolutions had incorporated references in their preamble to ensuring that counterterrorism measures comply with IHL. In the preamble of both resolutions 2462 and 2482, the UNSC reaffirmed that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law and IHL.

Such references in operative paragraphs had been infrequent,⁸⁸ but resolutions 2462 and 2482 both signal an evolution. In paragraph 5 of Resolution 2462, the UNSC required that States criminalize the financing of terrorism in a manner consistent with their IHL obligations. It:

[d]ecides that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law ... establish serious

85 Security Council Report, *Combatting Financing of Terrorism Open Debate*, 27 March 2019, available at: <https://www.securitycouncilreport.org/whatsinblue/2019/03/combating-financing-of-terrorism-open-debate.php>.

86 Security Council Report, *International Terrorism and Transnational Organised Crime*, 19 July 2019, available at: <https://www.securitycouncilreport.org/whatsinblue/2019/07/international-terrorism-and-transnational-organised-crime.php>.

87 The outcome has, however, been criticized as “fail[ing] to effectively mitigate against its potential impacts on humanitarian action and humanitarians’ longstanding concerns”, according to Scott Paul and Kathryn Achilles, “Correcting Course: Avoiding the Collision Between Humanitarian Action and Counterterrorism”, in *Just Security*, 23 May 2019, available at: <https://www.justsecurity.org/64158/correcting-course-avoiding-the-collision-between-humanitarian-action-and-counterterrorism/>.

88 UNSC Resolution 2178, above note 38, para. 5.

criminal offenses sufficient to provide the ability to prosecute and to penalize ... the wilful provision or collection of funds, financial assets or economic resources ... directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose ... even in the absence of a link to a specific terrorist act.

In a similar fashion, in paragraph 6 of Resolution 2462, the UNSC required that States ensure that all their counterterrorism measures comply with IHL. It:

[d]emands that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law.

In paragraph 16 of Resolution 2482, the UNSC borrowed language from Resolution 2462 and “urged” States to ensure that all measures taken to counter terrorism comply with their obligations under IHL.

The reference in these paragraphs to “their obligations” under IHL principally applies to States for whom IHL obligations have come into effect because they are party to an armed conflict. While most IHL obligations are designed to bind parties to an armed conflict, IHL does contain some obligations that apply in times of peace or that are binding on third States in connection with an ongoing armed conflict to which they are not a party. For instance, third States have IHL obligations relating to humanitarian relief or to humanitarian activities more broadly in connection with ongoing international armed conflicts to which they are not a party.⁸⁹ However, IHL applicable in non-international armed conflict (NIAC) is silent in this respect.⁹⁰

It is also interesting to note that paragraph 5 of Resolution 2462 uses the term “in a manner consistent with their obligations” whereas paragraph 6 uses the term “comply with their obligations”. The former term could be interpreted as less strict than the latter, possibly akin to respecting the object and purpose of obligations. The object and purpose of IHL obligations are to protect persons not or no longer participating in hostilities,⁹¹ including by allowing humanitarians to meet essential needs and ensuring the wounded and sick are cared for. Therefore, even if the phrase “in a manner consistent with their obligations” under paragraph 5 is interpreted as less strict, it still entails that States must establish measures to criminalize the financing of terrorism in a manner that protects persons not or no longer participating in hostilities.

⁸⁹ See AP I, Art. 70 and 81.

⁹⁰ See Nathalie Weizmann, “Ensuring Respect for IHL as it Relates to Humanitarian Activities”, in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law*, Routledge, Abingdon-on-Thames, 2021, pp. 201–202.

⁹¹ See ICRC, Commentary on the Second Geneva Convention, 2017, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1A35EE65211A18AEC12581150044243A>, Art. 2, para. 238.

Creating legally binding obligations

Under Article 25 of the UN Charter, “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. It is generally accepted that when the Council uses the verb “decides” in a resolution, it is making a decision and thus creating a legally binding obligation.⁹² As “demand” denotes an authoritative and insistent command (in French, for instance, the corresponding word is “*exige*”), it can also be interpreted as a decision. As one author has written, “whenever the Security Council uses firm language (such as ‘decides’, ‘demands’, ‘orders’) in contrast to a mere ‘calling upon’, ‘urging’ or ‘requesting’, this can be seen as an implied use of its authority to make legally binding decisions...”⁹³

Both operative paragraphs 5 and 6 of Resolution 2462 can therefore be interpreted as creating legally binding obligations.⁹⁴ However, paragraph 5 is narrower in scope than paragraph 6. The former requires that the criminalization of terrorism financing be consistent with a State’s obligations under IHL. The latter demands that States ensure that all counterterrorism measures comply with IHL. Paragraph 6 therefore encompasses a much broader set of actions, including, *inter alia*, economic sanctions, measures criminalizing material support to terrorism, and travel-related measures.⁹⁵

In contrast to “decides” and “demands”, the term “urges” used in paragraph 16 of Resolution 2482 is not understood as creating a legal obligation. Experts on UNSC practice have written, “it can be clearly established that by using ‘urges’ and ‘invites,’ as opposed to ‘decides,’ the paragraph is intended to

92 Daniel H. Joyner, “What Were the Implications of the Actions of the UN Security Council?”, in Daniel H. Joyner (ed.), *Iran’s Nuclear Program and International Law: From Confrontation to Accord*, Oxford Scholarship Online, 2016, pp. 195–198. See also Security Council Report, *The UN Security Council Handbook: A User’s Guide to Practice and Procedure*, New York, 2019, available at: <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/the-un-security-council-handbook-by-scr-1.pdf>.

93 Andreas Zimmermann, “Humanitarian Assistance and the Security Council”, *Israel Law Review*, Vol. 50, No. 1, 2017, pp. 3–23 and p. 16. See also Daniel H. Joyner, *Iran’s Nuclear Program and International Law: From Confrontation to Accord*, Oxford University Press, New York, 2016, p. 198. On how the absence of the term “decides” should not prejudice the legally binding character of the Council’s formulation, see Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds), *La Charte des Nations Unies: Commentaire article par article*, 3rd ed., Vol. 1, Economica, Paris, 2005, p. 915. According to the International Court of Justice (ICJ), “[i]n view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.” ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, paras 113–114.

94 Naz Modirzadeh and Dustin Lewis, *Taking into Account the Potential Effects of Counterterrorism Measures on Humanitarian and Medical Activities*, Harvard Law School Program on International Law and Armed Conflict, May 2021 (Taking into Account), available at: <http://blogs.harvard.edu/pilac/files/2021/05/Taking-Into-Account.pdf>, pp. 24–25.

95 For the types of counterterrorism measures that both paragraphs 5 and 6 cover, see Taking into Account, *ibid.*, pp. 32–33.

be exhortatory and not binding”.⁹⁶ The reason for this looser language may lie, at least in part, in the fact that paragraph 16 of Resolution 2482 incorporates an additional element not found in paragraphs 5 and 6 of Resolution 2462 and discussed below.⁹⁷ It is worth noting that paragraph 16 of Resolution 2482 also covers all measures to counter terrorism.

No conflict with international humanitarian law obligations

Before examining with which obligations of IHL these operative paragraphs require consistency or compliance and how this relates to preventing the adverse consequences for humanitarian activities described earlier, it can be relevant to address a recurrent query about potential conflicts between States’ IHL obligations and legally binding UNSC decisions, such as the requirement to take measures to counter terrorism.

96 Security Council Report, *Special Research Report No. 1: Security Council Action Under Chapter VII: Myths and Realities*, 23 June 2008, available at: <https://www.securitycouncilreport.org/research-reports/lookup-c-glkwlemtisg-b-4202671.php>, p. 10.

97 Comparison between relevant provisions of resolutions 2462 and 2482:

| Resolution 2462 | Resolution 2482 |
|--|---|
| <p>Para. 5. Decides that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense the wilful provision or collection of funds, financial assets or economic resources or financial or other related services, directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act;</p> <p>Para. 6. Demands that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law;</p> <p>Para. 24. Urges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law;</p> | <p>Para. 16. Urges Member States to ensure that all measures taken to counter terrorism comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, and urges States to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law;</p> |

Article 103 of the UN Charter states that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” The phrase “obligations of the Members of the UN under the Charter” is commonly interpreted as including decisions of the UNSC, as described above.⁹⁸ However, peremptory norms⁹⁹ of international law (or *jus cogens*), which include the basic rules of IHL¹⁰⁰ and in particular Article 3 common to the four Geneva Conventions,¹⁰¹ may not be overridden by a legally binding decision of the UNSC. As Judge *ad hoc* Lauterpacht wrote in a separate opinion in the Genocide Case before the International Court of Justice:

The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between the Security Council resolution and *jus cogens*.¹⁰²

98 Johann Ruben Leiae and Andreas Paulus, “Miscellaneous Provisions, Article 103”, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf, *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I, Oxford University Press, Oxford, 2012, para. 38.

99 A peremptory norm of general international law is defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art. 53. Peremptory norms protect the values and interests that are fundamentally important to the international community as a whole: International Criminal Tribunal for the former Yugoslavia, *Furundžija*, Case No. IT-95-17/1, Judgment (Trial Chamber), (10 December 1999), paras 153–156.

100 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, para. 257; International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Zoran Kupreskic and others*, Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 520; Marco Sassoli, “State Responsibility for Violations of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 84, No. 846, June 2002, available at: https://www.icrc.org/en/doc/assets/files/other/401_434_sassoli.pdf, p. 414; Luigi Condorelli and Laurence Boisson de Chazournes, “Quelques remarques à propos de l’obligation des États de ‘respecter et faire respecter’ le droit international humanitaire en toutes circonstances”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC and Martinus Nijhoff Publishers, The Hague, 1984, pp. 33–34; Alexander Orakhelashvili, “The Identification of Peremptory Norms”, in Alexander Orakhelashvili (ed.), *Peremptory Norms in International Law*, Oxford University Press Online, January 2009, p. 61.

101 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

102 Dissenting Opinion of Judge *ad hoc* Lauterpacht, ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* (Provisional Measures) (Order of 8 April 1993), *ICJ Rep* 3 1993, para. 100. See also Concurring Opinion of Sir Nigel Rodley, Human Rights Committee, *Sayadi and Vinck v. Belgium* (Communication No. 1472/2006), UN Doc. CCPR/C/94/D/1472/2006 (22 October 2008); Anne Peters, “Ch.V The Security Council, Functions and Powers, Article 25”, in B. Simma *et al.*, *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I, Oxford University Press, Oxford, 2012, para. 19; European Court of First Instance, *Yassin Abdullah Kadi and Al Barakaat International Foundation*

On the interplay of UNSC powers and IHL obligations specifically, one scholar has written:

Chapter VII economic sanctions are subject to peremptory norms, particularly the fundamental humanitarian rules ... All this implies an obligation not to deprive civilians of access to the goods necessary for their survival, and respective duties of the occupying powers. Any sanctions regime is governed by humanitarian norms essential for the survival of the civilian population, to secure food, water, shelter, medicines and medical care.¹⁰³

Another expert has added, “the provisions of the Geneva Conventions and their Additional Protocols on relief actions for the benefit of specially vulnerable groups threatened by starvation also belong to that category of absolutely binding obligations”.¹⁰⁴

Even where treaty obligations are not peremptory, judges and scholars have advocated an interpretation approach that avoids a conflict between a State’s obligations under the Charter and its other treaty obligations. It has been recommended that:

any interpretation of a Council decision should operate on the basis of the presumption, first, that the Council does not intend to deviate from international law, and second, that it does not intend to force members to violate international law when carrying out the decision.¹⁰⁵

Put slightly differently,

contradiction should only be assumed when norms stand in clear conflict with each other or in the case that the contradictory intent is clearly expressed. In other words, this would only be the case if no interpretation of the non-Charter rule appeared possible that would bring it into accordance with the Charter.¹⁰⁶

The European Court of Human Rights¹⁰⁷ and a member of the UN Human Rights Committee have applied this approach in the case of international human rights law, which shares many of the same aims and even expresses some of the same rules as IHL.

v. Council of the European Union and Commission of the European Communities, T-315/01, Judgment, 21 September 2005, para. 230.

103 Alexander Orakhelashvili, “The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions”, *European Journal of International Law*, Vol. 16, No. 1, 2005, pp. 66–67.

104 Hans-Peter Gasser, “Collective Economic Sanctions and International Humanitarian Law – An Enforcement Measure Under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 56, 1996, pp. 871–904 and p. 881.

105 A. Peters, above note 102.

106 Johann Ruben Leiã and Andreas Paulus, “Miscellaneous Provisions, Article 103”, in B. Simma *et al.*, *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I, Oxford University Press, Oxford, 2012, para. 18. See also Vera Gowlland-Debbas, “Is the UN Security Council Bound by Human Rights Law?”, *ASIL Proceedings*, Vol. 103, 2009, p. 202.

107 European Court of Human Rights, *Al-Jedda v. United Kingdom*, Application No. 27021/08, Judgment (Grand Chamber), 7 July 2011, para. 102.

Taken together, the peremptory nature of IHL rules, the interpretive approach of avoiding a conflict between Charter and other treaty obligations, and the legally binding requirement in Resolution 2462 that States' counterterrorism measures be consistent/comply with IHL, make it clear that UNSC counterterrorism requirements and States' IHL obligations coexist, and the former do not override the latter.¹⁰⁸

Humanitarian safeguards in United Nations Security Council resolutions 2462 and 2482

Paragraphs 5 and 6 of Resolution 2462 do not indicate how States should put into practice the requirement that counterterrorism measures be consistent or compliant with IHL obligations. However, paragraph 24 of Resolution 2462 and paragraph 16 of Resolution 2482 offer some direction by explicitly drawing attention to the adverse effects of counterterrorism measures on humanitarian and medical activities foreseen under IHL.

Paragraph 24 of Resolution 2462:

[u]rges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.

Similarly, paragraph 16 of Resolution 2482 "urges states to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law". The fact that this paragraph begins by urging States to ensure that their counterterrorism measures comply with IHL makes the direct connection between IHL compliance and safeguarding humanitarian activities against adverse effects all the more evident. Recently, scholars have interpreted that "to take into account" encompasses "at least the identification of those potential effects and taking the action necessary to ensure that the indicated measures reflect respect for or are otherwise compatible with potentially or actually applicable IHL rights and obligations concerning humanitarian and medical activities".¹⁰⁹

In both paragraphs 16 and 24, this humanitarian safeguard applies to all States adopting counterterrorism measures, i.e. States party to an armed conflict and third States not party to an armed conflict. Also worth noting is that the scope of paragraph 24 of Resolution 2462 is narrower than the scope of paragraph 16 of Resolution 2482: The former refers to measures to counter the

¹⁰⁸ It is worth noting that Art. 21 of the ICSFT provides that "[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular... international humanitarian law...".

¹⁰⁹ Taking into Account, above note 94, p. 38.

financing of terrorism whereas the latter refers to counterterrorism measures more generally. Neither of these two paragraphs is legally binding as each only “urges” States to take these potential effects into account.

International humanitarian law rules on humanitarian and medical activities in non-international armed conflict¹¹⁰

To bring to light this direct connection between States’ compliance with IHL in their counterterrorism measures and taking into account the potential effect of these measures on humanitarian activities, including medical activities, carried out in a manner consistent with IHL, this section lays out the relevant IHL obligations that relate to humanitarian activities and medical care.

Humanitarian activities

To recall, IHL governs hostilities wherever they take place on the territory of the affected State, and its rules on humanitarian activities and medical care and treatment in connection with the conflict apply wherever persons affected by the conflict are located.¹¹¹ IHL equally applies when hostilities between parties to a NIAC and their effects span neighbouring countries (e.g. in Syria and Iraq; in Mali, Burkina Faso and Niger; in Nigeria, Niger, Chad and Cameroon).

In a NIAC, which necessarily involves the participation of one or more non-State armed groups, IHL explicitly allows an impartial humanitarian body to offer its services to the parties for the benefit of persons who are not or no longer fighting, including civilians and fighters who are wounded, sick or detained.¹¹² Humanitarian activities can include assistance to provide food and medicine, repair systems for water supply and treatment, build medical facilities, and clear mines and unexploded ordnance. Protection activities, such as visits to persons deprived of their liberty, aim to ensure that parties to conflict respect their obligations under IHL.¹¹³

110 This section focuses on IHL rules applicable in NIAC since this is generally the type of armed conflict to which designated armed groups are a party. However, there may be circumstances in which IHL rules applicable in international armed conflict will govern the actions of armed groups (see, for example, Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132573, pp. 64–65; International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 25 July 1999, para. 137 on State “overall control” over the group; or Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 1(4)). Importantly, many of the same rules of IHL are applicable in any type of armed conflict as a matter of customary IHL.

111 See ICRC, Commentary on the First Geneva Convention, 2016, Art. 3 (2016 Commentary on GC I), para. 736.

112 Common article 3 to the GC; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 18.

113 2016 Commentary on GC I, common article 3, above note 111.

An impartial humanitarian body or organization (or “actor” as mentioned in resolutions 2462 and 2482) must have a minimum of structure and capacity to meet professional standards for humanitarian activities. The profit-making nature of a company will preclude it from qualifying as an impartial humanitarian body.¹¹⁴ To be able to offer its services under IHL, a humanitarian organization must operate impartially at all times, including during planning and implementation of a humanitarian activity. Impartiality requires that proposals, priorities and decisions on humanitarian activities be guided solely by and in proportion to the need of affected persons.¹¹⁵ It also requires that humanitarian activities be carried out without discrimination on the basis of nationality, race, religious beliefs, class or political opinions or similar criteria.

Offers of humanitarian services are not considered unlawful interference in the armed conflict or an unfriendly act.¹¹⁶ Nor are they considered to be recognition of or support to a party to the conflict. This, combined with the fact that IHL explicitly allows impartial humanitarian organizations to offer their services, should thus preclude the prohibition or criminalization of such offers of services or their implementation.¹¹⁷ In addition, IHL states that the right to offer humanitarian services does not affect the legal status of the parties to the conflict.¹¹⁸ In other words, it “does not limit the government’s right to fight a non-State armed group using all lawful means; and it does not affect its right to prosecute, try and sentence its adversaries for their crimes”.¹¹⁹ This also reinforces the fact that IHL applies independently of whether a non-State armed group has been designated as terrorist under domestic law.¹²⁰

Whenever offers of humanitarian services are made in NIAC, consent must be obtained¹²¹ from the State in whose territory the humanitarian operations are intended or transit. Parties to a conflict may have reservations about accepting humanitarian services. They may worry that humanitarian relief destined for a population under the control of the enemy may indirectly favour the enemy and enhance the latter’s chances of success,¹²² or that humanitarian convoys are

114 2016 Commentary on GC I, common article 3, above note 111, paras 792–793.

115 2016 Commentary on GC I, common article 3, above note 111, para. 796.

116 For NIAC, AP II, Art. 3(2) and Yves Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Geneva, 1987, paras 4502–4503 (Commentary on AP I and Commentary on AP II). See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Rep 1986, p. 14, para. 242; UN General Assembly Resolution 2675(XXV), 9 December 1970.

117 2016 Commentary on GC I, above note 111, paras 804–805; ICRC, *Commentary on the Geneva Conventions of 12 August 1949*, Geneva, 1952, p. 58; Commentary on AP II, above note 116, para. 4892.

118 Common article 3 to the GC.

119 2016 Commentary on GC I, above note 111, para. 864.

120 2016 Commentary on GC I, above note 111, para. 867.

121 In 2014, the UNSC, for the first time, overrode the requirement of State consent in UNSC Resolution 2165 (2014), 14 July 2014 by authorizing UN humanitarian agencies and their implementing partners to use routes and border crossings to deliver humanitarian assistance throughout Syria.

122 Michael Bothe, “Relief Actions: The Position of the Recipient State”, in Frits Kalshoven (ed.), *Assisting the Victims of Armed Conflict and Other Disasters: Papers Delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22–24 June 1988*, Martinus Nijhoff, Dordrecht, 1989, p. 95.

delivering weapons, not humanitarian assistance.¹²³ IHL factors in parties' security concerns but balances them against humanitarian ones. Although the requirement of obtaining State consent is rooted in a concern to protect a State's sovereignty, this does not entail that the State has absolute and unlimited discretion to withhold consent. As a matter of customary law, when civilians' essential needs are not being met and offers of impartial humanitarian relief operations have been made, a State may not withhold its consent arbitrarily.¹²⁴

Once consent to the presence and operations of an impartial humanitarian organization has been obtained, humanitarian organizations will typically enter into practical working-level contacts and arrangements with the parties – including armed groups that may be designated – as are operationally necessary to carry out humanitarian operations. When humanitarian activities consist of relief¹²⁵ operations, as a matter of customary IHL in any type of armed conflict, the parties must allow and facilitate rapid and unimpeded passage of humanitarian relief consignments, equipment and personnel to reach civilians in need, even in areas controlled by designated groups. The parties must ensure the freedom of movement of humanitarian personnel that is essential to the exercise of their functions,¹²⁶ and it is only in case of “imperative military necessity” that their activities may be limited or their movements may be temporarily restricted.¹²⁷

IHL also has some built-in safeguards to protect the parties' security interests.¹²⁸ The parties can prescribe measures of control for the passage of humanitarian relief. They can impose technical arrangements such as the search of consignments to verify that relief consignments are exclusively humanitarian (for example, that they do not contain equipment that could be used for military purposes), the use of prescribed routes at specific times so that relief convoys do not interfere with and are not endangered by military operations, or measures to ensure that medical supplies and equipment comply with health and safety standards.¹²⁹ In addition, the parties to an armed conflict may make passage of humanitarian relief consignments conditional on their distribution under the

123 Verbatim Record of the 8423rd Meeting of the UNSC, UN Doc. S/PV.8423, 13 December 2018.

124 Commentary on AP I, above note 116, paras 2805 and 4885; Michael Bothe, Karl Josef Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, The Hague/Boston, 2013, p. 485; Dapo Akande and Emanuela-Chiara Gillard, “Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict”, *International Law Studies*, Vol. 92, 2016, pp. 492–493; Report of the Special Rapporteur on Extrajudicial, Summary Or Arbitrary Executions, UN Doc. A/73/314, 7 August 2018, para. 23.

125 Humanitarian relief operations distribute items essential for survival, depend on the local conditions, and typically include water, food, medical supplies, clothing, bedding, means of shelter, fuel for heating, and objects needed for religious worship.

126 GC IV, Art. 59; AP I, Arts 70 and 71; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>, pp. 193–203 (rules 55–56).

127 Commentary on AP I, above note 116, para. 2896. See 2016 Commentary on GC I, above note 111, paras 819–820, which distinguishes humanitarian relief from broader assistance activities.

128 M. Bothe, K. Partsch and W. Solf, above note 124, p. 487.

129 GC IV, Art. 59; AP I, Art. 70(3)(a).

local supervision of an impartial organization or on other measures to ensure that the supplies will reach their intended beneficiaries.¹³⁰ This demonstrates how IHL has factored in parties' concerns about the risk of diversion and misappropriation of supplies and support to enemy fighters.

Relevant treaty rules applicable in NIAC are silent on the consent of third States and on their obligation to allow and facilitate passage of relief.¹³¹ However, as the ICRC has written:

when a humanitarian organization can only reach its beneficiaries by crossing through the territory of a particular State [not party to a NIAC], the humanitarian spirit underpinning the Conventions would suggest a legitimate expectation that that State does not abuse its sovereign rights in a manner that would be harmful to those beneficiaries. If [that State] were to refuse to allow and facilitate the delivery of relief, it would in effect preclude humanitarian needs from being addressed and thus render the consent given by the Parties to the conflict void.¹³²

Given the obligations of all States to ensure respect for IHL by parties to armed conflict by abstaining from encouraging violations and by taking proactive steps to end them,¹³³ third States should arguably also refrain from undermining and hindering a party's respect for IHL when that party has consented to humanitarian activities and must allow and facilitate the passage of relief.

In addition, a third State must not withhold consent or impede the passage of humanitarian relief if this amounts to a violation of its own obligations under international law. Of particular relevance to humanitarian relief operations is the human rights obligation to respect the enjoyment of social, economic and cultural rights in other countries and the obligation to refrain from acts that would prevent their enjoyment.¹³⁴ Moreover, a third State's withholding of consent in certain circumstances could amount to aiding or assisting another State in the commission of an internationally wrongful act.¹³⁵

Thus, where counterterrorism measures of a State party to a NIAC prohibit or criminalize impartial humanitarian activities foreseen under IHL, this can prevent the exercise of the right under IHL of impartial humanitarian

¹³⁰ AP I, Art. 70(3)(b).

¹³¹ Found in common article 3 to the GC and AP II, Art. 18. For relevant IHL rules applicable to third States in international armed conflict, see GC IV, Arts 23 and 59 and AP I, Arts 70 and 81. See also Weizmann, above note 90.

¹³² 2016 Commentary on GC I, common Art. 3, above note 111, para. 840.

¹³³ Common article 1 to the GC and 2016 Commentary on GC I, above note 111, paras 153–173.

¹³⁴ See Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, 2016 (Oxford Guidance), para. 116; and, for example, United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, para. 36; CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, paras 30–34; CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, para. 39.

¹³⁵ See Oxford Guidance, above note 134, para. 117; International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10).

organizations to offer humanitarian services and, once accepted, to carry them out. It can also amount to a violation of that State's own obligation not to arbitrarily withhold consent to offers of impartial humanitarian relief for civilians in need, and of its obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief to meet civilians' essential needs.

Where counterterrorism measures of a third State not party to a NIAC prohibit or criminalize impartial humanitarian activities foreseen under IHL, this can prevent the exercise of the right to offer humanitarian services and to carry them out once accepted. It can also render a State's consent to such an offer void.¹³⁶ This would be incompatible with IHL and with the obligation to ensure respect for IHL, including to refrain from undermining and hindering a party's respect for it.

Medical care

It is equally a fundamental rule of IHL applicable in any type of armed conflict that the wounded and sick shall be respected, protected, treated humanely and cared for.¹³⁷ This applies whether the wounded and sick person is a civilian or a member of armed forces or of a non-State armed group, and regardless of any terrorist designation.

AP II and the corresponding rule of customary IHL¹³⁸ require that the wounded and sick receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition. Only medical reasons can justify prioritizing care. This is an obligation of due diligence. If a party is not able or willing to care for the wounded and sick, then impartial humanitarian organizations may substitute with medical assistance. To recall, medical assistance carried out by impartial humanitarian organizations is explicitly foreseen in the safeguards found in paragraphs 24 and 16 of resolutions 2462 and 2482, respectively, which refer to "exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors...".

Providing medical care to a member of a non-State armed group does not constitute an act harmful to the enemy.¹³⁹ As is the case with an impartial humanitarian body's offer of humanitarian services described above, care for the wounded and sick does not affect the legal status of the parties to a NIAC.¹⁴⁰ The

136 Marco Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 600.

137 Common article 3 to the GC; AP II, Art. 7. See also 2016 Commentary on GC I, common article 3, above note 111, paras 731 and 749 and Commentary to AP II, paras 4633 and 4635. Art. 8 of AP I defines the wounded and sick as: "persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility." The rule's application should not depend on the severity of the medical condition: 2016 Commentary on GC I, common article 3, above note 111, para. 741.

138 AP II, Arts 7 and 8; ICRC Customary Law Study, above note 126, Rule 110.

139 2016 Commentary on GC I, common article 3, above note 111.

140 Common article 3 to the GC.

implication is that the obligation to provide medical care applies independently of any terrorist designation of an armed group or a State's right to prosecute members of armed groups for their crimes under applicable domestic law.

To further reinforce the rule that the wounded and sick must receive the medical care required by their condition, it is prohibited to compel medical personnel to carry out tasks that are not compatible with their humanitarian mission or to require them to give priority to any person except on medical grounds.¹⁴¹ It is equally prohibited to punish¹⁴² any person for carrying out medical activities compatible with medical ethics, regardless of the person benefitting from them.¹⁴³ This rule preserves the principle that medical activities are neutral, and providing medical care to any given person does not constitute taking sides. It also upholds medical ethics, which require that medical activities benefit any wounded or sick person regardless of the party to which they belong. It is also prohibited to compel a person engaged in medical activities to perform acts contrary to medical ethics.¹⁴⁴ This would include, for instance, compelling a person to refrain from caring for a wounded or sick patient.

These prohibitions of punishing any person for medical activities compatible with medical ethics and of compelling acts contrary to medical ethics apply broadly to protect doctors and other professionals engaged in medical activities (such as nurses, midwives and pharmacists) whether or not they have been exclusively assigned by a party to the conflict.¹⁴⁵ Importantly, they also protect persons carrying out medical activities on behalf of an impartial humanitarian organization. These prohibitions also cover a range of medical activities, including vaccinations, diagnoses and providing medical advice.¹⁴⁶

As discussed above, broadly worded counterterrorism measures can capture medical care for wounded and sick members of designated groups and thereby deter or punish the provision of medical care. For a State party to a conflict, this would go against its own IHL obligation to ensure that the wounded and sick receive medical care and against the prohibition of punishing any person for medical activities compatible with medical ethics. For a third State, this would be incompatible with IHL and with that State's obligation to ensure respect for IHL and to refrain from undermining and hindering a party's respect for it.

Implementation

According to a 2020 report on implementation of Resolution 2462 on countering the financing of terrorism, few States have in fact adopted specific actions to address the potential effects of such counterterrorism measures on humanitarian activities.

141 See AP II, Art. 9 and ICRC Customary Law Study, above note 126, Rule 26.

142 Punishment covers administrative and penal measures. Commentary on AP I, above note 116, Art. 10, para. 4691.

143 AP II, Art. 10(1) and ICRC Customary Law Study, above note 126, Rule 26.

144 AP II, Art. 10(2).

145 Commentary to AP II, Art. 10, para. 4686.

146 Commentary to AP II, Art. 10, para. 4687.

States have faced challenges in adopting policies or practical measures to ensure that potential effects are taken into account, with 45 percent of States lacking an institutional framework to consider the effects of counter-financing of terrorism measures on humanitarian activities.¹⁴⁷

In response to a questionnaire on actions taken to disrupt terrorism financing and challenges in implementing related UNSC measures, at least three States said they had incorporated humanitarian exemptions into their legislation to counter the financing of terrorism.¹⁴⁸ Such practice is consistent with how scholars have recently explained the notion of “to take into account” found in resolutions 2462 and 2482: “a State may decide to review whether its relevant legislative, regulative, or donor texts run counter to IHL provisions permitting humanitarian and medical actors to engage in their respective activities in armed conflicts ... that also qualify as counterterrorism contexts”.¹⁴⁹

In implementing Resolution 2462, some States have also expressed concern about financial institutions de-risking non-profit organizations, some adding that they prohibited de-risking. A small number of States have established national forums of government agencies and non-profit organizations to discuss practices such as avoiding de-risking and strengthening transparency of licencing and exemption measures.¹⁵⁰

Even before the adoption of resolutions 2462 and 2482, some regional and national jurisdictions had taken steps to ensure that their counterterrorism measures complied with their IHL obligations relating to humanitarian activities and medical care and avoided the known adverse effects of counterterrorism measures on humanitarian and medical activities. The most effective practice thus far has consisted of neatly excluding humanitarian activities from the scope of application of counterterrorism measures. This can serve as a good model for implementing the IHL-related obligations and humanitarian safeguards in resolutions 2462 and 2482.

Safeguards under counterterrorism sanctions

In the US, the Office of Foreign Assets Control (OFAC) of the Department of the Treasury may grant licences to authorize transactions, such as those required in the course of humanitarian activities, which would otherwise be prohibited under counterterrorism sanctions. Two types of licence are available. A general licence authorizes a specific type of transaction for a class of persons or entities and does not entail applying for it. For instance, a general licence can authorize NGOs to carry out transactions and activities involving a designated group that are

147 UNSC, Letter dated 3 June 2020, above note, 17 pp. 3 and 24.

148 *Ibid.*, pp. 24–25.

149 Taking into Account, above note 94, p. 39.

150 *Ibid.*, pp. 24–25.

ordinarily incident and necessary to activities to support humanitarian projects to meet basic needs, including the provision of food and health services.¹⁵¹ In contrast, specific licences are tailored to a particular person or entity and transaction, and issued only in response to an application. Recognizing that humanitarian activities might unwittingly fall foul of sanctions, OFAC has also clarified that in

circumstances involving a dangerous and highly unstable environment combined with urgent humanitarian need ... some humanitarian assistance may unwittingly end up in the hands of members of a designated group. Such incidental benefits are not a focus for OFAC sanctions enforcement.¹⁵²

EU counterterrorism sanctions do not foresee any comparable exemptions or derogations to authorize humanitarian organizations to carry out activities that would otherwise be prohibited under these sanctions. However, with respect to EU sanctions more generally, the EU Council has stated that “any EU measures including designing and applying restrictive measures and all counter-terrorism measures, must be in accordance with all obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law”.¹⁵³ In its 2020 report on steps taken to promote compliance with IHL, it added,

any potential negative impact on humanitarian action should be avoided and domestic implementation of restrictive measures needs to be in line with international law. To that effect, EU legal instruments laying down financial restrictions, restrictions on admission (travel bans) and other restrictive measures may allow for the application of appropriate exemptions and/or derogations, such as ... ensuring the unimpeded delivery of humanitarian assistance.¹⁵⁴

Some humanitarian organizations have noted that having to obtain licences or derogations under States’ sanctions measures (and often from several different States at the same time) is costly, time-consuming, causes delays in the movement of humanitarian supplies, and undermines their neutrality and independence in carrying out humanitarian activities.¹⁵⁵ For instance, the ICRC has explained that these

151 See Office of Foreign Assets Control, Department of the Treasury (United States), *General License No. 11 Regarding Certain Transactions in Support of Nongovernmental Organizations’ Activities in Yemen*, 19 January 2021, available at: https://home.treasury.gov/system/files/126/ct_gl11.pdf. Note the licence was revoked on 16 February 2021.

152 Office of Foreign Assets Control, Department of the Treasury (United States), *Guidance Related to the Provision of Humanitarian Assistance by Not-For-Profit Non-Governmental Organizations*, 17 October 2014, available at: https://home.treasury.gov/system/files/126/ngo_humanitarian.pdf.

153 Council of the EU, *Council Conclusions on Humanitarian Assistance and International Humanitarian Law*, 14487/19, Brussels, 25 November 2019, available at: <https://data.consilium.europa.eu/doc/document/ST-14487-2019-INIT/en/pdf>.

154 Working Party on Public International Law, *Third Report on the EU Guidelines on Promoting Compliance with International Humanitarian Law*, June 2020, available at: <https://www.icrc.org/en/document/third-report-eu-guidelines-promoting-compliance-international-humanitarian-law>, p. 20.

155 A. Debarre, *Making Sanctions Smarter*, above note 55, p. 3.

are not workable from an operational perspective. In addition, derogation/authorization/licenses systems are not compatible with IHL as they add an additional layer of consent to humanitarian action not foreseen under this body of law.¹⁵⁶

In contrast, some financial institutions rely on derogations and licences to authorize transactions with humanitarian organizations that operate where designated entities are present. Others, however, have considered them a red flag indicating a high risk of illegal activity.¹⁵⁷

To facilitate transactions needed for humanitarian operations, governments may at times offer reassurance to financial institutions through dialogue and the issuance of letters on behalf of humanitarian organizations to attest the legitimacy of funds and the organizations' activities. "Statements of fact" will describe a government's decision to fund a humanitarian organization. "Comfort letters" have been described as a "blanket endorsement of the [humanitarian] partner and/or programme".¹⁵⁸ In France, for instance, the Director General of the Treasury has issued comfort letters in support of NGOs with the aim of reassuring banks. However, these do not amount to any legal guarantee and might not necessarily be available to all those humanitarian organizations who would need one.

Exceptions under criminal law

Some States have introduced exceptions (at times also referred to as exemptions) into their criminal counterterrorism legislation to exclude humanitarian and medical activities from their scope of application.

In the EU, Directive 2017/541, which requires the criminalization of support to criminal activities of a terrorist group, contains a clause that excludes humanitarian activities from its scope: "[t]he provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive...".¹⁵⁹ According to a 2020 report assessing compliance with the Directive, Austria, Belgium, Italy and Lithuania have legislation containing

156 ICRC, *Call for Input – UN Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism (CT) – Thematic Report to the 75th Session of the UN General Assembly*, 2020, available at: <https://www.ohchr.org/Documents/Issues/Terrorism/SR/GA75/ICRC-GA75CT.docx>.

157 E.-C. Gillard, *Recommendations for Reducing Tensions*, above note 82, p. 7.

158 Justine Walker, *Risk Management Principles Guide for Sending Humanitarian Funds into Syria and Similar High-Risk Jurisdictions*, May 2020, available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200526-risk-management-guide_en_0.pdf, p. 18.

159 European Parliament and the Council of the EU, "Directive (EU) 2017/541 of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA", *Official Journal of the European Union*, L 88/6, 15 March 2017, Recital 38, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32017L0541>.

limitations to the application of counterterrorism legislation to humanitarian activities. In fifteen other Member States, generic legislation such as the criminal code can be interpreted in this manner, or authorities have said that they apply this principle in practice.¹⁶⁰

In Chad, counterterrorism legislation adopted in 2020 criminalizes the provision by any means, directly or indirectly, of funds with the intention of seeing them used or with the knowledge that they will be used, in whole or in part, to support a terrorist group, including in the absence of a link with one or more specific acts of terrorism.¹⁶¹ But, it also states that activities of an exclusively humanitarian and impartial character carried out by neutral and impartial organizations are excluded from the law's scope of application. It also adds that no provision of the law can be interpreted as derogating from IHL or international human rights law.

In the Philippines, the 2019 *Act to Prevent, Prohibit and Penalize Terrorism* criminalizes material support to any terrorist organization or individual who commits an act of terrorism, with the knowledge that the organization or individual is committing or planning to commit such an act.¹⁶² Similarly to the definition under US law, material support includes, *inter alia*, any property, tangible or intangible, or service, including currency or monetary instruments, training, as well as expert advice or assistance. However, the Act excludes from the scope of this provision humanitarian activities by the ICRC, the Philippine Red Cross and other State-recognized impartial humanitarian partners or organizations in conformity with IHL.¹⁶³

In Ethiopia, the 2020 Proclamation to Provide for the Prevention and Suppression of Terrorism Crimes makes it a criminal offence to carry out certain acts (such as handing over information or providing technical or professional support) with the intent to support a terrorist Organization; however, it also states that humanitarian aid by organizations engaged in humanitarian activities “is not punishable for the support made only to undertake function and

160 European Commission, *Report to the European Parliament and the Council Based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA* (Report, 30 September 2020), available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/crisis-and-terrorism/report_on_transposition_of_directive_2017.541.on_combatting_terrorism.pdf, pp. 6–7.

161 Law No. 003/PR/2020 “Portant Répression des Actes de Terrorisme en République du Tchad”, 28 April 2020, available at: https://www.unodc.org/documents/westandcentralafrica/Loi_terrorisme_du_Tchad_2020.pdf, Arts 2(8) and 10.

162 Republic of the Philippines, *An Act to Prevent, Prohibit and Penalize Terrorism, thereby Repealing Republic Act No. 9372, otherwise known as the “Human Security Act of 2007”*, Republic Act No. 11479, available at: <https://www.officialgazette.gov.ph/downloads/2020/06jun/20200703-RA-11479-RRD.pdf>.

163 *Ibid.*, sections 3(e), 12 and 13. See also Republic of the Philippines, Department of Justice Anti-Terrorism Council, *The 2020 Implementing Rules and Regulations of Republic Act No. 11479, otherwise known as The Anti-Terrorism Act of 2020*, rule 4.14, available at: <https://www.icnl.org/resources/library/implementing-rules-and-regulations-of-republic-act-no-11479-anti-terrorism-act>. The Anti-Terrorism Council determines whether an organization is a State-recognized impartial humanitarian partner or organization in conformity with IHL; it may involve other parties to assist and make recommendations in this regard.

duty”.¹⁶⁴ Under Swiss legislation adopted in 2020, it is a criminal offence to support the activities of a criminal or terrorist organization but this does not apply to humanitarian services provided by an impartial humanitarian organization such as the ICRC in accordance with common Article 3.¹⁶⁵

Under the New Zealand *Terrorism Suppression Act 2002*, it is an offence to make available, or cause to be made available, directly or indirectly, without lawful justification or reasonable excuse, any property, or any financial or related services, either to, or for the benefit of, an entity, knowing that the entity is a designated terrorist entity.¹⁶⁶ However, a reasonable excuse exists, for instance, “where the property (for example, items of food, clothing, or medicine) is made available in an act that does no more than satisfy essential human needs of (or of a dependant of) an individual designated under [the] Act”.¹⁶⁷ While the above-described exceptions refer to impartial humanitarian activities, the exception in New Zealand’s legislation explicitly mentions medicine independently of humanitarian activity. This is important because medical activities are most often carried out by medical personnel who do not belong to an impartial humanitarian organization.

To recall, under US legislation, the crime of material support or resources does not include the provision of medicine or religious materials.¹⁶⁸ In addition, the Secretary of State, with the agreement of the Attorney General, may explicitly approve the provision of material support to a FTO, consisting of “personnel”, “training”, or “expert advice or assistance”. Approval is not possible for other forms of material support.

With respect to travel-related counterterrorism regulation, the UK *Counter-Terrorism and Border Security Act 2019* has incorporated an exception to the offence of entering or remaining in a designated area when it is for the purpose of “providing aid of a humanitarian nature”.¹⁶⁹ Similarly, under the Australian Criminal Code, entering or remaining in an area declared by the foreign minister as one where a listed entity is engaging in hostile activity is not an offence if a person enters or remains in the area solely for the provision of aid of a humanitarian nature.¹⁷⁰

With respect to both counterterrorism sanctions and criminal legislation, excluding humanitarian activities from their scope of application is an effective way of ensuring that impartial humanitarian activities, including medical

164 Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, Proclamation No. 1176/2020, 25 March 2020.

165 “Arrêté fédéral portant approbation et mise en œuvre de la Convention du Conseil de l’Europe pour la prévention du terrorisme et de son Protocole additionnel et concernant le renforcement des normes pénales contre le terrorisme et le crime organisé”, 5 October 2020, FF 2020 7651, Art. 260ter.

166 *Terrorism Suppression Act 2002* (New Zealand), section 10(1), available at: <https://www.legislation.govt.nz/act/public/2002/0034/latest/whole.html#DLM152716>.

167 *Ibid.*, section 10(3).

168 18 USC § 2339A, above note 36; 18 USC § 2339B, above note 35.

169 *Counter-Terrorism and Border Security Bill* as amended (United Kingdom), HL Bill (2018) 153, Chapter 1, available at: <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0153/18153.pdf>.

170 Australian Criminal Code, above note 32, div. 119.2(3)(a).

activities, are not prohibited or punishable when these intersect with designated armed groups. They offer an explicit way for a State to ensure that its counterterrorism measures comply with its IHL obligations relating to humanitarian activities and medical care and to safeguard these activities. Such exceptions apply without requiring that a humanitarian organization seek prior authorization to carry out any activities that would otherwise be prohibited or criminalized, and they therefore offer much needed clarity at the outset of and throughout the full range of a humanitarian organization's activities. They can pre-empt the cascade of adverse consequences described above by precluding any legal risk under criminal legislation or sanctions, by eliminating the need for problematic donor clauses, by alleviating the inclination for banks and other private sector services to de-risk, and by minimizing administrative burdens, overcorrection and the overall chilling effect borne by humanitarian organizations.

In comparison, case-by-case licences and other reassurances meant to authorize or facilitate humanitarian activities that would otherwise be prohibited or criminalized are less effective at safeguarding humanitarian and medical activities in line with IHL. Their issuance can be unpredictable and is not guaranteed, they do not necessarily benefit all impartial humanitarian organizations or activities in any given context, they can undermine actual and perceived independence, neutrality and impartiality, and they can subject humanitarian activities to the discretion of a third State even when humanitarian operations have been consented to by the territorial State in accordance with IHL.

Consistent with the view that exceptions are a solid approach to ensuring that counterterrorism measures comply with IHL and safeguard humanitarian and medical activities, the UN Secretary-General recommended in his 2021 report on the protection of civilians in armed conflict that States ensure that all impartial and humanitarian and medical activities be excluded from the scope of application of counter-terrorism measures.¹⁷¹ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also recommended that "States ... unambiguously exempt humanitarian actions from their counter-terrorism measures at every possible opportunity, nationally, regionally and internationally..."¹⁷²

Also with respect to counterterrorism measures generally, whether in the form of sanctions or criminal measures, the UN General Assembly in its 2021 UN Global Counterterrorism Strategy Review urged States to

ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as

171 Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2021/423, 3 May 2021, p. 16.

172 Fionnuala Ní Aoláin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/40/52 (1 March 2019), para. 22, available at: <https://undocs.org/en/A/HRC/40/52>.

foreseen by international humanitarian law, noting the applicable rules of international humanitarian law relating to the non-punishment of any person for carrying out medical activities compatible with medical ethics.¹⁷³

The Human Rights Council included this wording in its 2018 resolution on terrorism and human rights.¹⁷⁴

This was also what the 2015 High-Level Review of United Nations Sanctions recommended as it considered the adverse impact of UN sanctions on humanitarian action: “If concerns exist that sanctions could impact humanitarian action, the Council should consider standing exemptions for UN humanitarian actors and implementing partners in that situation.”¹⁷⁵ To date, the UNSC sanctions regime for Somalia, under which Al Shabaab is a listed entity, is the only UN sanctions regime that excludes financial transactions needed for humanitarian activities from its scope of application.¹⁷⁶ The UNSC has decided that the prohibition of making funds, financial assets or economic resources available “shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia” by a series of identified humanitarian organizations.¹⁷⁷ In light of the presence and influence of Al Shabaab where humanitarian activities take place in Somalia and the ubiquity of financial transactions connected with humanitarian operations of such magnitude, this exclusion is considered to be best suited to prevent the adverse consequences of counterterrorism measures described earlier.

Conclusion

Taken together, the legally binding requirement of consistency or compliance with IHL in Resolution 2462 and the urging in resolutions 2462 and 2482 to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities strengthen the foundation for ensuring that counterterrorism measures safeguard and do not impede impartial humanitarian action. Ideally, this would entail simply interpreting and applying

173 UN General Assembly Resolution 75/291, 2 July 2021, para. 109.

174 UN General Assembly Resolution 73/174, 17 January 2019.

175 Compendium of the High-Level Review of United Nations Sanctions, UN Doc. A/69/941, 12 June 2015, p. 49.

176 Although this Somalia sanctions regime is not explicitly connected to counterterrorism, one of the bases for listing is an affiliation to groups designated under the 1267 regime. The UNSC sanctions regime for the Democratic People’s Republic of Korea (DPRK) allows case-by-case humanitarian exemptions on request; the UNSC sanctions regime for Yemen allows case-by-case humanitarian exemptions from all its measures – arms embargo, travel ban and financial sanctions. At present the Yemen regime only lists individuals. On the DPRK, see UNSC Resolution 2397/2017, 22 December 2017; on Yemen, see UNSC Resolution 2564/2021, 25 February 2021. Exemption requests under UN sanctions have been described as time-consuming, complex, unpredictable, and limited in time and scope. See Rebecca Brubacker and Sophie Huvé, *UN Sanctions and Humanitarian Action*, United Nations University, January 2021, p. 7.

177 UNSC Resolution 2551(2020), 12 November 2020, para. 22.

any counterterrorism measure in a manner that does not interfere with impartial humanitarian activities foreseen under IHL. In the alternative, and in line with the practice of a number of States, explicitly excluding impartial humanitarian and medical activities foreseen under IHL from the application of counterterrorism measures is also an effective way to ensure that counterterrorism measures comply with IHL obligations and to offset the risk of adverse consequences that these measures pose for impartial humanitarian and medical activities where designated entities are present. State practice excluding humanitarian activities from the scope of counterterrorism regulation demonstrates that this is feasible. It also demonstrates how State interests in countering terrorism and enabling humanitarian and medical activities for people in need are entirely reconcilable.

Until each State can exclude impartial and humanitarian and medical activities from the scope of application of its counterterrorism measures, adverse consequences for humanitarian activities will persist through the various layers of financial sanctions and criminal legislation at play (e.g. in countries where humanitarian operations are conducted, in countries of nationality of humanitarian staff, in organizations' countries of registration, in donor countries, and where financial services are rendered, in addition to regional and UN measures). This is why systematically inserting legally binding exceptions in UNSC counterterrorism resolutions—in both the 1267 sanctions regime and relevant prohibition and criminalization measures that are part of the Resolution 1373 line of succession—would establish a strong universal standard for all UN Member States to follow.

The relationship between international humanitarian law and asset freeze obligations under United Nations sanctions

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Abstract

While challenges may persist with respect to the relationship between counterterrorism (CT) and humanitarian action, it is at least understood that CT measures must comply with international humanitarian law (IHL). Clarifying the relationship between this body of law and CT measures is one of the modest but important innovations of United Nations (UN) Security Council Resolution 2462. At a minimum, references to IHL in this resolution leave a pathway for States to take measures to preserve impartial humanitarian action from the effects of CT, and at most, they prescribe that States should take such measures. Progress in clarifying the relationship between UN sanctions obligations and IHL obligations appears to be lacking with respect to non-CT-related UN sanctions. As will be discussed in this paper, this leads to questions regarding the application of the so-called “supremacy clause” contained in Article 103 of the UN Charter vis-à-vis IHL obligations.

Keywords: sanctions, humanitarian action, international humanitarian law, UN Charter.

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Introduction

Over recent years, the potential for counterterrorism (CT) measures to negatively impact the ability of impartial humanitarian organizations¹ to carry out their work has received much attention.² Against this backdrop, it has also been suggested that United Nations (UN) sanctions, including those that are not strictly related to CT, may similarly have an impact on such humanitarian action in situations of armed conflict.³ For example, the United Nations University has sought to specifically study the relationship between non-CT-related UN sanctions and humanitarian action, a project that is ongoing at the time of writing.⁴

“Non-CT-related” UN sanctions which are related to armed conflict make up a majority of the sanctions regimes adopted by the UN Security Council (UNSC) that are currently in force. Of the fourteen UN sanctions regimes in force at the time of writing, ten can be characterized as “conflict-related” sanctions – i.e., those that are designed to apply to situations of armed conflict. These are those sanctions applicable to Somalia, the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Yemen, Mali, Sudan, South Sudan, Libya, Iraq, and the 1988 sanctions regime relating to the Taliban in Afghanistan,⁵ all of which are the focus of this paper.⁶ The paper therefore excludes an analysis of the 1267

- 1 The term “impartial” is a term of art under international humanitarian law (IHL) that triggers specific legal consequences, some of which will be elaborated in this paper. It is used throughout IHL, including in key provisions relating to humanitarian action such as Articles 3 and 9/9/9/10 common to the four Geneva Conventions. According to the International Committee of the Red Cross (ICRC), “impartiality” denotes an “attitude to be adopted vis-à-vis the persons affected by armed conflict” in the planning and implementation of humanitarian activities. Impartiality dictates that the needs of the persons affected by armed conflict are the exclusive criteria in shaping and implementing humanitarian activities. Naturally, and as the ICRC makes clear, any discrimination based on “nationality, race, religious beliefs, class or political opinions or any similar criteria” would disqualify a humanitarian activity from being “impartial”. See, generally, ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), paras 794–796, 1160–1164.
- 2 Jessica S. Burniske and Naz K. Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action & Comment on Study*, Harvard Law School Program on International Law and Armed Conflict, 2017; Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Prevention/Countering Violent Extremism on Principled Humanitarian Action*, 12 June 2018; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 22 November 2019, pp. 59–61.
- 3 Alice Debarre, *Making Sanctions Smarter: Safeguarding Humanitarian Action*, International Peace Institute, December 2019; Emanuela-Chiara Gillard, *Recommendations for Reducing Tensions in the Interplay Between Sanctions and Counterterrorism Measures and Humanitarian Action*, Chatham House, August 2017.
- 4 Rebecca Brubaker and Sophie Huvé, *UN Sanctions and Humanitarian Action: Review of Past Research and Proposals for Future Investigation*, United Nations University, Centre for Policy Research, January 2021.
- 5 It must be noted that this article was written prior to the Taliban’s takeover of Afghanistan in August 2021. As a result, the observations in this paper relating to the Afghan context may no longer be applicable by the time this paper is published.
- 6 For an overview, see United Nations, “The Subsidiary Organs of the United Nations Security Council: 2021 Fact Sheet”, 16 July 2021, available at: www.un.org/securitycouncil/sites/www.un.org/securitycouncil/files/subsidiary_organs_factsheets.pdf (all internet references were accessed in November 2021).

sanctions regime on Al-Qaeda and the Islamic State of Iraq and the Levant (ISIL), which is the only “pure CT” sanctions regime within the UN system.⁷

Focusing on the ten conflict-related UN sanctions regimes listed above, this paper is an attempt to add to the discourse surrounding these UN regimes, which have thus far appeared to receive less attention from a legal perspective than their CT-related counterparts. It seeks to draw lessons from the legal discourse surrounding CT obligations binding on member States pursuant to decisions by the UNSC acting under Chapter VII of the UN Charter,⁸ and their potential impacts on impartial humanitarian action. More concretely, it examines the possible threats posed to impartial humanitarian action by UN sanctions, and any potential mitigating measures based on past discussions concerning CT and international humanitarian law (IHL).

Comparisons between non-CT-related sanctions and UN sanctions with CT measures mandated by the UNSC are drawn,⁹ because the threats to impartial humanitarian action they both pose are similar in kind. As will be elaborated in the following section, the dangerous elements of CT resolutions such as Resolution 2462 find parallels in non-CT-related UN sanctions. Both have the potential to either directly prohibit impartial humanitarian action or at least have a prohibitive impact.

With regard to CT, however, there have been developments towards striking a balance between CT objectives, on the one hand, and IHL and humanitarian action, on the other. For instance, Resolutions 2462 and 2482 have explicitly clarified that all CT measures must be implemented in accordance with IHL using binding “decides” and “demands” language in their operative paragraphs.¹⁰ To date, however, there have been no such references in non-CT-related UN sanctions.

What may seem like banal references to IHL could in fact be rather crucial from a legal perspective. At a minimum, these explicit references using mandatory language in the operative paragraphs of CT resolutions clarify the relationship between the obligations contained therein and IHL. They dictate that the former cannot come at the expense of the latter; rather, all CT obligations must be implemented in accordance with IHL. As will be explained, this includes specific IHL rules that protect and privilege impartial humanitarian action.¹¹ In the

7 See the article by Rebecca Brubaker and Sophie Huvé in this issue of the *Review*.

8 Recalling that UNSC decisions under Chapter VII are binding on member States. Charter of the United Nations, 1 UNTS XVI, 26 June 1945 (entered into force on 24 October 1945) (UN Charter), Art. 25.

9 Among the many examples of what could be considered a “CT measure”, laws criminalizing support to individuals or entities designated as “terrorists” have raised particular concerns. The ICRC has also brought attention to CT sanctions regimes and the tendency for States to impose cumbersome CT clauses in their funding agreements as examples of CT measures that negatively impact impartial humanitarian action. See ICRC, above note 2, p. 60.

10 UNSC Res. 2462, 28 March 2019, op. paras 5, 6. In Resolution 2462, this is coupled with a relatively weaker paragraph “urging” member States to “take into account” the impact that measures taken to counter the financing of terrorism may have on impartial humanitarian action (op. para. 24). Resolution 2482 expands the requirement to comply with IHL to all CT-related measures, not just measures to counter the financing of terrorism as was the case in Resolution 2462. UNSC Res. 2482, 19 July 2019, op. para. 16.

11 These obligations will be elaborated below in the section entitled “Mitigating Measures and Obligations under IHL”.

absence of such references to IHL, as is the case for non-CT-related UN sanctions, not only is the relationship between IHL and sanctions obligations unclear, but it could also lead to assumptions that UNSC obligations take precedence over IHL by virtue of Article 103 of the UN Charter.

Article 103 stipulates that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under this present Charter shall prevail”.¹² At first glance, this “supremacy clause”, meant to prioritize UN Charter obligations over conflicting obligations, could be considered to apply to IHL. Indeed, the supremacy of UN Charter obligations over IHL has already been argued in the past within the context of CT.¹³ Against this backdrop, this paper seeks to explore the relationship between IHL and UN sanctions obligations. It focuses on Article 103 and argues that the supremacy clause does not impact obligations under IHL relating to impartial humanitarian action even in the absence of references to IHL akin to those found in UNSC Resolution 2462.

This discussion is useful in determining the extent to which States may take measures to safeguard impartial humanitarian activities in the absence of UNSC resolutions that call for such measures. For example, there may be hesitancy to adopt measures to mitigate the impact of sanctions on humanitarian action through domestic or regional “carve-outs” for impartial humanitarian organizations¹⁴ without specific instructions to do so in UNSC resolutions. The reasoning is that such carve-outs could result in actual or perceived non-compliance with sanctions because they necessarily result in the non-application of sanctions measures vis-à-vis humanitarians and their work. The European Union (EU), for instance, takes the position that it is only possible to include mitigating measures such as “humanitarian exemptions” or carve-outs¹⁵ when implementing UN sanctions if such exemptions are authorized or demanded in the UNSC resolutions themselves.¹⁶

Accordingly, the fundamental question this paper seeks to answer is whether States can adopt mitigating measures such as carve-outs from UN sanctions, in the absence of language contained in UNSC resolutions obliging or authorizing them to do so. To address this question, the article proceeds by first providing a brief overview of recent studies on the impact of UN sanctions on humanitarian action, with a particular focus on asset freeze measures and the

12 UN Charter, Art. 103.

13 For one example, see David McKeever, “International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations”, *Comparative Law Quarterly*, Vol. 96, No. 1, 2019, p. 31.

14 Such carve-outs have also been referred to as “sectoral” humanitarian exemptions. See Katie King, Naz K. Modirzadeh and Dustin A. Lewis, *Understanding Humanitarian Exemptions: U.N. Security Council Sanctions and Principled Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict, 2016, p. 8.

15 This terminology is explained in more detail below in the section entitled “Existing Mechanisms for Preventing and Mitigating Harm to Impartial Humanitarian Action”.

16 Council of the European Union, *Sanctions Guidelines: Update*, Brussels, 4 May 2018, para. 46, available at: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>.

dangers they could pose to impartial humanitarian action.¹⁷ This is followed by a discussion of select IHL rules which could safeguard impartial humanitarian organizations from the effects of UN sanctions. Finally, the article concludes by examining the relationship between IHL and sanctions obligations in light of the supremacy clause under Article 103 of the UN Charter.

At the outset, it must be noted that the purpose of this paper is not to provide a comprehensive presentation of how these sanctions have actually prevented or impeded humanitarian action. Rather, primarily from a legal perspective, the paper explains how the current formulation of UN sanctions obligations has the potential to inhibit or prevent the work of humanitarians. Gathering of concrete evidence of negative impact, which is undoubtedly an important task for this discussion, is left to others who are better placed and equipped for such purposes.¹⁸ That said, this paper was prompted by a study which indicates that there are already a handful of examples indicating unintended repercussions on humanitarian action.¹⁹ Accordingly, it borrows examples from this and other studies to articulate the actual and potential practical implications of the legal obligations posited by the UNSC. At the same time, the present author fully accepts that it is not always possible to state with certainty that a negative impact vis-à-vis impartial humanitarian action necessarily stems from UN sanctions. The studies that gather evidence of impact on humanitarian action make this abundantly clear.²⁰

Notwithstanding these caveats, the forthcoming legal discussions, particularly with regard to the relationship between IHL and sanctions obligations, are worth having while further evidence is being gathered. Ideally, these discussions will become moot in the absence of evidence indicating impact on humanitarians. At the same time, however, this paper strives to anticipate and provide a way out of potential legal quagmires in the event that additional concrete evidence of the negative impact of sanctions on humanitarian action is uncovered.

Potential tensions between asset freezes under UN sanctions and impartial humanitarian action

Of the three core sanctions measures of asset freezes, travel bans and embargoes,²¹ asset freezes have been described as posing the biggest threat to impartial

17 As is elaborated in the following section, asset freezes are the focus of this paper due to the fact that they are likely to pose the greatest impediments to impartial humanitarian action. Moreover, asset freezes are the most relevant for the purposes of this paper because they most closely resemble measures demanded by the UNSC in Resolution 2462 relating to countering the financing of terrorism.

18 See, for example, the United Nations University Centre for Policy Research project on “UN Sanctions and Humanitarian Action”, available at: <https://cpr.unu.edu/research/projects/unsha.html#outline>.

19 A. Debarre, above note 3.

20 *Ibid.*; R. Brubaker and S. Huvé, above note 4, p. 5.

21 Of the ten UN sanctions regimes within the scope of this paper, eight include all three sanctions measures. Of the remaining two, the regime applicable to Iraq contains an asset freeze and an arms embargo and the Mali regime contains an asset freeze and a travel ban.

humanitarian action.²² This is not to say that the other categories of UN sanctions measures do not have the potential to negatively impact humanitarian action. Embargoes, most commonly in the form of arms embargoes, can impede the ability for humanitarian organizations to import equipment in instances where the equipment could qualify as a “dual-use” object, meaning an object that could be used for both humanitarian/civilian and military purposes.²³ Travel bans, while seemingly innocuous, also have the potential to limit the ability of humanitarian organizations to interact with listed individuals. On example of this is the difficulty experienced by some organizations in conducting training on humanitarian or legal concerns, if such interactions would require the listed individuals to travel across international borders.²⁴ That said, asset freeze measures are the focus of this paper because they resemble measures demanded by the UNSC in relation to countering the financing of terrorism under UNSC Resolution 2462.

The similarities between asset freezes and obligations under Resolution 2462 stem primarily from the resolutions establishing the sanctions themselves. The UN sanctions applicable to Mali, for instance, stipulate the following obligation under Chapter VII of the UN Charter:

[The UNSC] *decides* further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, directly or indirectly to or for the benefit of the individuals or entities designated by the [Sanctions] Committee.²⁵

Identical phrasing can be found in the asset freeze language in the resolution applicable to South Sudan²⁶ and the 1988 regime applicable to the Taliban in Afghanistan.²⁷ The DRC,²⁸ Somalia,²⁹ Libya,³⁰ Sudan,³¹ CAR³² and Yemen³³ regimes also contain similar language but with the omission of the words “directly or indirectly”, thereby arguably narrowing the scope of the obligation to freeze assets.³⁴ This language is concerning because the precise scope of these obligations is unclear and could lead to expansive interpretations by member States. For instance, what does it mean to “make available” any “funds, financial

22 R. Brubaker and S. Huvé, above note 4; United Nations, *Compendium of the High-Level Review of United Nations Sanctions*, UN Doc. S/2015/432, 12 June 2015, p. 47.

23 *Ibid.*, p. 5.

24 *Ibid.*

25 UNSC Res. 2374, 5 September 2017, op. para. 4.

26 UNSC Res. 2206, 3 March 2015, op. para. 12.

27 UNSC Res. 2255, 22 December 2015, op. para. 1(a).

28 UNSC Res. 1807, 31 March 2008, op. para. 11.

29 UNSC Res. 1844, 20 November 2008, op. para. 3.

30 UNSC Res. 1970, 26 February 2011, op. para. 17.

31 UNSC Res. 1591, 29 March 2005, op. para. 3(e).

32 UNSC Res. 2399, 30 January 2018, op. para. 16.

33 UNSC Res. 2140, 26 February 2014, op. para. 11.

34 The regime applicable to Iraq does not contain this type of asset freeze. See, generally, UNSC Res. 1483, 22 May 2003, op. para. 23(b).

assets or economic resources” for the “benefit” of individuals? The danger is that member States may interpret these asset freeze obligations in a way that could hamper impartial humanitarian action.³⁵

Compare this asset freeze language with operational paragraph 5 of UNSC Resolution 2462 relating to CT:

[The UNSC] [d]ecides that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law ... establish serious criminal offenses ... [for the] the wilful provision or collection of funds, financial assets or economic resources or financial or other related services, directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act.³⁶

As was reported in the lead-up to the adoption of Resolution 2462, the breadth of this language raised the concerns of the humanitarian community for the potential impact that it could have on their work.³⁷ Others have pointed to the potential for obligations under this paragraph to collide with those under IHL. For example, as Lewis and Modirzadeh have argued, terms such as “for the benefit of terrorist organizations” in Resolution 2462 could include the provision of funds financing medical care for wounded or sick fighters in armed conflict who are considered to be “terrorists”.³⁸

It is submitted that asset freezes may likewise give rise to interpretations that result in impediments to humanitarian action. This is in part because there is also currently little to no uniform guidance from the UN itself as to how these asset freezes are to be interpreted and implemented.³⁹ Moreover, unlike

35 For example, the United States has implemented the Somalia asset freeze by, *inter alia*, prohibiting “[t]he making of any contribution or provision of funds, goods, or services by, to, or for the benefit” of listed individuals or entities. See Somalia Sanctions Regulations, US Code of Federal Regulations, Title 31, Part 551, 1 July 2011, Section 551.201(b)(1). This could potentially overlap with goods and services provided by impartial humanitarian organizations.

36 UNSC Res. 2462, 28 March 2019, op. para. 5.

37 “Combating Financing of Terrorism Open Debate”, *What’s in Blue*, 27 March 2019, available at: www.securitycouncilreport.org/whatsinblue/2019/03/combating-financing-of-terrorism-open-debate.php; Nathalie Weizmann, “Painting Within the Lines: The UN’s Newest Resolution Criminalizing Financing for Terrorists – Without Imperilling Humanitarian Activities”, *Just Security*, 29 March 2019, available at: www.justsecurity.org/63442/painting-within-the-lines-the-uns-newest-resolution-criminalizing-financing-for-terrorists-without-imperilling-humanitarian-activities/.

38 Dustin A. Lewis and Naz K. Modirzadeh, *Taking into Account the Potential Effects of Counterterrorism Measures on Humanitarian and Medical Activities: Elements of an Analytical Framework for States Grounded in Respect for International Law*, Harvard Law School Program on International Law and Armed Conflict, May 2021, pp. 27–28.

39 At the time of writing, Implementation Assistance Notices (IANs), a potential tool for clarifying the scope of such measures, have only been drafted for asset freezes in the Libya sanctions regime (excluding regimes that do not fall within the scope of this paper). The IANs relate to three narrow issues, none of which are relevant to the fundamental question of the scope of the asset freeze obligations mentioned above. One of the IANs deals with the question of whether subsidiaries of listed entities are subject to the asset freeze; the

Resolution 2462, asset freeze obligations are broader in certain respects because the UNSC resolutions establishing them do not include subjective requirements such as “wilful” or “with the intention to”.⁴⁰ This is coupled with the fact that failure to comply with these measures results in grave consequences depending on the jurisdiction, including civil and criminal liability.⁴¹ There are indeed States that prescribe penal sanctions for violations of asset freezes, even due to negligence.⁴²

This poses a risk for humanitarian organizations, and for their donors when providing and transferring funds and assets to the former. Humanitarian organizations operating in armed conflict naturally encounter listed individuals and entities in the course of their work, especially when the parties to the armed conflict themselves are listed entities.⁴³ Within these contexts, humanitarian organizations may be forced to provide incidental payments, such as tolls, taxes and permit fees, to designated individuals or entities when operating.⁴⁴ The diversion of relief supplies, an occurrence that cannot be avoided with absolute certainty, may also result in such supplies falling into the hands of listed individuals and entities.⁴⁵

The most obvious risk is that humanitarian organizations and their staff could be implicated and punished for sanctions violations. Moreover, these measures could have indirect effects to the detriment of humanitarian action. There is at least anecdotal evidence of self-regulation and “over-compliance” by humanitarians, in an effort to avoid liability arising out of sanctions violations.⁴⁶

other two deal with the payment of management fees on frozen assets and the payment of interest and other earnings on frozen assets respectively. See UNSC, “Implementation Assistance Notices”, available at: www.un.org/securitycouncil/sanctions/1970/implementation-assistance.

40 UNSC Res. 2462, 28 March 2019, op. para. 5.

41 The Somalia Sanctions Regulations, above note 35, Section 551.701(a)(2), applying the International Emergency Economic Powers Act (United States Code, Title 50, Section 1705), “provides for a maximum civil penalty not to exceed the greater of \$311,562 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed”; Section 551.701(a)(3) stipulates that “[a] person who willfully commits, willfully attempts to commit, willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition [under the Somalia Sanctions Regulations] may, upon conviction, be fined not more than \$1,000,000, or if a natural person, be imprisoned for not more than 20 years, or both.” Within the EU context, penalties are set by each member State individually, even for UN sanctions implemented through EU regulations and decisions. For an overview, see Francesco Giumelli, “Implementation of Sanctions: European Union”, in Masahiko Asada (ed.), *Economic Sanctions in International Law and Practice*, Routledge, New York, 2021, p. 125.

42 Germany imposes a term of imprisonment of up to five years for violations of the DRC asset freeze. Violations due to negligence could result in imprisonment of up to three years or fines. See *Report of Germany to the Security Council Committee Established Pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo on the Implementation of Measures set Forth in Security Council Resolutions 1857 (2008) and 1896 (2009) and Subsequent Resolutions*, UN Doc. S/AC.43/2010/9, 24 September 2010.

43 According to Gillard, at least three parties to armed conflict are listed in country-specific UN sanctions: Somalia, the DRC and the CAR. E.-C. Gillard, above note 3, p. 10.

44 *Ibid.*, p. 6.

45 See, for example, *Final Report of the Panel of Experts on Yemen*, UN Doc. S/2020/326, 28 April 2020, para. 86 and the table on p. 34, citing an example of assets being appropriated by the Houthis from revenues provided by Save the Children.

46 United Nations, above note 22, p. 48.

This so-called “chilling effect” has reportedly caused responses in certain contexts to skew heavily towards government-controlled areas.⁴⁷

Another indirect consequence stems from risks for donors, which in turn impacts humanitarian responses. The High-Level Review of United Nations Sanctions documented difficulties for some humanitarian organizations in obtaining funding to operate in certain areas, particularly those under the control of listed non-State armed groups.⁴⁸ Such challenges in obtaining funds may be due to de-risking by States and private institutions such as banks, which are hesitant to transfer funds for programmes in areas under the control of listed entities.⁴⁹

Existing mechanisms for preventing and mitigating harm to impartial humanitarian action

This section seeks to introduce the existing mechanisms for mitigating the impact of sanctions on impartial humanitarian action and to examine how such mechanisms may fit within IHL. Before doing so, however, a brief discussion of semantics is useful.

Broadly speaking, “humanitarian exemptions” are often cited when discussing mechanisms for protecting impartial humanitarian action from both CT measures and sanctions. That said, the current paper prefers the term “carve-outs”. As some authors have pointed out, the term “humanitarian exemption” may lead to confusion, because “exemption” denotes several different mechanisms.⁵⁰ Within the UN system, a “humanitarian exemption” could denote the case-by-case non-application of sanctions measures against a listed individual, including on humanitarian grounds.⁵¹ Other “exemptions” are directed at the humanitarian organizations and activities themselves.⁵²

Even within this latter type of exemptions, there are two subtypes. The first requires that relevant sanctions committees selectively derogate sanctions measures on a case-by-case basis,⁵³ while the second precludes the application of sanctions

47 With regard to the situation in Somalia in and around 2008 and 2010, when Al-Shabaab was listed by the United States and the UN respectively, humanitarian organizations were forced to suspend programmes in Al-Shabaab-controlled areas in order to avoid violating sanctions prior to the current “carve-out” contained in the Somalia sanctions regime. Debarre notes similar effects in Afghanistan in Taliban-controlled areas, prior to the Taliban’s takeover in August 2021. Given the lack of clarity as to what is permitted under the applicable sanctions regimes in these contexts, humanitarian responses have been “heavily skewed” towards government-controlled areas. Granted, the factors contributing to this observation cannot be solely attributed to sanctions per se. See A. Debarre, above note 3, pp. 14, 16.

48 United Nations, above note 22, p. 48.

49 A. Debarre, above note 3, pp. 15–16.

50 *Ibid.*

51 For instance, a designated individual could be exempt from a travel ban to allow life-saving medical assistance in another State or to allow the flow of assets needed to cover basic expenses for foodstuffs and medical treatment. See, for example, UNSC Res. 1596, 3 May 2005, op. para. 16.

52 R. Brubaker and S. Huvé, above note 4, pp. 6–7.

53 See, e.g. for Yemen sanctions, UNSC Res. 2564, 25 February 2021, op. para. 4.

measures vis-à-vis select humanitarian actors and activities without the need for any case-by-case assessments. For the purposes of this paper, these two mechanisms will be referred to as “*ad hoc* derogations”⁵⁴ and “carve-outs”⁵⁵ respectively.

From the perspective of mitigating the impact on impartial humanitarian action and upholding the framework under IHL, there is therefore a preference for carve-outs.⁵⁶ They would clarify at the outset, for both the entities implementing sanctions and humanitarian organizations, that the sanctions measure would not apply to impartial humanitarian action.⁵⁷ Currently, there is only one such carve-out in force, which exists within the Somalia sanctions regime. Resolution 2551 most recently renewed this carve-out, which precludes the application of sanctions measures vis-à-vis

the United Nations, its specialised agencies or programmes, humanitarian organisations having observer status with the United Nations General Assembly that provide humanitarian assistance, and their implementing partners including bilaterally or multilaterally funded non-governmental organisations participating in the United Nations Humanitarian Response Plan for Somalia.⁵⁸

This is reportedly immensely helpful, if not crucial, for the continuation of humanitarian action in Somalia. Among other things, it provides a “basis for donors, contractors and finance and banking systems to enable the financing of humanitarian assistance in areas in which Al-Shabaab operates”.⁵⁹ At the same time, it has garnered criticism on the grounds that it is limited to select humanitarian actors.⁶⁰ Reproducing such a carve-out in other sanctions regimes, or better yet, adopting a similar, more inclusive carve-out across all sanctions regimes, has been put forward as one of the most effective ways to prevent and

54 The present author borrows this term from R. Brubaker and S. Huvé, above note 4, p. 7.

55 Another example of a mitigating measure that falls in between *ad hoc* derogations and carve-outs can be found in the United Nations Verification and Inspection Mechanism for Yemen (UNVIM). The Mechanism itself was meant for alleviating the dire humanitarian situation facing Yemen, exacerbated by the enforcement of sanctions under UNSC Resolution 2216. Prior to the creation of UNVIM, ships seeking entry into Yemeni ports had to be inspected by the Saudi Arabia-led coalition as part of the enforcement of an arms embargo, which could delay deliveries of goods, including food, for up to four to six weeks. UNVIM facilitates the flow of commercial cargo into Yemen to mitigate delays that would be caused by the inspections under the prior system. Vessels are required to obtain clearance from UNVIM, but a carve-out is technically included inasmuch as humanitarian organizations are exempt from this requirement. For more details, see the UNVIM website, available at: www.vimye.org/about. For background on UNVIM, see “In Hindsight: The Story of the UN Verification and Inspection Mechanism in Yemen”, *Security Council Report*, 1 September 2016, available at: www.securitycouncilreport.org/monthly-forecast/2016-09/the_story_of_the_un_verification_and_inspection_mechanism_in_yemen.php.

56 E.-C. Gillard, above note 3, p. 7.

57 *Ibid.*

58 UNSC Res. 2551, 12 November 2020, op. para. 22.

59 “Letter Dated 13 September 2019 from the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator addressed to the Chair of the Security Council Committee pursuant to Resolution 751 (1992) concerning Somalia”, UN Doc. S/2019/799, 7 October 2019, paras 41–43.

60 A. Debarre, above note 3, p. 16.

mitigate the impact on humanitarian action.⁶¹ The reality, however, is that such a comprehensive carve-out at the international level does not currently exist.

In contrast to carve-outs, the reaction towards *ad hoc* derogations has been more mixed. These derogations have been criticized due in part to the fact that the process of obtaining approval from the sanctions committees can be time- and energy-intensive on the part of humanitarian actors.⁶² Moreover, *ad hoc* derogations may have a negative effect on the actual or perceived impartiality, neutrality and independence of the humanitarian actors applying for them.⁶³ This is because, in effect, these procedures allow sanctions committees to influence “when, how and with whom” humanitarians can operate in armed conflict.⁶⁴ Such derogations could also provide an avenue for sanctions committees to second-guess humanitarian organizations’ needs assessments on the ground, or how each organization can meet those needs. For instance, humanitarian activities are exempt from the measures included under the Yemen sanctions regime if “the Committee determines that such an exemption is *necessary* to facilitate the work of the United Nations or other humanitarian organisations in Yemen”.⁶⁵

From a legal standpoint, such a layer of “approval” or determination of “necessity” by members of sanctions committees appears to disturb the normative framework for impartial humanitarian action. Under IHL it is only the parties to the conflict and impartial humanitarian organizations that are given the prerogative to appraise the outstanding humanitarian needs and the “necessity” of the humanitarian response and its implementation. Without delving into the framework in its entirety, the key facets are as follows.

As a starting point, the parties to the armed conflict have the primary obligation to meet the needs of the affected population, and will naturally make needs assessments.⁶⁶ Against this backdrop, IHL provides a legal basis for *impartial* humanitarian bodies to offer their services to the parties to the conflict and to supplement the humanitarian responses of those parties to the conflict.⁶⁷ Within this framework, impartial humanitarian organizations may assess any outstanding needs that must be met and put forward proposals to do so.⁶⁸ Where the needs assessments by impartial humanitarian organizations may come under scrutiny, albeit in a limited way, lies in the requirement that such activities be undertaken with the consent of the parties to the conflict concerned.⁶⁹ At least in theory, a party to the conflict could deny consent on the grounds that there were no outstanding humanitarian

61 E.-C. Gillard, above note 3, p. 9.

62 A. Debarre, above note 3, pp. 7–8.

63 R. Brubaker and S. Huvé, above note 4, p. 7.

64 *Ibid.*

65 UNSC Res. 2564, 25 February 2021, op. para. 4 (emphasis added).

66 ICRC Commentary on GC I, above note 1, para. 826.

67 *Ibid.*, paras 826, 1124.

68 *Ibid.*, para. 803.

69 See common Article 3(2) and common Article 9/9/10. See also Additional Protocol II, Art. 18(1).

needs,⁷⁰ provided that the assessment was made in “in good faith”.⁷¹ That said, a miscalculation, even if made in good faith, regarding the needs of the affected population could lead to both moral and legal responsibility for denying consent.⁷²

Once consent is granted, parties to the conflict are granted a limited degree of control over how humanitarian programmes are implemented through their “right of control”.⁷³ This does not, however, allow the relevant party to the conflict to determine what is necessary to facilitate the implementation of such programmes. In reality, the right of control is rather limited. While not an exhaustive list, the International Committee of the Red Cross (ICRC) mentions the following as falling under the right of control: verifying the nature of the humanitarian action, prescribing technical arrangements, and restricting humanitarian activities due to imperative military necessity, provided limitations are temporally and geographically limited and do not unduly delay or render impossible the implementation of humanitarian activities.⁷⁴

This framework under IHL limits the degree to which the needs assessments, planning and implementation of activities by humanitarian organizations can be second-guessed. Based on the reasons outlined above, the framework of IHL envisages impartial humanitarian organizations as the primary appraisers of outstanding humanitarian needs, with scope (albeit limited) for parties to the conflict to challenge such assessments. Contrary to this system, however, *ad hoc* derogations appear to allow sanctions committees to add an additional layer of assessment and control other than what is envisaged under IHL.⁷⁵

Questions as to the legality of domestic carve-outs and other mitigating measures in light of Chapter VII of the UN Charter

In lieu of carve-outs at the international level mandated by the UNSC, UN member States could theoretically take the initiative and adopt carve-outs in their domestic legislation. In the CT sphere, there have been regional and domestic efforts to

70 See Eve Massingham and Kelisiana Thynne, “Humanitarian Relief Operations”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 329, citing, for example, Geneva Convention IV, Art. 59, and Additional Protocol II, Art. 18(2).

71 ICRC Commentary on GC I, paras 834, 1121.

72 See, for instance, *ibid.*, para. 834: “Thus, any impediment(s) to humanitarian activities must be based on valid reasons, and the Party to the conflict whose consent is sought must assess any offer of services *in good faith* and in line with its international legal obligations in relation to the humanitarian needs of the persons affected by the non-international armed conflict. Thus, where a Party to a non-international armed conflict is unwilling or unable to address basic humanitarian needs, international law requires it to accept an offer of services from an impartial humanitarian organization. If such humanitarian needs cannot be met otherwise, the refusal of an offer of services would be arbitrary, and therefore in violation of international law” (emphasis added).

73 For more on the “right of control”, see “ICRC Q&A and Lexicon on Humanitarian Access”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014, p. 373.

74 ICRC Commentary on GC I, para. 839.

75 This issue with *ad hoc* derogations was highlighted in the *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc No. A/75/337, 3 September 2020, para. 35.

prevent CT legislation and measures from applying to humanitarian action. Key examples include the EU CT directive as well as domestic criminal legislation such as that of the United Kingdom and Australia.⁷⁶

The question that the following section seeks to address, however, is whether such mitigating measures would be permissible as a matter of law vis-à-vis UN sanctions obligations adopted under Chapter VII.⁷⁷ Would, for instance, a State be permitted to preclude, *in toto*, the application of domestic civil and criminal penalties against a humanitarian organization through a domestic carve-out?

The issue is that in the absence of a carve-out at the level of the UNSC, a member State adopting mitigating measures necessarily appears to be implementing sanctions in a way that is lax when compared to what is envisaged in the relevant UNSC resolution. This reasoning appears to prevent the EU from adopting carve-outs or exemptions when implementing UNSC resolutions in its own restrictive measures:

Chapter VII UNSC Resolutions are mandatory under international law. In the case of EU implementation of restrictive measures decided by the Security Council through a resolution, it will therefore only be possible to include exemptions if they are in line with the Resolution.⁷⁸

As will be discussed below, however, there is an argument to be made that such mitigating measures would be in furtherance of fulfilling obligations under IHL. The question then turns to the crux of this issue – that is, whether or not States could adopt such measures based on IHL when doing so could be interpreted as failing to comply with UN sanctions obligations.

Mitigating measures and obligations under IHL

Two IHL rules are of particular relevance to mitigating measures.⁷⁹ The first is the obligation to “allow and facilitate” impartial humanitarian action. According to the ICRC, this obligation binds, at a minimum, parties to the armed conflict as a matter of customary international law applicable to both international and non-international armed conflicts.⁸⁰ Not only does this obligation require parties not

76 Directive (EU) 2017/541 of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 15 March 2017, Recital 38; United Kingdom, Counter-Terrorism and Border Security Act 2019 (c. 3), 12 February 2019, Part I, Chap. 1, Section 4 (amending the 2000 Terrorism Act with the inclusion of Section 58(B)); Australian Criminal Code Act 1995, Compilation No. 138, 20 April 2021, Sections 80.1AA, 102.8(4)(c), 119.4(7), 119.5(4).

77 Recalling that the UN Charter, at Article 25, stipulates that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

78 Council of the European Union, above note 16, para. 46.

79 Other articles in this issue of the *Review* provide a more comprehensive analysis of potentially relevant IHL. See, for example, the article by Tristan Ferraro in this issue of the *Review*.

80 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 55, pp. 193–200, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

to “impede” impartial humanitarian action, but it also creates positive obligations such as the lifting of measures and formalities that could unduly interfere with or hinder humanitarian activities.⁸¹

At least for States party to Additional Protocol I, this obligation applies not only to the immediate parties to the conflict but also to all States that could potentially have an impact on the ability for humanitarian organizations to carry out their missions.⁸² A similar stipulation was dropped from Additional Protocol II at the last minute of drafting; that being said, the ICRC also cites practice to indicate that the scope of the obligation to allow and facilitate may extend beyond the immediate parties to a non-international armed conflict as a matter of customary international law.⁸³

A second relevant rule under IHL is the obligation of “non-prohibition” of impartial humanitarian activities. Crucially, this rule is a potential legal basis for carve-outs from sanctions measures. According to the ICRC, the prerogative of impartial humanitarian organizations to offer services as enshrined in Article 3 common to the four Geneva Conventions, applicable to all types of armed conflicts, includes protection from criminalization and prosecution. In other words, IHL prohibits the criminalization, or penalization through other means, of impartial humanitarian action.⁸⁴

Against the backdrop of these rules, the ICRC argued with respect to CT in its 2019 Challenges Report that measures which impede impartial humanitarian action are “incompatible with the letter and spirit of IHL”, citing, among other things, the obligation to allow and facilitate humanitarian action and the protection from prohibition and criminalization.⁸⁵ Carve-outs have thus been described as a means to allow and facilitate humanitarian action and protect it from prohibition.⁸⁶ Hence, it is at least plausible to argue that IHL calls for, or at least provides the legal basis for, mitigating measures vis-à-vis UN sanctions. Such measures would perhaps be in the form of carve-outs or other means to

81 The *Manual on the Law of Non-International Armed Conflict* states that measures taken by a conflict party in control of an area “should not unduly impede or delay the provision of humanitarian assistance”. International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, Sanremo, 2006, p. 61, para. 5.1(4), available at: www.legal-tools.org/doc/ccf497/pdf/.

82 This is evident from the reference to both “Parties to the conflict” and “each High Contracting Party” in Additional Protocol I, Art. 70. See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 2829.

83 ICRC Customary Law Study, above note 80, Rule 55.

84 ICRC Commentary on GC I, above note 1, para. 804.

85 ICRC, above note 2, p. 61.

86 *Ibid.* To be precise, the ICRC stops short of stating that carve-outs are required under IHL, stating instead that they are in the “letter and spirit” of the law. Granted, this is not universally accepted by States within the CT sphere, particularly with respect to the notion that IHL obliges States to posit carve-outs from CT legislation. According to a statement by the US Mission to the UN, “the United States rejects the efforts by some to read language included in paragraph 109 [of UNGA Res. 75/291] to mean that all Member States—including non-parties to the relevant armed conflict—have obligations under international humanitarian law ... any time it applies to ensure that counterterrorism legislation does not impede humanitarian aid, even if terrorists benefit from such aid”. United States Mission to the United Nations, “Explanation of Position on the UN General Assembly Global Counter-Terrorism Strategy”, 30 June 2021, available at: <https://usun.usmission.gov/explanation-of-position-on-the-un-general-assembly-adoption-of-the-global-counter-terrorism-strategy/>.

clarify the scope of sanctions and reassure humanitarians, their donors and any other related stakeholders.⁸⁷

The potential effect of Article 103 of the UN Charter on IHL

Taking for granted that UN sanctions have the potential to impact impartial humanitarian action, and that mitigating measures could be interpreted as measures to respect IHL, the next question is whether States would be permitted to implement such measures without falling foul of the UN Charter. On this particular point, the relationship between obligations under IHL and obligations stemming from the UN Charter is key.

While Resolution 2462 has not escaped criticism for falling short with regard to the protection of humanitarian action,⁸⁸ it at least makes clear that member States must implement the resolution in compliance with their obligations under IHL.⁸⁹ As mentioned, no such stipulations exist with respect to UN sanctions more generally. While resolutions may call on parties to the armed conflict to adhere to IHL, to date there are no stipulations in relevant UNSC resolutions requiring that sanctions be implemented in accordance with this body of law. This absence of references to IHL could lead to the conclusion that sanctions obligations prevail over obligations under IHL, such as the obligation to allow and facilitate impartial humanitarian action and to refrain from prohibiting such action.

As was explained at the beginning of this article, such a conception of the relationship between IHL obligations and sanctions could be based on the so-called “supremacy clause” under Article 103 of the UN Charter. Article 103 dictates that all obligations under the UN Charter prevail over obligations under “any other international agreement”.⁹⁰ To be clear, sanctions obligations adopted under Chapter VII would undoubtedly qualify as a UN obligation coming under the scope of Article 103.⁹¹

Within the CT context, some have used Article 103 to argue that IHL obligations are subject to the supremacy of conflicting UN Charter obligations,⁹²

87 In terms of other measures, the obligation to allow and facilitate could also be interpreted as requiring States to take positive measures to address the aforementioned “chilling effect” impacting humanitarian organizations and their donors. States could take steps to clarify and communicate the extent of their sanctions legislation to these actors or encourage banks with offices within their jurisdictions to transfer funds to impartial humanitarian actors even if they operate in “high-risk” areas.

88 Scott Paul and Kathryn Achilles, “Correcting Course: Avoiding the Collision between Humanitarian Action and Counterterrorism”, *Just Security*, 23 May 2019, available at: www.justsecurity.org/64158/correcting-course-avoiding-the-collision-between-humanitarian-action-and-counterterrorism/.

89 UNSC Res. 2462, 28 March 2019, op. paras 5, 6; UNSC Res. 2482, 19 July 2019, op. para. 16.

90 For a discussion on the importance of Article 103 for the legality of UN sanctions which, in some instances, would be “*per se*” violations of international law but for the supremacy clause, see Masahiko Asada, “Definition and Legal Justification of Sanctions”, in M. Asada (ed.), above note 41, p. 8.

91 UN Charter, Art. 25. See International Court of Justice (ICJ), *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)*, Order, Provisional Measures, *ICJ Reports* 1992, paras 39, 42.

92 D. McKeever, above note 13, p. 31.

with the exception of those rules under IHL that have attained the status of *jus cogens*.⁹³ If this were the case, a State facing seemingly conflicting obligations under UN sanctions regimes and IHL would be required to implement the former at the expense of the latter. Article 103 would, at least temporarily, suspend IHL obligations relating to the protection of impartial humanitarian action, such as the obligation to allow and facilitate, or to refrain from punishing, humanitarian action. This could in turn lead to the conclusion that mitigating measures violate UN sanctions and the Charter.⁹⁴

Given the potential for this line of argument to harm impartial humanitarian action, it would therefore be a welcome development if UN sanctions regimes were to clarify, similarly to the aforementioned Resolution 2462, that all sanctions measures must be implemented in accordance with IHL.⁹⁵ At the very least, this would bring clarity for impartial humanitarian organizations and States as to the relationship between sanctions and IHL. Failing to do so should not, however, lead to the conclusion that until such language is included, Article 103 necessarily leads to sanctions obligations overriding those under IHL.

Granted, some already take this view, based on the notion that IHL would constitute the *lex specialis* in situations of armed conflict and that Article 103 would not have an impact on customary IHL even if the relevant norms did not attain the status of *jus cogens*.⁹⁶ Both arguments are plausible⁹⁷ but fall outside of the scope of this current contribution. As will be discussed below, there are additional avenues to arrive at a similar conclusion. Without prejudicing the forthcoming discussion, suffice it to say that this hinges on what is meant by “conflict” within the meaning of Article 103.

“Discretionary” and “non-discretionary conflicts” between UN Charter obligations and IHL

The aforementioned “supremacy clause” under Article 103 applies to “conflicts” between obligations stemming from the Charter and those under other

93 Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary*, Vol. 2, 3rd ed., Oxford University Press, Oxford, 2021, p. 2133. While some issues relating to humanitarian action, such as the prohibition of the war crime of starvation as a method of warfare, could be argued by some to qualify as *jus cogens*, such a reading with respect to the other elements relating to humanitarian action is, in the present author’s opinion, unlikely to gather much support at this stage.

94 D. McKeever, above note 13, pp. 30, 31.

95 A. Debarre, above note 3, pp. 17–19.

96 *Report of the Special Rapporteur*, above note 75, para. 24.

97 This is not to say that these two propositions are without controversy. As mentioned above, determining what body of law is *lex specialis* is not a clear-cut task. Moreover, some may argue that *lex specialis* is irrelevant in light of Article 103. See B. Simma *et al.* (eds), above note 93, p. 2116. See also Ben Saul, “International Humanitarian Law and Terrorism”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 410; International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L/682, 13 April 2006, para. 345.

“international agreements”.⁹⁸ Whether or not obligations under IHL, such as the obligation to allow and facilitate humanitarian action or refrain from its prohibition, would survive the supremacy of Article 103 and the Charter hinges on how we interpret “conflicts” in this context.

On the one hand, the International Law Commission (ILC) has adopted a broad definition of conflicts generally. In its report on fragmentation, it defines “conflicts” as any situation in which there are two sets of obligations and each frustrates the goals of the other, even “without there being any strict incompatibility between their provisions”.⁹⁹ Based on this definition, one could argue, for instance, that precluding the application of sanctions measures to humanitarian actors “frustrates” the goals of the sanctions regime. This is especially true if there is a risk of assets being diverted for the benefit of listed individuals or entities. It is, however, questionable whether such a broad definition would be appropriate with respect to the relationship between IHL and sanctions. To be clear, the aforementioned definition of “conflicts” was a general definition adopted by the ILC for conflicts of norms and not one that was specific to its discussion on Article 103.

Given the potential breadth of sanctions measures as outlined in the previous section,¹⁰⁰ it is important to distinguish between two broad categories of conflicts: “discretionary” and “non-discretionary”. Starting with the latter, a “non-discretionary” conflict exists where the implementation of one obligation necessarily results in the violation of another.¹⁰¹ Such would be the case if the implementation of a sanctions obligation would result in, for instance, an impediment to impartial humanitarian action with no room to accommodate the latter. The other type of conflict is what this paper refers to as a “discretionary” conflicts. This would include cases where a UNSC obligation is flexible enough that it can be implemented in accordance with other obligations such as those under IHL.¹⁰² In such discretionary conflicts, there is no inevitable conflict between obligations; rather, the existence of a conflict is dependent on how the obligations are interpreted.

98 UN Charter, Art. 103.

99 ILC, above note 97, paras 24–25. The ILC also notes that there are other, narrower understandings of “conflict” – for example, when one obligation “may be fulfilled only by thereby failing to fulfill another obligation” (para. 24).

100 For instance, the obligation to prevent assets or economic resources from being “made available ... directly or indirectly to or for the benefit of” listed individuals or entities. UNSC Res. 2374, 5 September 2017, op. para. 4.

101 This is precisely the predicament that the EU faced with respect to the *Kadi* cases, albeit in the context of human rights law. In these cases, member States were required to freeze Mr Kadi’s assets and any failure to do so would have constituted a violation of Article 25 of the UN Charter. At the same time, the sanctions measures were such that their implementation necessarily limited Mr Kadi’s enjoyment of his human rights, including his right to property as well as his rights to be heard and to effective judicial review. See Antonios Tzanakopoulos, “The *Solange* Argument as a Justification for Disobeying the Security Council in the *Kadi* Judgments”, in Matej Avbelj, Filippo Fontanelli and Guiseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial*, Routledge, New York, 2014, p. 123.

102 *Ibid.*

It is submitted that currently, the potential conflict between UN sanctions and IHL is a discretionary conflict. This is based on the fact that whether the relevant obligations are incompatible depends on how sanctions measures such as asset freezes are interpreted. To date, the precise meaning of UN sanctions measures is still open to interpretation. While the aforementioned asset freeze language prohibiting the “mak[ing] available” of any “funds, financial assets or economic resources” for the “benefit of [designated] individuals”¹⁰³ certainly can be interpreted to encompass humanitarian activities, there is currently nothing to suggest that these measures must be implemented in such a way. There is nothing intrinsic to these terms to indicate that they would cover impartial humanitarian activities, nor is there an indication that the UNSC wishes this to be the case.

This distinction and conclusion is supported by the jurisprudence of the European Court of Human Rights (ECtHR). In the *Al-Jedda* case, the ECtHR had to determine whether obligations under UNSC Resolution 1546 prevailed over those under international human rights law. The precise question at hand was whether the UK could place individuals under internment or preventive detention, a modality of detention that is not foreseen under Article 5 of the European Convention on Human Rights (ECHR).¹⁰⁴ In this case, the ECtHR decided that Article 103 did not have the effect of displacing obligations under human rights law. The key factor was that there was no explicit language authorizing or requiring internment,¹⁰⁵ and the Court reasoned that “there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights”.¹⁰⁶ Perhaps most importantly for the present discussion, the Court opined that “[i]n the event of any ambiguity in terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the [ECHR] and which avoids any conflict of obligations”.¹⁰⁷

This reasoning suggests that tensions between UN obligations and their goals, on the one hand, and clear-cut IHL rules safeguarding humanitarian action, on the other, would be insufficient to trigger the supremacy clause at the expense of the latter. As mentioned above, what is required is express language authorizing or requiring the implementation of sanctions even at the expense of impartial humanitarian action. No such language currently exists within UN sanctions regimes, nor is there interpretive guidance to suggest otherwise.

In the absence of explicit language or other indications as to the intent of the Council, it is submitted that it would be difficult to presume that the UNSC

103 See the discussion surrounding the text at above note 25.

104 ECtHR, *Al-Jedda v. The United Kingdom*, Appl. No. 27021/08, Judgment, 7 July 2011, para. 100.

105 Resolution 1546 authorized the taking of “all necessary measures” to contribute to the maintenance of security and stability in Iraq; see UNSC Res. 1546, 8 June 2004, op. para. 10. The question of whether mere authorizations, rather than obligations, stemming from the UNSC fell within the ambit of Article 103 was discussed by the ECtHR and was answered in the affirmative.

106 ECtHR, *Al-Jedda*, above note 104, para. 102.

107 *Ibid.*

specifically intends to impose sanctions obligations that would impede humanitarian action to the detriment of IHL. On the contrary, Resolution 2286, for example, reiterates at the outset the UNSC's responsibility to "promote and ensure respect for the principles and rules of international humanitarian law",¹⁰⁸ and individual members of the UNSC have made it clear that sanctions are not intended to hinder or impede humanitarian action.¹⁰⁹ The transition from comprehensive to "targeted" sanctions suggests an intention to avoiding negative humanitarian consequences.¹¹⁰ Furthermore, it is worth recalling that one of the objectives of UN sanctions appears to be to protect and facilitate impartial humanitarian access. Not only do conflict-related sanctions regimes include language condemning the obstruction of humanitarian action, but six sanctions regimes enable entities that obstruct humanitarian access to be sanctioned themselves.¹¹¹ As outlined in the previous section, there is little guidance from the UN as to how exactly States must implement asset freezes and other measures, thereby leaving room for States to adopt interpretations and implementation measures that benefit impartial humanitarian action.¹¹²

The focus then turns to a hypothetical but more difficult question: what to make of a non-discretionary conflict. An example of such a situation would be if the UNSC were to adopt asset freeze measures, or even interpret current measures, to cover cases where listed entities benefit through diversion of assets.¹¹³ Or perhaps even more damaging would be if the Council were to clearly adopt interpretations akin to the "fungibility" theory which arose out of CT jurisprudence, whereby humanitarian assistance could be characterized as providing assets to listed entities insofar as it "frees up" those entities' other resources.¹¹⁴

While there is certainly room for debate, the present author is of the view that the relevant provisions of such a resolution would still fall outside of the ambit

108 UNSC Res. 2286, 3 May 2016, preambular para. 1.

109 "President Kaljulaid of Estonia: Pandemic Cannot Be Used as Pretext to Hinder Access of Humanitarian Aid", statement given at the Open Debate on the Protection of Civilians in the UNSC, 27 May 2020, available at: <https://un.mfa.ee/president-kaljulaid-of-estonia-pandemic-cannot-be-used-as-pretext-to-hinder-access-of-humanitarian-aid/>.

110 R. Brubaker and S. Huvé, above note 4, p. 2.

111 *Ibid.*, p. 9. The Somalia, DRC, Yemen, Mali, South Sudan and CAR sanctions all include the obstruction of humanitarian assistance or access as a listing criterion.

112 For an example of how conflicts between humanitarian considerations and UNSC obligations have been avoided in practice, see the ICJ's Namibia Advisory Opinion. Here, the Court opined that member States' obligations under UNSC Resolution 276 "cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia". ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, ICJ Reports 1971 (Namibia Advisory Opinion), para. 122. The obligations under Resolution 276 to which the Court refers are as follows: UNSC Res. 276, 30 January 1970, op. para. 5, "[c]alls upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution". Paragraph 2 declares that the continued presence of South African authorities in Namibia is illegal and that all acts taken by those authorities on behalf of or concerning Namibia are illegal and invalid.

113 Such as what occurred in Yemen with respect to Save the Children: see above note 45.

114 D. A. Lewis and N. K. Modirzadeh, above note 38, p. 9, referring to US Supreme Court, *Holder v. Humanitarian Law Project*, 561 US 1, 21 June 2010.

of Article 103. This is based on the fact that there are limits to the competence of the UNSC,¹¹⁵ and that a violation (or violations) of IHL at the expense of humanitarian action would fall outside of the powers of the Council. Admittedly, the question of precisely what constitutes an *ultra vires* act by the UNSC, and how to make such a determination, is a difficult one. What is clear, however, is that the UNSC is bound by the purposes and principles of the UN.¹¹⁶ Article 24(2) of the UN Charter stipulates that the UNSC “shall act in accordance with the Purposes and Principles of the United Nations” when discharging its duties.¹¹⁷

These principles and purposes are found in Article 1(3) of the UN Charter, which posits international cooperation in solving international problems, including of a humanitarian character, as one of the purposes of the organization.¹¹⁸ Based on this, some commentators have argued that the rule of law and respect for IHL constitute limitations on the powers of the UNSC acting under Chapter VII.¹¹⁹ Accordingly, leaving aside the immense issue of how to determine the legality of UNSC acts, it is submitted that the UNSC does not have the power to impose a sanctions resolution which explicitly results in violations of IHL and undermines efforts to solve problems of a “humanitarian character”. Such sanctions obligations, enacted *ultra vires* by the UNSC, would not be subject to the supremacy clause under Article 103 of the Charter.¹²⁰

Admittedly, this is a highly theoretical line of argument. If such a situation were to arise in practice, determining the legality of a UN sanction would not be a straightforward task, and nor would determining the forum in which to conduct such a legal review of UNSC acts. Member States would truly be caught “between a rock and a hard place”, having to choose between IHL and UN Charter obligations. Some may choose to rely on Article 103 to justify deviations from

115 As put by the International Criminal Tribunal for the former Yugoslavia (ICTY), the “Charter ... speaks the language of specific powers, not of absolute fiat”. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Judgment (Appeals Chamber), 2 October 1995, para. 28.

116 Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart, Oxford, 2004, pp. 191–216.

117 UN Charter, Art. 24(2). See also Namibia Advisory Opinion, above note 112, para. 110: “The only limitations [to the powers of the UNSC to maintain international peace and security] are the fundamental principles and purposes found in Chapter I of the Charter.”

118 UN Charter, Art. 1(3): “To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

119 E. de Wet, above note 116, pp. 204–216; Hans-Peter Gasser, “Collective Economic Sanctions and International Humanitarian Law: An Enforcement Measure under the United Nations Charter and the Rights of Civilians to Immunity: An Unavoidable Clash of Policy Goals?”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 56, No. 4, 1996, pp. 880, 881, 885.

120 See, for instance, ILC, above note 97, para. 331: “The question has sometimes been raised whether also Council resolutions adopted *ultra vires* prevail by virtue of Article 103. Since obligations for Member States of the United Nations can only derive out of such resolutions that are taken within the limits of its powers, decisions *ultra vires* do not give rise to any obligation to begin with. Hence no conflict exists.” See also B. Simma *et al.* (eds), above note 93, p. 2127; Rain Liivoja, “The Scope of the Supremacy Clause of the United Nations Charter”, *International and Comparative Law Quarterly*, Vol. 57, No. 3, 2007, p. 586.

IHL, while others may strive to preserve IHL.¹²¹ Either way, such a clear contradiction between the object and purposes of the UN and the effects of UN sanctions may reflect negatively on the legitimacy of sanctions as a global policy tool for influencing actors involved in armed conflict.¹²²

Conclusion

If subsequent research confirms the indications that UN sanctions can have an adverse impact on impartial humanitarian action, it is useful to take note of their broader implications for humanitarian action. Such evidence of impact would mean that UN sanctions could undermine the ability of humanitarian organizations to act, or to be perceived to be acting, in an impartial, neutral and independent manner. It would also mean that a political body such as the UNSC could dictate the implementation programmes of humanitarian activities that are meant to be quintessentially apolitical. This is despite the fact that adherence, and perception of adherence, to these principles is often a necessary condition for humanitarians to be able to operate effectively and safely.¹²³

This paper has hoped to address this potential dynamic from a legal perspective, with particular attention paid to the apparent friction between IHL and sanctions obligations. As has been argued, Article 103 cannot trigger the supremacy of sanctions obligations over IHL unless such an effect is clearly intended by the UNSC. In the absence of clear evidence to the contrary, it should be assumed that the Council does not intend unduly to encroach on this crucial humanitarian space.¹²⁴ IHL must therefore always be respected when sanctions

121 The EU, for instance, may have difficulties implementing a resolution that explicitly requires a violation of IHL. Recall a similar situation with respect to the *Kadi* cases, albeit with respect to Mr Kadi's human rights. In a series of cases, his human rights were preserved even in light of Article 103 of the Charter. In making such a determination, the European Court of Justice in *Kadi I* took the view that "obligations imposed by international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights". See European Court of Justice, *Kadi and Al Barakaat International Foundation v. Council and Commission*, Case Nos C-402/05 P and C-415/05 P (Grand Chamber), 3 September 2008, para. 285. It remains to be seen whether IHL and humanitarian action would be given a similar status to human rights in *Kadi*, but it is difficult to rule this out given the impressive commitment that the EU has placed on respecting and promoting respect for IHL, as well as impartial humanitarian action. See Treaty on European Union (Consolidated Version), C 235/5, 7 February 1992 (entered into force 1 November 1993), Arts 3(5), 21(2)(g); Treaty on the Functioning of the European Union (Consolidated Version), OJ L 326/47-326/390, 26 October 2012, Art. 214(2). See also *Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law*, OJ C 303, 15 December 2009.

122 R. Brubaker and S. Huvé, above note 4.

123 See, for example, Daniel Thürer, "Dunant's Pyramid: Thoughts on the 'Humanitarian Space'", *International Review of the Red Cross*, Vol. 89, No. 865, 2007; Marrion Harrof-Tavel, "Neutrality and Impartiality – the Importance of these Principles for the International Red Cross and Red Crescent Movement and the Difficulties Involved in Applying Them", *International Review of the Red Cross*, Vol. 29, No. 273, 1989.

124 As argued, this is not least because one of the purposes of UN sanctions is to facilitate and protect impartial humanitarian actors. R. Brubaker and S. Huvé, above note 4, p. 9.

obligations do not explicitly require States to violate such obligations. On the other hand, if the UNSC clearly intends for its decisions and demands on member States to violate IHL, the effect of such a provision in a UNSC resolution may be null, at least in theory, due to the Council acting *ultra vires*.¹²⁵

The present author is aware of the theoretical, political and practical challenges that this may give rise to, but it is important not to lose sight of the current reality of UN sanctions. Given that the primary issue is that there is a lack of clarity as to the precise scope of sanctions obligations, one could imagine that an overwhelming majority of issues would fall under the category of a “discretionary” conflict, which must be resolved in favour of preserving IHL. Such a line of argument, should it be accepted, is of course far from being a panacea – it is merely the first step of many.

Experts who are familiar with the issue will be quick to note that it is not necessarily UN sanctions that are the root cause of impediments to humanitarian action, but a combination of multilateral and unilateral sanctions which can lead to further complications. Accordingly, this paper only addresses part of the issue, but it is hopefully one that helps to avoid inaction by States with regard to preserving the impartial humanitarian space due to fears that doing so would violate UN Charter obligations. As studies into the impact of sanctions on humanitarian action continue, it would certainly be interesting and useful to determine what proportion, if any, of the issues relating to IHL would amount to such a “non-discretionary” conflict with sanctions obligations. In such cases, the theoretically and practically difficult question of whether the UNSC has acted *intra vires* may come into play.

To address doubts that may stem from either of these types of norm conflicts, it would perhaps be prudent to include explicit language in UN sanctions reminding States implementing related duties that they have an obligation to respect IHL. A lack of such a stipulation, however, should not be taken to mean that IHL may be left by the wayside.

125 ILC, above note 97, para. 331; B. Simma *et al.* (eds), above note 93, p. 2127; R. Liivoja, above note 120.

Conflict-related UN sanctions regimes and humanitarian action: A policy research overview

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Abstract

This paper offers a brief overview of the potential interplay of United Nations (UN) sanctions regimes applied in contexts of armed conflict and humanitarian action. It traces how this issue has emerged within the counterterrorism (CT) sphere, before examining the possibilities of compatibility and risks for humanitarian action in conflict-related sanctions regimes. The paper lays out research gaps and outlines a new path for policy research focused on UN sanctions regimes imposed in the context of armed conflicts (“conflict-related”) yet falling outside the pure CT space. The paper concludes by illuminating why establishing further evidence on this issue is critical to both the legitimacy and the effective use of UN sanctions.

Keywords: international humanitarian law, sanctions, counterterrorism, armed conflict, United Nations.

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Introduction

Since the early 2000s, international and regional organizations as well as States have increasingly imposed sanctions that serve to control, restrict or prohibit interactions with certain States, groups or individuals, for political, social and economic ends. At the United Nations (UN) level, these ends have notably included upholding the international security order, resolving armed conflicts, deterring violations of international human rights or humanitarian law, and blocking sponsorship of or engagement in terrorism. Conversely, for the past few years, increasing assertions have been made inside and outside the humanitarian community that, as a result of international sanctions, especially in the field of counterterrorism (CT), the space for principled humanitarian action has been shrinking.

This paper offers a brief overview of UN sanctions regimes applied in contexts of armed conflict and humanitarian action. It traces the emergence of the issue within the CT sphere and seeks to compare the similarities and differences between the single UN CT sanctions regime and the ten UN regimes imposed in situations of armed conflict with conflict resolution as their primary goal (hereafter referred to as “conflict-related” regimes).¹ In particular, this paper aims to present areas of compatibility and even complementarity between UN conflict-related sanctions regimes and international humanitarian law (IHL), as well as the potential risks that sanctions pose to humanitarian action. The paper lays out research gaps and outlines a new path for policy research focused on conflict-related sanctions regimes and falling outside the pure CT space. The paper concludes with an explanation of why establishing further evidence on this issue is critical to both the legitimacy and the effective use of UN sanctions.

Examining the current moment

Moments of scrutiny and change in the design and use of UN sanctions regimes

Applied under Article 41 of the UN Charter, UN sanctions are composed of all measures “not involving the use of armed force” that the UN Security Council can adopt to give effect to its decisions.² Sanctions are one of the critical instruments employed by the Security Council in its efforts to maintain or restore international peace and security. When imposed in armed conflict situations,

1 The ten sanctions regimes applied in armed conflict contexts with the primary goal of resolving the conflict are Somalia, the Democratic Republic of the Congo (DRC), Yemen, Mali, Sudan, South Sudan, the Central African Republic (CAR), Libya, Iraq (formal occupation regime) and 1988 (Afghanistan).

2 Charter of the United Nations, 1 UNTS XVI, 24 October 1945 (UN Charter), Art. 41: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

their primary goal is contributing to mitigating and preventing an escalation of or return to violent conflict.³ Sanctions are also used to counter terrorism. In practice, UN sanctions regimes most frequently include assets freezes, travel bans, arms embargoes and commodity bans. They are applied to individuals and entities with the aim of changing their behaviour, constraining their activities or signalling that their actions fall outside generally accepted international norms.⁴ Article 25 of the UN Charter creates a legal obligation on member States to carry out the decisions of the UN Security Council, including the Council's call for sanctions under Article 41.

Members of the Security Council have redesigned and refined sanctions over time, leading to more targeted, efficient and effective versions of the tool. Two significant moments of crisis, scrutiny and change have fundamentally altered the design of and approach to UN sanctions. The first involved the reforms undertaken between 1998 and 2002 in response to the devastating humanitarian impacts of comprehensive sanctions on the civilian population in the former Yugoslavia, Haiti and Iraq. Comprehensive sanctions measures were found to have contributed to deleterious effects both through the restriction of access to essential goods, including medical supplies and petrol, and through the secondary effects that arose as governments diverted resources away from public services and towards sanctions evasion.⁵ In view of these consequences and in response to concerted lobbying from a coalition of researchers, member States, UN officials and private sector representatives, the UN Security Council members adapted their approach to designing sanctions. Instead of placing comprehensive sanctions on a government or territory as a whole, the architects of UN sanctions regimes shifted to using "targeted" measures intended to have a limited, strategic impact on selected individuals and entities. In addition, sanctions designers narrowed trade embargoes to diminish the impact on the overall economy.⁶ Sanctions designers intended for the new approach to help minimize the effects of sanctions on the civilian population and the national or regional economy while also increasing the efficacy of the measures in achieving their stated goals of exerting influence over specific individuals or groups.

The second moment of crisis, scrutiny and change emerged as an unexpected consequence of efforts to make sanctions more targeted. As sanctions measures became more individualized and discriminating, the procedures for listing and the process required for de-listing individuals were called into

3 Rebecca Brubaker and Thomas Doerfler, *UN Sanctions and the Prevention of Conflict: A Thematic Paper for the United Nations–World Bank Study on Conflict Prevention*, United Nations University, August 2017, available at: <https://collections.unu.edu/eserv/UNU:6431/UNSsanctionsandPreventionConflict-Aug-2017.pdf> (all internet references were accessed in September 2021).

4 Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, Cambridge University Press, New York, 2016.

5 David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Lynne Rienner, Boulder, CO, 2000.

6 For example, the new measures targeted vessels transporting illicit oil rather than banning the import of oil in general, and banned the export of rough diamonds rather than a country's diamond trade. For more on this moment of change, see T. J. Biersteker, S. E. Eckert and M. Tourinho, above note 4.

question.⁷ A growing wave of litigation raised the issue that the UN's targeted listings were unduly impacting individuals' and entities' due process rights, especially in the CT sphere. In the wake of significant pressure from both member States and national and regional courts, the UN Security Council, wishing to protect both the efficacy and the legitimacy of its measures, undertook to address the threats to due process rights in the CT sphere, established an ombudsperson for the 1267 sanctions regime (named after Security Council Resolution 1267) and began to reform the listing procedures.⁸

UN sanctions are now facing a third moment of crisis and scrutiny around the impact of current sanctions measures on the humanitarian sector's ability to safely, promptly and effectively access and assist those in need.⁹ The scrutiny to date has mostly focused on UN sanctions applied with the sole objective of countering terrorism. Although not necessarily new for many humanitarian actors, this issue has gained momentum in the past few years, attracting attention both amongst the broader set of sanctions implementers and among sanctions designers. However, UN sanctions imposed in situations of armed conflict with different objectives than countering terrorism, such as conflict resolution, have largely been left out of the analysis.

This history of previous challenges and processes of reform of UN sanctions presents two useful lessons on how to understand and subsequently address the current crisis. The first lesson is that sanctions' effectiveness is inextricably linked to their legitimacy as a global policy tool. While the Security Council may design and adopt the measures, it relies on others to implement them.¹⁰ When left unaddressed, past challenges have hurt the legitimacy of the measures in the eyes of other States. In turn, scrutiny of the legitimacy of sanctions has led to decreased willingness on the part of States to implement them. Accordingly, UN sanctions, as a whole, have become less effective. Second, the previous two moments of change demonstrate that when faced with clear evidence of adverse impacts, the UN Security Council has risen to the challenge and enacted reforms.¹¹ Thus, there is reason to believe that the Security Council and its sanctions committees may be moved to act in this third case as well.

7 James Cockayne, Rebecca Brubaker and Nadeshda Jayakody, *Fairly Clear Risks: Protecting UN Sanctions' Legitimacy and Effectiveness through Fair and Clear Procedures*, research report, United Nations University Centre for Policy Research (UNU-CPR), 2018.

8 UNSC Res. 1904, 17 December 2009. The Council also adopted reforms on the processes for listing individuals. States cannot put a name forward for listing until the name has been independently verified by three separate sources. Groups of experts also have to rely on three independent sources in their reports before putting a name forward. Reforms have made it harder to be listed.

9 For the purposes of this paper, the terms "humanitarian sector", "humanitarian organizations" and "humanitarian actors" are used interchangeably and are meant to include all non-governmental organizations, civil society actors and UN agencies operating in an impartial manner and engaging in exclusively humanitarian activities.

10 Although all States are legally required to implement all UN Security Council decisions, hence including sanctions measures, the practice does not always match the theory. In practice, some States automatically implement Security Council decisions. Other States filter Security Council decisions through their own courts and only implement what they feel is legally sound.

11 In the case of challenges regarding due process safeguards, reforms were more modest and related principally to the CT sanctions regime.

By continuing to respond to new evidence and refine its tools, the Council helps to protect both the legitimacy and the effectiveness of sanctions.

Overview of existing research and looking beyond CT sanctions

Over the last decade, there have been an increasing number of reports from humanitarian organizations, UN humanitarian agencies, civil society organizations and sanctions experts that raise concerns that CT measures in general, and CT-related sanctions measures in particular, are negatively impacting the ability of humanitarian organizations to carry out their activities in contexts of armed conflicts in line with provisions under IHL.¹²

As demonstrated by existing research, the constraints posed by CT measures writ large and CT sanctions in particular on humanitarian actors' ability to operate in certain areas or for the benefit of certain categories of individuals challenge the fundamental requirement under IHL according to which humanitarian actors must operate in an impartial manner.¹³ These constraints also take a toll on the ability of humanitarian organizations to be perceived as neutral actors by the parties to the conflict.¹⁴ Although the concrete negative impacts of CT sanctions in particular on humanitarian action are difficult to isolate from the impacts of other international, regional and national CT measures, research conducted to date provides initial evidence that the three main sanctions measures used in efforts to counter terrorism – asset freezes, travel bans and sectoral embargoes – may all affect humanitarian action. As a result, some research has concluded that a tension exists between CT measures writ

12 For the impacts of CT measures in general, see, notably, Emma O'Leary, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, Norwegian Refugee Council, June 2018; Tom Keatinge, *Uncharitable Behavior and Banks that Drop Nonprofit Customers*, Demos, 2019; Ben Hayes, *The Impact of International Counterterrorism on Civil Society Organisations: Understanding the Role of the Financial Action Task Force*, Bread for the World, 2017; Tom Keatinge and Florence Keen, *Humanitarian Action and Non-State Armed Groups: The Impact of Banking Restrictions on UK NGOs*, research paper, Chatham House, April 2017; Stuart Gordon, Alice Robinson, Harry Goulding and Rawaad Mahyub, *The Impact of Bank De-risking on the Humanitarian Response to the Syrian Crisis*, Humanitarian Policy Group (HPG), August 2018; Stuart Gordon and Sherine El Taraboulsi-McCarthy, *Counter-Terrorism, Bank De-risking and Humanitarian Response: A Path Forward: Key Findings from Four Case Studies*, HPG, August 2018, p. 2; Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Norwegian Refugee Council, 2013; Sherine El Taraboulsi-McCarthy and Camilla Cimatti, *Counter-Terrorism, De-risking and the Humanitarian Response in Yemen: A Call for Action*, HPG, February 2018. On CT sanctions in particular, see, notably, Alice Debarre, *Making Sanctions Smarter: Safeguarding Humanitarian Action*, policy report, International Peace Institute, December 2019; High Level Review of United Nations Sanctions, *Compendium*, November 2015; Emanuela-Chiara Gillard, *Recommendations for Reducing Tensions in the Interplay between Sanctions, Counterterrorism Measures and Humanitarian Action*, research paper, Chatham House, August 2017.

13 Note that IHL is applicable only in relation to situations of armed conflict. Only some, not all, CT sanctions are applied in relation to such situations.

14 Neutrality is not a required condition under IHL, but it is considered a fundamental operational principle for humanitarian action. A perceived lack of impartiality and neutrality might endanger the safety and security of humanitarian workers when operating in sensitive conflict contexts and when engaging with non-State armed groups considered to be "terrorists".

large, CT sanctions, and IHL—in particular, IHL rules governing humanitarian activities, IHL rules protecting the wounded and sick as well as persons providing medical care, and IHL rules protecting humanitarian personnel.¹⁵

The vast majority of existing UN sanctions regimes applied in armed conflicts, however, pursue objectives other than countering terrorism. In these regimes, the primary goal of sanctions is to address the existing armed conflict and pursue objectives such as conflict mitigation or resolution, protection of civilians, and respect for the humanitarian mission. These sanctions regimes are “conflict-focused” or “conflict-related”. Yet, research on the impacts of UN sanctions on humanitarian activities in these conflict-related regimes is somewhat scarce. As described above, scholars have established a tension between CT measures and IHL rules protecting the humanitarian space, and it remains to be seen whether this tension also exists in the conflict-related sanctions regimes. While research is currently lacking, two assumptions can be made on this issue: one of alignment, and one of risks.

Apparent alignment between conflict-related sanctions regimes, IHL and humanitarian action

Some may believe that there is an obvious and therefore unproblematic complementarity between UN-mandated sanctions applicable outside the counterterrorism sphere and IHL, for two reasons. First, conflict-related sanctions regimes apply in armed conflict contexts in which IHL is the prevailing legal framework. As sanctions must comply with international law, including IHL, they should thus be compatible with safeguarding the humanitarian space. Second, conflict-related regimes do not have certain complications that the single CT regime does possess, and they are thus presumed to present fewer risks to humanitarian action. Let us examine these two points in turn.

Compatibility and complementarity between conflict-related sanctions regimes and humanitarian action

The design of conflict-related sanctions regimes can be complementary to the application of IHL rules. Indeed, unlike in the single CT regime, conflict-related sanctions regimes have always included language and provisions illustrating the intent or the willingness of the Security Council to use sanctions as a tool to help facilitate the delivery of humanitarian assistance and to protect humanitarian organizations from unlawful action and abuse by parties to the conflict. There are

15 See, for example, Emanuela-Chiara Gillard, *Humanitarian Action and Non-State Armed Groups: The International Legal Framework*, research paper, Chatham House, February 2017; Naz K. Modirzadeh, Dustin A. Lewis and Claude Bruderlein, “Humanitarian Engagement under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011.

three elements of protection used by the UN Security Council that are worth noting here.

First, in all but one of its conflict-related sanctions regimes, the Security Council recalls the obligation of the parties to the conflict to comply with their obligations under international law, including IHL, human rights law and refugee law. It may be useful to note that this call to comply with IHL in general implicitly covers the specific rules regulating humanitarian access and the protection of humanitarian and medical workers (hence all IHL obligations on the parties to the conflict pertaining to the protection of the humanitarian space). Moreover, all but one of the conflict-related regimes includes language specifically referring to and condemning violations of IHL, violations which often represent barriers to humanitarian access and humanitarian action. By contrast, the 1267 (ISIL and Al-Qaeda) UN sanctions regime—known as IDAQ—does not refer to the obligations of the parties to the conflict to comply with IHL, and very rarely contains specific condemnations of IHL violations, even where the targeted individuals and groups are “parties to the conflict” and are reported as being involved in violations of the laws of war.

Second, and again in contrast to the IDAQ regime, all conflict-related regimes emphasize the importance of securing humanitarian access and assistance and of protecting humanitarian personnel. Over the last two decades, sanctions regimes have developed to include language and provisions specifically intended to protect the humanitarian space from violations by parties to the conflict. Current conflict-related sanctions regimes include frequent and standardized language in both preambles and operative paragraphs that reflect the specific rules of IHL related to humanitarian activities and humanitarian personnel.¹⁶

Third and finally, these references to IHL in general, and humanitarian access, assistance and personnel in particular, are translated into action through two designation criteria. These criteria provide the basis on which the Security Council can act to prevent or put a stop to abuses of and impediments to humanitarian relief. Eight of the conflict-related sanctions regimes include a general designation criterion of “violations of IHL”.¹⁷ Thus, cases of obstruction of access, diversion of aid or attacks on personnel could be sanctioned on this basis when demonstrated by the relevant panel or group of experts to amount to a violation of IHL. Moreover, six of the conflict-related sanctions regimes also include a stand-alone designation criterion based on the obstruction of humanitarian access, impediments to the delivery or distribution of humanitarian assistance, and/or attacks against humanitarian personnel.¹⁸ Thus, cases of

16 Said language notably condemns the obstruction and misappropriation of humanitarian assistance; condemns the targeting of and attacks against humanitarian personnel; recalls the corresponding obligations to ensure full, safe and unhindered humanitarian access to all those in need; and recalls the importance of respecting the humanitarian principles of humanity, impartiality, neutrality and independence.

17 South Sudan, Mali, Yemen, CAR, DRC, Libya.

18 South Sudan, Mali, Yemen, CAR, DRC, Libya, Somalia, Sudan.

obstruction or attacks could be sanctioned on that basis even when they do not amount to an IHL violation.

These three elements demonstrate that protection of humanitarian access, assistance and personnel against abuses and violations of IHL is integrated as part of the secondary objectives of conflict-related sanctions regimes. Thus, the primary goal of conflict-related regimes (conflict resolution) and the design of the sanctions measures adopted in pursuit of that goal are assumed, by some, to be complementary and compatible with IHL and the humanitarian space.

Comparing contexts: Fundamental differences with the CT sphere

Only one of the current fourteen UN sanctions regimes has as its primary objective the countering of terrorism. IDAQ is the only “pure” CT regime. It was adopted in 2011, following a split between what was once a single UN sanctions regime covering both the Taliban and Al-Qaeda. The Security Council split the regime to signal to the Taliban the possibility of reconciling through selected de-listing from the 1988 sanctions regime, which was redesigned to focus primarily on resolution of the conflict within Afghanistan. By contrast, the new CT regime – which initially focused on Al-Qaeda and its associates – had as its goal not reconciliation, conflict resolution or bringing members of Al-Qaeda “in from the cold”; rather, it only aimed to contain terrorist activities, making it more difficult for Al-Qaeda to fund initiatives, travel, and procure weapons.¹⁹ The IDAQ regime applies globally – i.e., everywhere that Al-Qaeda, ISIL or the groups and individuals listed as their affiliates operate. However, while the regime overlaps with situations of international and non-international armed conflict in which ISIL, Al-Qaeda or their affiliates might be parties to the conflict – such as Syria, Iraq and Afghanistan, Mali, Libya, Somalia and Yemen – it is not meant to address them, and only focuses on the deterrence and constraint of the terrorist-affiliated groups.²⁰ As described by Biersteker, Van Den Herik and Brubaker, “listings of groups” in the IDAQ regime, in contrast to the conflict-related regimes focusing on conflict resolution,

are intended to exclude them from global society and disrupt their ability to engage in terrorist activity. Eligibility for designation is based on individual behaviour, especially conduct associating a person with a terrorist/ clandestine group either through direct participation or the provision of indirect support.²¹

On the other hand, the most common type of contextual setting for UN sanctions is situations of armed conflict, which the sanctions are designed to address. Currently,

19 Thomas J. Biersteker, Rebecca Brubaker and David Lanz, *UN Sanctions and Mediation: Establishing Evidence to Inform Practice*, UNU-CPR, 18 February 2019.

20 Note that there are no UN sanctions regimes applicable to Syria as a country; however, the UN sanctions measures on ISIL and Al-Qaeda are applicable to the region.

21 Thomas J. Biersteker, Larissa van den Herik and Rebecca Brubaker, *Enhancing Due Process in UN Security Council Targeted Sanctions Regimes*, internal report drafted for Switzerland’s International Law Directorate, April 2021, p. 10 (pending publication, on record with the authors).

there are ten conflict-related sanctions cases pertaining to situations in Somalia, the Democratic Republic of the Congo (DRC), Yemen, Mali, Sudan, South Sudan, the Central African Republic (CAR), Libya, Iraq (formal occupation regime), and Afghanistan. Six out of ten cases (Iraq, Libya, Mali, Somalia, Afghanistan and Yemen) possess significant CT dimensions, either because of the global application of the IDAQ sanctions regime on top of the armed conflict regime or because of the application of parallel regional or unilateral CT sanctions. The four remaining conflict-related regimes (CAR, DRC, South Sudan and Sudan) are either “pure” armed conflict cases or have minor CT elements. Contrary to the singular IDAQ regime, in these ten cases sanctions are deployed as leverage towards settlement of the conflict.²² In other words, the primary purpose of these sanctions regimes remains resolution of a conflict through a negotiated settlement, not the deterrence of terrorist-affiliated groups.²³ As a result, sanctions are imposed on key political and military actors involved in the armed conflict, in order to constrain their activity or to nudge them towards cooperation with an ongoing peace or reconciliation process.²⁴ Individuals and groups are listed on the basis of both their status and their conduct.²⁵

This fundamental difference in the underlying purposes of sanctions regimes in the CT and the conflict-related spheres might impact States’ interpretation, and hence their implementation, of sanctions. In particular, there might not be the same level of severity and scrutiny on engaging with listed non-State armed groups in the conflict-related sphere as there is in the CT sphere. This relatively diminished focus extends to concerns over the risks of diversion of humanitarian aid. For example, looting, stealing, diversion and abuse of humanitarian aid by non-State actors, including listed armed groups and individuals, have been reported over the years by the panels of experts for the majority of conflict-related regimes. Yet, such actions were never directly reported by the Monitoring Team in the IDAQ regime—even though the IDAQ regime strongly emphasizes aid diversion and abuse as a potential source of financing of terrorist-affiliated groups and individuals, while the majority of the other conflict-related regimes condemn aid diversion and abuse by listed armed groups as one of a number of actions hindering the delivery of humanitarian relief to populations in need.²⁶ Moreover, the IDAQ regime emphasizes the need for States to adopt a risk-averse approach and refers heavily to the Financial Action Task Force’s (FATF) recommendations regarding “the risk of abuse of non-profit organizations by terrorist groups and networks”.²⁷ By contrast, FATF recommendations do not apply to the same extent in conflict-related sanctions

22 *Ibid.*, p. 8.

23 J. Cockayne, R. Brubaker, and N. Jayakody, above note 7, p. 4; see also Table 8 and pp. 30–35.

24 T. J. Biersteker, L. van den Herik and R. Brubaker, above note 21, p.8

25 *Ibid.*

26 Note that Taliban sanctions regime (1988) makes similar references to the risk of humanitarian aid being diverted and used as a source of financing.

27 See, for example, FATF, *Best Practices: Combating the Abuse of Non-Profit Organizations* (Recommendation 8), June 2015.

regimes. This may give the impression that financial sanctions applied in conflict-related regimes without CT components may not need to be subjected to an equally rigorous review, especially regarding the risks of abuse of humanitarian aid.

A final significant difference between the armed conflict sphere and the CT sphere may lead to different research results. The single UN CT sanctions regime is part of a larger political and legal CT framework developed by the UN Security Council over the years under Chapter VII of the UN Charter. This framework imposes general and abstract rules binding on all UN member States, a trend which started with Resolution 1373. In particular, through this framework, Resolutions 1373 and 2462 impose obligations on States to criminalize the financing of terrorism in domestic orders, which includes violations of the sanctions measures imposed in the IDAQ regime.²⁸ By contrast, in the conflict-related sanctions regimes, States have the discretion to decide the type of penalty to institute in relation to national actors' non-compliance with UN sanctions. As a result, States may be less severe regarding violations of UN sanctions in the conflict-related regimes than in the CT context, with potential repercussions on private actors' approach to risk when working with humanitarian actors in both spheres.²⁹ In summary, all these distinctions can foster different interpretations and implementation practices in conflict-related regimes. Conflict-related sanctions regimes may thus bear less risks for humanitarian action than the 1267 regime – at least in appearance.

Challenging the assumptions of inherent compatibility and absence of risk

As described above, the design of the conflict-related regimes indicates the will to protect humanitarian action and to uphold IHL. Yet, UN sanctions applied in conflict contexts might also both directly and indirectly limit, and in certain cases even undermine, humanitarian action. Moreover, some humanitarian actors are increasingly concerned that their activities may be contravening UN sanctions or the measures adopted by States and donors to implement them in conflict contexts outside the pure CT sphere.³⁰ Concern over being found to be out of compliance has led some organizations to severely limit or even shut down their

28 This notably includes the obligation of States to criminalize in their domestic orders violations of sanctions measures (in particular the assets freeze measure) applicable in the ISIL/Al-Qaeda regime. Obligations arising from UN Security Council resolutions on counterterrorism adopted under Chapter VII, such as Resolution 1373 and later Resolution 2462, are very similar to conventional obligations of the International Convention for the Suppression of the Financing of Terrorism. After the adoption of Resolution 1373, scholars notably wrote about the Security Council acting as a supranational legislator for the rest of the UN member States. See, for example, Stefan Talmon, "The Security Council as World Legislature", *American Journal of International Law*, Vol. 99, No. 1, 2005; Paul C. Szasz, "The Security Council Starts Legislating", *American Journal of International Law*, Vol. 96, No. 4, 2002.

29 However, this might not be true when looking beyond UN sanctions.

30 Based on author telephone interviews with a broad range of international and national humanitarian actors in the DRC, Somalia, Yemen and Mali, November 2020–May 2021 (transcripts on record with the authors).

own operations, while others have decided to simply disregard the sanctions measures. The question thus becomes whether the conflict-related regimes, as they stand now, contain sufficient safeguards to prevent or mitigate the unintended and yet potentially harmful effects of sanctions on humanitarian action, especially considering the seeping of CT objectives into conflict-related regimes.

Increasing overlap with the CT sphere

While it is important to appreciate general differences between the conflict-related and CT spheres, in an increasing number of cases, these spheres overlap.

First, it is important to remember that the sanctions measures are the same across both conflict-related regimes and the CT regime. What ultimately varies is how the scope of these sanctions measures is interpreted by Security Council members as well as implementing member States. This can be particularly problematic for the implementation of assets freeze measures, which require that funds, financial assets or economic resources are prevented from being made available, directly or indirectly, to or for the benefit of designated entities. Although the interpretation of the assets freeze in the contexts of conflict regimes is assumed to be less widely enforced as in the IDAQ regime, there is nothing that prevents a shift to a stricter position in conflict-related regimes. In the absence of any specific humanitarian carve-out or guidance, this prohibition can be interpreted as encompassing the typical activities of impartial humanitarian actors. Such activities might include the delivery of large quantities of assistance items diverted by a listed entity, or the handover of water, sanitation and habitation infrastructures, or even the provision of humanitarian assistance or services to designated entities, including notably the provision of medical care to wounded and sick members of designated groups.

Second, from Somalia to Mali and from Yemen to Afghanistan, the application of UN sanctions has increasingly turned to both conflict mitigation and countering terrorism. In some of these contexts, the Security Council has updated the design of its sanctions regimes to address this overlap. For example, affiliation to groups designated under the IDAQ regime is mentioned in the 2374 (Mali), 751 (Somalia) and 1970 (Libya) sanctions regimes, as an additional basis for the listing of several individuals and entities. Currently Al-Shabaab is listed under the 751 sanctions regime, a regime with a standing humanitarian exemption and a primary focus on conflict resolution rather than on CT. However, Kenya has been pushing for the addition of Al-Shabaab to the 1267 CT list, which would in turn jeopardize the application of the standing humanitarian exemption for humanitarian actors operating in areas under the control of the group. Furthermore, States are encouraged to list individuals and entities supporting ISIL or Al-Qaeda operating in Mali and Libya. In one instance, an individual was re-listed on the Somalia list after being de-listed from the IDAQ list. In addition, the groups of experts affiliated with these regimes and the CT regime conducted joint analyses upon recognizing that threats and financing

schemes apparent in the analysis of ISIL or Al-Qaeda may also be relevant to investigations on the financing of the arms trade, armed groups, or human trafficking.

Most importantly, the Security Council's increasing imposition of a CT framework in armed conflict settings has been shown to create challenges for humanitarian action. One of these challenges pertains to the fungibility approach, predominant in the CT context, which might overflow into the design and implementation of conflict regimes. In the other cases, the design of the regimes has remained out of step with the way the sanctions are being used. As a result, the humanitarian space is being limited in these contexts, in large part due to the transfer of CT goals into an armed conflict context, without the subsequent transfer of the humanitarian safeguards that now exist in the primary CT regime.

Lack of adequate IHL safeguards against the deleterious effects of sanctions themselves within conflict-related regimes

Considering the seeping of CT objectives into conflict-related regimes, there may be problems for humanitarian action despite an apparent alignment. Indeed, while IHL and humanitarian action are relevant to the design of sanctions regimes imposed in conflict contexts, they remain peripheral issues, and are not the core purpose of what the sanctions regimes are about. Thus, there is always a risk that the measures adopted to reach the objectives of conflict-related regimes run counter the rules of IHL and the humanitarian space. Most importantly, the conflict-related sanctions regimes only explicitly focus on the IHL obligations of the parties to the conflict to support humanitarian access and fail to mention the obligations of third-party member States to comply with IHL when implementing sanctions.

Indeed, the majority of conflict-related sanctions regimes fail to contain any language requesting member States to comply with IHL when implementing sanctions measures. To be clear, although conflict-related regimes do include language protecting humanitarian action from interference by the parties to the conflict, these same regimes generally do not contain language protecting humanitarian actors who engage and conduct activities with listed individuals and non-State armed groups, nor do they contain language protecting humanitarian action from interference by third States. This lapsus may lead States to prioritize their sanctions obligations over their IHL obligations when these appear to conflict with each other. By contrast, this language now exists in the IDAQ sanctions regime following the adoption of Security Council Resolution 2462.

This lack in the conflict-related regimes is problematic, as most of the negative effects of sanctions on humanitarian actors may be secondary or tertiary and can arise at the level of sanctions implementation by member States – at least from what has been witnessed in the CT sphere. Moreover, in contrast to the IDAQ regime, which now protects “humanitarian activities” since the adoption of Resolution 2462, language in the conflict-related regimes is limited to humanitarian activities of “assistance”, thus failing to include formally and

explicitly “protection” activities. It remains to be explained why this language is restricted to “assistance” activities, and an exploration of the potential implications on the ground is needed.³¹ However, risks for impartial humanitarian organizations are particularly important when sanctions are imposed against an armed group controlling territory rather than individual actors viewed as obstructing a peace process. Narrow and broad sanctions exist both in the CT and conflict spheres. Lack of proper language to protect humanitarian organizations engaging with armed groups holding territory, such as in the DRC and Somalia, might be problematic. Thus, the existing elements of protection described above may not be sufficient on their own to fully cover and protect humanitarian actors and their activities from the potential negative effects of UN sanctions.

The fact that sanctions regimes must comply with IHL is clearly expressed only in a few conflict-related sanctions regimes, namely the 1988 regime, Somalia, Libya, Yemen, and since very recently, the DRC. The language adopted in the DRC regime drastically departs from the other regimes and is worth noting, as the Security Council demands in Resolution 2582 that “States ensure that all measures taken by them to implement this resolution comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, as applicable”.³² Moreover, the Council has stressed that “the measures imposed by this resolution are not intended to have adverse humanitarian consequences for the civilian population of the DRC”.³³ This language demonstrates some awareness of the challenges evident in applying sanctions in armed conflict contexts.

Looking ahead: An agenda for future research

In summary, there is a pressing need to understand the impact of UN sanctions in conflict contexts beyond the CT sphere, as only one of the current UN sanctions regimes focuses exclusively on CT. Only a few studies have focused on cases involving UN sanctions designed to address armed conflict cases rather than CT, and never in isolation from other regional or unilateral measures. The difficulties in engaging in such research may account for this lacuna—although most of them also apply to research on CT sanctions. This gap matters for two reasons. First, UN sanctions are the only type of sanctions universally endorsed through the delegated authority that UN member States have given to the Security Council under Article 25 of the UN Charter. Thus, even though they are neither the most frequently applied nor necessarily the most effective, they are the most widely accepted as legitimate amongst the range of sanctions measures deployed.

31 Note that former regimes, such as the one applicable in Yugoslavia, mentioned the need to allow access to camps, prisons and detention centres (for the International Committee of the Red Cross and other relevant international humanitarian organizations), which belongs to the realm of protection activities.

32 UNSC Res. 2582, 29 June 2021, op. para. 4.

33 *Ibid.*, Preamble.

In addition, they both benefit from an implied international consensus and are held to a higher level of global accountability than individual or regional State sanctions. To the extent that they set the tone and standards or pave the way for the application of additional regional and unilateral measures, it is even more imperative that UN sanctions in particular conform to certain basic standards when imposed in armed conflict contexts, vis-à-vis IHL.

Second, UN sanctions tend to be of a more limited nature than regional or unilateral measures. The parallel application of UN and other sanctions in a single case will have interactive effects, but to the extent that research can deduct the impact of UN sanctions alone, it is more valuable for engaging with UN sanctions designers. Effecting change requires convincing sanctions designers of the impacts of their measures. As a result, if the original UN measures are found to have deleterious effects in a given case, there is a strong basis for pushing for a change in their design and application.

Any future research agenda will need to take three elements into consideration when embarking on further study: (1) the need for more terminological and conceptual clarity, (2) the need to dive into substantive areas for new research, and (3) a realistic understanding of the challenges inherent to the research methodology.

Terminology

In the research conducted thus far, common language often remains elusive, leading at times to critical misunderstandings between the CT and sanctions field, on the one hand, and the sanctions and IHL field, on the other. Six terminological issues warrant particular attention:

1. First, future research endeavours should aim to distinguish between instances of “direct” or “primary” impact and “indirect” or “secondary” impact. While the effects on humanitarian action may be similar, the plan for mitigating impact varies considerably, as does the political coalition needed to push for change.
2. Second, within the sanctions literature there is common reference to the term “unintended consequences”. This term is used to refer to the type of effects described in this paper. Just as a closer look at the meaning and type of “impact” would help clarify the meaning of “consequences”, a more studied look at the intentions of designers and implementers would help shine more light on what has otherwise been a long ignored or perhaps overly simplified description of the phenomenon under study.
3. Third, there is a critical issue of terminology around the use and meaning of the terms “exemption” and “exception”.³⁴ The UN uses the terms as they are employed in this paper; by contrast, at the EU level, the meaning of the

34 Rebecca Brubaker, *Nine Points on Designing UN Sanctions to Better Protect Humanitarian Activities*, remarks given at the High-Level Retreat on IHL, UN Sanctions and Counterterrorism, Greentree Estate, New York, March 2020, available at: <https://i.unu.edu/media/cpr.unu.edu/post/3989/SanctionsBriefing-July2020.pdf>.

terms is reversed. In a similar vein, the *Interlaken Manual on Targeted Financial Sanctions* follows a similar approach to the EU.³⁵ As a result, there is a general confusion of terms both within the sanctions community and amongst humanitarian practitioners. This terminological confusion has led to a tendency for past work either to mistakenly concur on points of divergence or to seek consensus where no real differences exist. Thus, there is a pressing need for future research to look for conditions which would help to generate consensus and propose a standard definition for these terms so that new work both within and across the two fields can speak from a common foundation of understanding.³⁶

4. Fourth, there is general confusion and lack of terminological clarity on the meaning of “impact”. To begin with, there is a need to distinguish more systematically between three types of impact: (1) the impact on the affected population, (2) the impact on humanitarian activities, and (3) the impact on the impartial and humanitarian character of the humanitarian sector. Within category (2), the impact on humanitarian activities, there is also a need to parse the effects on humanitarian access, on the one hand, and on humanitarian activities of assistance and protection, on the other. Such a studied distinction in future work would help better ground arguments for further adjustments in existing international legal frameworks.
5. Fifth, and similarly, future research would do well to clarify the origins and importance of the terms “impartial” and “neutral” in descriptions of humanitarian organizations, when discussing appropriate derogations and safeguards. Most individuals in the sanctions community will not be familiar with the debates around these terms. As a result, they are less likely to appreciate the potential impact that their measures may have either in support of or in contravention to these fundamental concepts. Rather, sanctions experts and practitioners are more accustomed to considering humanitarian actors as one uniform category.
6. Finally, amongst the community of sanctions implementers, on the one hand, and government regulators, on the other, there is a persistent terminological and conceptual debate at the heart of discussions around compliance, as well as a lack of understanding regarding the operational realities faced by humanitarian organizations. This debate centres around the question of whether there is such a thing as zero risk, and if not, what an acceptable level of risk tolerance should look like. This debate is key to any future research on potential measures for mitigating the impact of sanctions due to overcompliance and de-risking. Further terminological clarity would assist in building consensus around currently divergent approaches to risk and conceptions of acceptable risk.

35 Thomas J. Biersteker, Sue E. Eckert, Peter Romaniuk, Aaron Halegua and Natalie Reid, *Targeted Financial Sanctions: A Manual for Design and Implementation*, Contributions from the Interlaken Process, Watson Institute at Brown University, 2001.

36 For example, the term “exemption” used at the UN sanctions level is inverted with the term “exceptions” in the EU forum. This confusion is reproduced in the academic sector as well.

Substantive areas for further research

Foremost on any future research agenda should be the primary and secondary impacts of the remaining thirteen sanctions regimes on humanitarian action, given how substantially these regimes differ from the single CT sanctions regime. However, such an analysis should look for both negative and positive impacts rather than presume one or the other. There is an under-researched element of sanctions regimes which sees them as one source of deterrence in efforts to uphold IHL and protect the humanitarian space. Accordingly, there is a need for a dual-pronged research agenda, with one prong that looks for a potential negative impact of sanctions measures on humanitarian action and one that looks for potential positive impacts. Both prongs will have to treat the issue of impact carefully, as described above, given previous findings that secondary impacts, which are less directly attributable to sanctions measures, can have more noticeable effects. As part of this dual research endeavour, researchers should identify and recommend measures that could mitigate negative impacts and amplify positive impacts identified at the sanctions design, interpretation, application and adjustment stages.

An additional area of investigation that is ripe for further research is the extent to which States can and must take IHL into account when implementing UN sanctions in armed conflict settings. Studying implementation remains an ongoing challenge, however, given the variety of approaches amongst the 193 members of the UN as well as the complexity of the intergovernmental process that is often involved in implementation. Short of a comprehensive analysis of State implementation, policy actors may still benefit if future research identifies best practices from select States, such as those which have managed to apply UN sanctions measures effectively while remaining in compliance with their IHL obligations.

Methodological challenges

Future research will have to take into consideration and look to surmount certain key methodological challenges. Some of these challenges are simply inherent to this field of study. Paramount amongst these is the debate around how to most accurately and efficiently measure impact. This challenge can largely be divided into two subsequent hurdles: sourcing and validating information, and establishing a causal chain.

On the first point, previous studies have relied on self-reporting by humanitarian actors, and this in turn has resulted in criticism from sanctions experts, sanctions architects and government stakeholders, who point both to the self-reporting bias and to the lack of concrete details supplied to back up

anecdotal evidence.³⁷ Many humanitarian actors have asserted that detailed reporting is impossible given the confidentiality inherent in their work. In some cases, humanitarian actors may simply lack information and knowledge regarding the often complex, and sometimes rather opaque, UN sanctions regimes. Moreover, humanitarian actors may be wary of providing information or analysis that could subject them to greater scrutiny or potentially even legal action. Previous research efforts have cited challenges in reporting due to practitioners' wariness of admitting to conduct that, while covered by IHL, may nevertheless be interpreted by some States as prohibited under an existing UN sanctions regime. This, therefore, precludes cross-sectional studies on a sufficiently large scale.³⁸ An entity trusted by both communities could consider engaging in such a project in the future, given adequate resources and access, while noting that it may be extremely difficult to effectively undertake such an initiative in light of prevailing circumstances.³⁹

The second challenge exists in attempting to establish a causal link between a policy intervention and an outcome. This is a challenge that has plagued many fields of applied research. It is particularly fraught in the realm of sanctions given the myriad factors influencing the outcomes in question – restricted access, diminished assistance and hampered protection activities, to name a few. One current study is looking precisely at the challenge of establishing a causal chain between the application of CT measures writ large and the impact on humanitarian action.⁴⁰ There is also an inherent difficulty in isolating UN sanctions measures from other regional and unilateral sanctions. In addition, the relatively limited scope of certain sanctions regimes and the limited number of designations in others may also make it difficult to obtain a general overview of impact.⁴¹ As a result of these various factors, there is a significant gap in understanding of the interplay between UN sanctions and humanitarian action in armed conflict contexts beyond the realm of the CT sphere.

One could consider an alternative approach that looks to use counterfactuals to gauge impact, as has been much explored in the area of conflict prevention.⁴² Looking for the impact of a non-event has the advantage of simplifying contextual factors and better isolating a policy contribution. In this setting, rather than looking at the most severe instances of impeded access or diminished assistance, one could instead look at cases where UN sanctions

37 This has been a criticism repeated several times at different workshops and conferences bringing together sanctions experts and government practitioners. There are also increased requests from governments for “hard data” evidencing the direct impacts of sanctions measures on humanitarian action.

38 Based on author interviews.

39 Consultations under Chatham House, 2019–20.

40 This study is being produced by the Harvard Law School Program on International Law and Armed Conflict's Counterterrorism and Humanitarian Engagement Project.

41 For example, most designations in the Iraq regime date from the period immediately following the post-2003 US-led invasion and focus on former Baathists who no longer play a significant role in the conflict. As another example, in Sudan, only four individuals have been listed since 2005.

42 See for example, Laurie Nathan, Adam Day, João Honwana and Rebecca Brubaker, *Capturing UN Preventive Diplomacy Success: How and Why Does It Work?*, UNU-CPR, May 2018.

coexist with humanitarian activities and seek to understand what enables them to coexist productively. Any such study will, of course, have to account for situational differences, such as the scope of the existing UN sanctions, the presence of additional non-UN sanctions, the degree of stigmatization of the actors involved, and the existence of additional measures such as UN peace operations or foreign military occupation. Lastly, the counterfactual approach could also be used to examine instances of best practice when it comes to the degree of compliance with IHL rules regulating humanitarian access and activities.

Conclusion

It is important to understand what is at stake in this third moment of crisis and scrutiny around the UN sanctions tool. It is an opportunity for change. Addressing instances of negative impact effectively can serve to ensure that the legitimate end of maintaining international peace and security through sanctions is not at the expense of meeting the needs of victims of armed conflicts as envisaged under IHL. In the mid- to long term, addressing frictions through careful adjustments to the sanctions tool can help maintain both the legitimacy and the effectiveness of UN sanctions. The current research demonstrates that the stakes are high – if actors feel they cannot both maintain access and protect humanitarian activities in compliance with IHL while implementing sanctions, it is likely that instances of non-compliance will only increase. Alternatively, humanitarian organizations unwilling to risk non-compliance may choose to increasingly disengage from conflict contexts under UN sanctions. By contrast, if future research can better identify the sources of friction and suggest actionable paths forward that both protect humanitarian action and enable compliance with UN sanctions, there exists some potential for the two sets of activities to work in tandem and to ensure that compliance with sanctions does not come at the expense of meeting the needs of victims of armed conflicts.

OPINION NOTE

Humanitarian values in a counterterrorism era

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Abstract

In this opinion note, we explore ways to understand the contemporary encounters between a growing global counterterrorism architecture and impartial humanitarian activities while critically assessing our own role in shaping responses to those encounters. Humbled by a decade of experience in this area, we aim to explain how counterterrorism concerns have been elevated over the humanitarian imperative and to offer potential avenues to secure greater respect for impartial humanitarian activities.

Keywords: counterterrorism, humanitarian activities, international humanitarian law.

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Introduction

Over the last decade, the humanitarian community has sought to mitigate restrictions imposed by counterterrorism measures on impartial humanitarian

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activities. For many humanitarians involved in this struggle, at least a partial victory came over a five-day period in 2019. On 28 March of that year, the Security Council adopted a resolution in which the Council urged States to take into account the potential effects of counterterrorism measures on impartial humanitarian activities.¹ Then on 1 April 2019, the Council convened a debate on international humanitarian law (IHL), focusing largely on safeguarding humanitarian action in counterterrorism contexts.² In the subsequent two years, humanitarians have seized on this resolution to seek limited humanitarian-sector “carve-outs” or broad general licences for humanitarian activities in counterterrorism contexts.

We can trace this complex story to the large – and, perhaps, growing – number of situations that double as armed conflicts under IHL and counterterrorism contexts.³ A proliferation of these “joint” contexts has been accompanied by an apparent prioritization – in practical and political terms, if not necessarily in legal terms – of counterterrorism concerns over respect for impartial humanitarian activities. In short, in situations that qualify simultaneously as armed conflicts and counterterrorism contexts, a widening global counterterrorism structure regulates, constrains and orients humanitarian aid and protection activities for civilian populations in need and fighters *hors de combat*.

In the last decade, humanitarian agencies, donors, scholars and policy researchers have invested significantly in efforts to address these constraints. Pro-humanitarian-imperative efforts have included drafting extensive legal analyses and field-based reports on the impact of counterterrorism measures on humanitarian action; convening workshops with counterterrorism actors, financial-sector officials, donors and humanitarian bodies; and (re)drafting exceptions, exemptions and other provisions meant to “carve out” humanitarian commitments in counterterrorism systems. As a result of these types of efforts, more actors across governments, international organizations and humanitarian bodies are aware of the impact of counterterrorism measures. For our part, we have been – and continue to be – involved in helping shape these debates, and we continue to find this work important.

However, all is not well. True, some awareness has been raised and a handful of humanitarian “carve-outs” have been adopted. Yet these are, in our

1 UN Security Council Resolution 2462 (2019), para. 24.

2 See UN Security Council, Meeting on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: International Humanitarian Law, 8499th Meeting, 1 April 2019, UN Doc. S/PV.8499.

3 The overlap typically occurs when an international or a non-international armed conflict involves an individual or an entity characterized as a “terrorist” under a relevant framework. Those frameworks may be rooted in one or more international or internal measures aimed at countering terrorism. Examples of such frameworks include the UN Security Council’s terrorism-suppression sanctions against the Islamic State in Iraq and the Levant (ISIL), Al-Qaida and associated individuals, groups, undertakings and entities, as well as a diverse array of domestic anti-terrorism measures adopted by specific States. See UN Security Council Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) *et seq.* Since 2001, these types of “joint” scenarios, marked by overlapping armed-conflict situations and counterterrorism contexts, have occurred in at least a dozen States and have involved the military, political or financial participation of dozens of additional States.

view, relatively small victories, and they may risk creating a false perception of having comprehensively overcome the core challenge. We are more concerned than ever that the humanitarian imperative may be undergoing a slow erosion by appeasing a growing counterterrorism architecture that in practice rejects some of the core normative commitments underlying impartial humanitarian activities. With more such “victories”, the humanitarian community ultimately risks defeat.

In this opinion note, we explore ways to understand the contemporary encounters between the counterterrorism architecture and impartial humanitarian activities while critically assessing our role in shaping responses to those encounters. Humbled by a decade of experience in this area, we aim to explain how counterterrorism concerns have been elevated over the humanitarian imperative and to offer potential avenues to secure greater respect for impartial humanitarian activities. The more that we have engaged in recent years with counterterrorism bodies, humanitarian donors and operational agencies, the more we have come to believe that what lies beneath these trajectories is a failure—including by us—to acknowledge with clear eyes what is a fundamental clash of values. In our view, by failing to build strategies accordingly, we and others have misapprehended the core challenge and developed approaches that have proven ill suited to safeguarding the humanitarian imperative from the expanding counterterrorism architecture.

In the next section, we sketch the counterterrorism system. Following that, we frame what we see as a foundational values clash. Then the next section identifies four of the humanitarian community’s responses. In the penultimate section, we suggest possible pathways that States, humanitarian bodies and other actors concerned with safeguarding impartial humanitarianism may take. In the final section, we conclude by underscoring the stakes in the struggle for values primacy in this area.

For this opinion note, by “impartial humanitarian activities”, we mean the actions or steps taken by an entity or one or more natural persons to provide, in respect of a situation of armed conflict, relief or protection to civilians in need or fighters *hors de combat*, or some combination of such categories of people.⁴ Those entities may include, among others, a State or non-State party to an armed conflict or an impartial humanitarian body, such as the International Committee of the Red Cross (ICRC).⁵ By the “humanitarian imperative”, we mean a preemptory requirement to undertake—on an urgent basis—impartial humanitarian activities where needs are unaddressed. Finally, by “impartial humanitarianism”, we mean concern for the urgent fulfillment of human needs in an armed conflict as a pre-eminent moral good and the accompanying disposition to act based on that concern rather than for other reasons.⁶

4 We focus on situations of armed conflict that double as counterterrorism contexts. While not our focus here, it is important to also bear in mind that impartial humanitarian activities may be taken in relation to disasters and situations of violence other than armed conflicts as well.

5 See, e.g., ICRC, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, 2nd edition, 2020, paras 825–65, available at: <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary> (all internet references were accessed in September 2021).

The growing counterterrorism structure

A global counterterrorism architecture enjoys nearly unanimous support among States. The structure consists of an assemblage of laws, policies, institutions, concepts and practices that States and other international actors have designed and implemented over several decades—at the global, regional and national levels—to prevent, suppress and punish terrorism.⁷ The United Nations (UN) Security Council plays a central role in setting the system’s operational scope and normative orientation,⁸ with all UN Members required to accept and carry out the Council’s decisions under the UN Charter.⁹ Notably, the architecture lacks a shared general international legal definition of “terrorism”.¹⁰ State support for the structure persists publicly even if, behind closed doors, officials express significant reservations concerning an array of political, legal and other adverse impacts that the system has on a vast range of matters. Those reservations relate to both the substantive aspects of those impacts and the relatively closed decision-making process of the Security Council, leaving little room for other international actors to shape the Council’s “legislative” activity in this area.

Indeed, the already-large global counterterrorism structure keeps growing, including in relation to numerous situations of armed conflict. As terrorist threats—both actual and perceived—continue to rise around the world, the counterterrorism architecture is occupying political space, expanding its material footprint, and taking on more and more “advisory” or “technical” roles. This trajectory may be detected through a widening of the counterterrorism system’s bureaucratic reach; increases in the structure’s personnel as well as in its financial and institutional resources; and the architecture’s expansion into diverse fields, such as organized crime, biometrics and battlefield evidence. An increasingly wide variety of counterterrorism measures—be they of a legal, regulatory, administrative or other nature—are accordingly proliferating.

A clash of values

As we understand it, the humanitarian imperative is based on normative commitments to provide—in all armed conflicts—impartial aid and protection to

6 In using this term, we mean a set of moral commitments and dispositions that are not necessarily coterminous in all respects with the definition of impartiality as an element of humanitarian activities in line with IHL and humanitarian-policy frameworks.

7 Fionnuala Ní Aoláin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders, UN Doc. A/HRC/40/52, 1 March 2019.

8 See UN Security Council Resolution 1267 (1999) *et seq.* and Resolution 1373 (2001) *et seq.*

9 UN Charter (1945), Art. 25.

10 Accordingly, in this opinion note, our use of the term “terrorist” is not meant to weigh in on the validity of any specific international or domestic legal definition pertaining to such a characterization of a person, entity or form of conduct, nor do we mean to characterize the actual legal status of any particular individual or entity.

all civilians in need and fighters *hors de combat* irrespective of affiliation. Impartiality – in the sense of being driven by the needs of the persons affected by the conflict rather than their affiliation¹¹ – serves as one of the humanitarian imperative’s primary ideological justifications. In this sense, the humanitarian imperative embodies deeper and more principled ideas and moral tenets than its textual IHL formulations can express.

The global counterterrorism architecture is not built on the same core normative commitments. The counterterrorism system requires taking sides – actively – against those who commit terrorism and their supporters. States cannot agree on a singular and unifying international legal definition of terrorism. Nevertheless, the global counterterrorism system rests on the animating and organizing notion that there is undeviating agreement on the moral abhorrence of terrorism and, as a corollary, on the illegitimacy of acts of terrorism and the provision of support to terrorism.

When seen through a counterterrorism lens, impartial humanitarian activities are often conceptualized as supporting terrorism. There is the “fungibility theory”, according to which otherwise “innocuous” assistance to a terrorist group “frees up” the group’s resources for terrorist conduct. There is the “false-front theory”, according to which organizations or individuals operating under a false humanitarian guise funnel support to terrorist groups. Also there is the “naïve humanitarians theory”, according to which terrorist groups dupe well-intentioned but naïve humanitarian actors into serving as terrorism-support conduits.

In its current form, the counterterrorism architecture functionally rejects – based on one or more of those rationales – two of the linked premises underlying impartial humanitarian activities.¹² First, to a greater or lesser extent depending on the context, the counterterrorism system recasts many – and, potentially, all – impartial humanitarian services as forms of illegitimate support to terrorist groups. Second, the structure also repudiates the corollary notion that impartial humanitarian actors may offer and provide their services in relation to a terrorist group’s members – irrespective of whether the members are *hors de combat* – and

11 See, e.g., ICRC, *Commentary*, above note 5, paras 833–5.

12 See, e.g., Lindsay Hamsik and Lissette Almanza, *Detrimental Effects: How Counter-terror Measures Impede Humanitarian Action – A Review of Available Evidence*, InterAction, April 2021, available at: <https://www.interaction.org/wp-content/uploads/2021/04/Detrimental-Impacts-CT-Measures-Humanitarian-Action-InterAction-April-2021.pdf>; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, October 2019, pp. 59–61; available at: <https://shop.icrc.org/download/ebook?sku=4427/002-ebook>; Norwegian Refugee Council, *Principles Under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, 2018, available at: https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/nrc-principles_under_pressure-report-2018-screen.pdf; Jessica S. Burniske and Naz K. Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict (PILAC), March 2017, available at: <https://pilac.law.harvard.edu/pilot-empirical-survey-study-and-comment>; Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, UN Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, July 2013, available at: <https://www.nrc.no/globalassets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf>.

to civilian populations in need under the group's *de facto* control and authority. In short, under these counterterrorism systems, "support to terrorism" is defined in part as seeking access to provide—and providing—life-saving assistance and protection to civilians in need and fighters *hors de combat*, that is, as impartial humanitarian activities.

To be sure, our diagnosis of a clash of fundamental values is not universally held. A countervailing position, which articulates a vision of shared core values and corresponding objectives between the humanitarian imperative and the counterterrorism system, may be detected, including in viewpoints set out by several humanitarian agencies. Those organizations and actors typically frame the encounter between the regimes by underscoring that acts of terrorism devalue human life and contravene human dignity. They also argue that both impartial humanitarianism (including its embodiment in IHL) and the counterterrorism system seek fundamentally to preserve human life and uphold human dignity. But those articulations fail to grapple with the fact that, in practice, the counterterrorism system seeks primarily to suppress terrorism and support to terrorism. And, in doing so, the counterterrorism structure often embraces definitions of "terrorism" and "support to terrorism" that—despite purported shared core normative commitments—sweep in impartial humanitarian activities.

In these ways, an irreconcilable incompatibility between the current counterterrorism architecture and the humanitarian imperative appears to have arisen. The latter compels activities that the former either begrudgingly tolerates or outright proscribes. While securing respect for, protection of and fulfillment of human rights are increasingly seen as necessary elements to create the conditions conducive to suppressing terrorism, the provision of impartial humanitarian activities in counterterrorism contexts often remains intolerable under currently enacted security rationales.

How the humanitarian community has responded

The humanitarian community has mainly relied on four responses to the counterterrorism structure's growing influence on the humanitarian imperative. None of these responses takes as its starting point, at least not directly, that the counterterrorism architecture and the humanitarian imperative are premised on irreconcilable values. Instead, all of these responses assume, implicitly or expressly, either that the clash does not exist or that, if it does, it can be worked around through technocratic means.

One response is to call for dialogue with counterterrorism actors. An assumption here is that if counterterrorism actors were made aware of impartial humanitarianism, then those actors would be open to changing their approach to accommodate humanitarian concerns. The initial call is typically followed, sometimes over and over, by more appeals for more dialogue. In our experience, relatively few durable concrete pro-humanitarian-imperative changes have resulted from this dialogue; quite the contrary. Further, in practice, rather

than changing how counterterrorism systems operate, these engagements often result in humanitarian actors accepting counterterrorism's conceptual frameworks and forcing humanitarian activities to fit into notions of "exceptions" or "exemptions". In this sense, humanitarian actors are left to conduct a rearguard preservative action. A relative "win" by the humanitarian community, such as the adoption of a limited sectoral "carve-out" in a particular counterterrorism instrument, usually already reflects a compromise on impartial humanitarian values.¹³

A second approach is to seek to prove the adverse impact of counterterrorism measures on impartial humanitarian activities. In our experience, in the eyes of numerous actors focused on suppressing terrorism, a lack of such evidence is too often interpreted as evidence of the absence of any adverse impact whatsoever. Yet for humanitarian actors, formulating, documenting, validating and revealing the necessary proof entails numerous risks, data-collection difficulties and interpretive challenges. Perhaps the most significant risk is that, in doing so, at least in certain contexts, humanitarian actors may be accumulating evidence of their own breach of counterterrorism measures.

A third approach relates to humanitarians' attempts to appease counterterrorism regulators by proving that they are "serious" about compliance with counterterrorism measures. Those efforts include things like emphasizing that "diversion" runs counter to humanitarian principles and reallocating humanitarian resources to create internal counterterrorism policies. Meanwhile, several of the "red lines" defined by humanitarian actors earlier in the encounter with the counterterrorism system have been repeatedly crossed. These have included vetting of beneficiaries against blacklists and agreeing to submit certain categories of prospective beneficiaries to preapproval from authorities.

A fourth response—and one that merits heightened attention, from our perspective, due to its relative strategic import—is to ground the humanitarian imperative in the language and concepts of IHL. In practice, for example, the current approach to seeking "carve-outs" is largely an offshoot of IHL-related arguments. A primary impetus in invoking IHL is to link the humanitarian imperative to legal obligations relating to the provision of impartial humanitarian services for civilians in need and fighters *hors de combat*, the protection of which in contemporary armed conflicts is deeply rooted in IHL.

Yet we have come to see that framing humanitarian-imperative claims primarily in IHL invites States to assess those IHL provisions—and, thereby, the legitimacy of IHL-linked impartial humanitarian activities—relative to other international legal obligations. The pull of counterterrorism obligations flowing from Security Council decisions, in particular, has disturbed the course of IHL protections for impartial humanitarian activities. Amid the characterizations of

13 See, e.g., Dustin A. Lewis and Naz K. Modirzadeh, *Taking into Account the Potential Effects of Counterterrorism Measures on Humanitarian and Medical Activities: Elements of an Analytical Framework for States Grounded in Respect for International Law*, Harvard Law School PILAC, May 2021, pp. 16–17, available at: <https://pilac.law.harvard.edu/take-into-account-report-web-version>.

“joint” armed-conflict-and-counterterrorism contexts, international actors have increasingly staked out legal and political positions that elevate terrorism-suppression concerns over respect for the part of IHL that protects the humanitarian imperative.

By itself, IHL is not well suited to address the totality of these concerns. For example, IHL does not speak with great specificity to States when they act as humanitarian donors. Indeed, even perfect compliance with IHL will not overturn the panoply of counterterrorism-based constraints on impartial humanitarian activities. In this context, references to IHL in counterterrorism instruments may seem salutary on the surface in that those invocations remind States of IHL obligations amid a welter of counterterrorism measures. Yet, paradoxically, if current trajectories continue, those IHL references may ultimately serve in practice to empower technocratic security bureaucracies to see and assess IHL through a counterterrorism lens.¹⁴ The formal status of Security Council-decided counterterrorism obligations plus the overwhelming “hard” security narrative combine to create a danger that IHL will be interpreted in ways that will subvert its core humanitarian purposes. Seen from this perspective, the problems in this area do not arise from a doctrinal conflict that is resolvable through sophisticated lawyering.

In sum, for those seeking to safeguard the humanitarian imperative, a retreat into legalism invites both a category error and a strategic error. Instead, a finely calibrated balance is warranted: one that underscores the vital importance of compliance with IHL but does not see IHL as a cure-all.

How to secure greater respect for impartial humanitarian activities

Two decades after the Security Council’s first foray into global counterterrorism “legislation”, a bolder and arguably riskier approach is warranted. In our view, as we asserted above, a clash of values – not merely doctrinal discord – is driving the practical predominance of the counterterrorism structure over impartial humanitarianism. We sense that this values clash is increasingly pronounced. Further, we see existing responses aimed at safeguarding impartial humanitarian activities as inadequate. Supposing we are correct, arguably a precondition for securing greater respect for impartial humanitarian activities is to champion

14 A legal and policy debate has emerged concerning the possibility of endowing a non-judicial, technocratic security entity (such as the Counter-Terrorism Committee Executive Directorate, which is a special political mission of the UN Security Council) with the power to interpret and assess IHL compliance – including as relates to protections for impartial humanitarian services – through an institutional counterterrorism lens. See, e.g., Dustin A. Lewis, Naz K. Modirzadeh and Jessica S. Burniske, *The Counter-Terrorism Committee Executive Directorate and International Humanitarian Law: Preliminary Considerations for States*, Legal Briefing, Harvard Law School PILAC, March 2020; Dustin Lewis and Naz Modirzadeh, “Counterterrorism and Humanitarian Action: Will 2020 Be a Turning Point for International Humanitarian Law at the United Nations?”, *Lawfare*, 31 March 2020, available at: <https://www.lawfareblog.com/counterterrorism-and-humanitarian-action-will-2020-be-turning-point-international-humanitarian-law>.

humanitarian values on their own terms. A handful of potential pathways – which may overlap in various respects – may be put forward.

For example, one way to champion humanitarian values on their own terms is to reject counterterrorism-rooted calls to suppress needs-based aid and protection in armed conflicts involving terrorists. Impartiality serves as one of the humanitarian imperative's primary ideological justifications. That justification, in turn, may help undergird political practices, enlist popular support, and provide a cornerstone of a newly configured normative and operational strategy. Advocating for impartiality may also help bring greater humanitarian consciousness to governments and civil society. Further, it may provide more opportunities to exert moral and intellectual leadership and forge political alliances. This avenue's relative success or failure may turn partly on making and fulfilling commitments to engage, now and in the years to come, in normative contestation and political education to (re)build cultures that privilege and prioritize respect for the humanitarian imperative.

A second possible course is to embrace, ground and reconfigure "security"-centred concepts and frameworks in terms of strict respect for impartial humanitarian activities. Doing so might involve formulating arguments that expressly articulate and foreground the requirements and interests of civilian populations in need and fighters *hors de combat*. A core idea underlying this avenue is that a special and enduring strength of the humanitarian imperative is that it contributes to a human dignity-centred notion of security by embodying values, attitudes and practices that aid and protect people in need amid the disorder and deprivations of armed conflict. Attempts to develop conceptual frameworks capable of dislodging today's predominant "hard" counterterrorism-related security systems may draw upon decades' worth of research and policy engagement in the field of human security (among others).

A third potential avenue is to confront and contest constraints on impartial humanitarian activities arising from counterterrorism rationales. A starting point here may be that contemporary interpretations of "terrorism" are inseparable from debates as to its existence. Advocating for the humanitarian imperative may entail forming and expressing positions, including in respect of concrete cases, that proscribed conduct does not meet a legitimate definition of "terrorism". It may also involve, more fundamentally, arguing that certain definitions of "terrorist" conduct are illegitimate because they sweep in justifiable—even morally required—activities, including the provision of impartial humanitarian services.

We anticipate a response from some pro-humanitarian-imperative actors that the most to hope for in the current geopolitical environment is a kind of negotiated compromise, perhaps one that could hold until more favourable conditions exist to address some of the fundamental framings of the counterterrorism system. Even if we are right in diagnosing the problem, they might argue, far less is to be gained and far too much is at risk of being lost by pursuing our suggested approach.

We are not suggesting a wholesale withdrawal of the existing responses. We call instead for a clear-eyed acknowledgement of irreconcilable values and reflection on how to address that tension to safeguard impartial humanitarianism in relation to the counterterrorism structure. We do not assert that recognizing the values clash will alone suffice to prevent another decade marked by an increasing elevation of counterterrorism concerns over impartial humanitarianism. However, a failure to take account of—and think creatively and clearly about—the conflict we describe here seems like a recipe for further constraints on impartial humanitarian activities. Further, the call for a renewed approach to this issue and recognition of how much the counterterrorism framing has come to dominate impartial humanitarianism must be made primarily to and through States. That is because the necessary change cannot come solely or even mainly from humanitarian organizations or counterterrorism bodies; these matters require State action.

Conclusion

We are not so naïve as to think that the world has ever witnessed pristine observance of the normative commitments animating impartial humanitarian activities. At least for as long as it has been enacted in IHL, the humanitarian imperative has been contested—and unfortunately, in numerous instances, forcibly rejected—on theoretical, practical and tactical bases. Nevertheless, we think that the core values underlying impartial humanitarianism ought to have a greater role today in shaping how we all see each other and what we all owe to each other in armed conflicts, including conflicts that double as counterterrorism contexts.

The counterterrorism system's relative authority is increasingly grounded in political, economic and legal institutions. States regularly devise strategies, enact laws and allocate funding to counter terrorism. Despite the proliferation of “joint” armed-conflict-and-counterterrorism contexts, it is exceptional for these measures to take account of, let alone safeguard, the humanitarian imperative—quite the opposite. Further, while several States that have invested substantially in building the global counterterrorism architecture also provide the bulk of financial support for impartial humanitarian activities, that latter support is typically conditioned on strict compliance with prohibitive counterterrorism policies. New laws, policies and institutions aimed, first and foremost, at securing respect for the humanitarian imperative are relatively rare. The core values of impartial humanitarianism may be at risk of dropping out of mainstream support and political legitimacy and becoming associated with a “radical” ideology. Whether impartial humanitarianism is ultimately elevated, suppressed or reconfigured (or some combination thereof) will profoundly shape how populations experience armed conflicts in the years to come.

If the current trajectory continues, two possibilities seem likely to come to pass. One is that counterterrorism measures may further constrain the practical scope of impartial humanitarian activities. A second is that an ever-expanding

counterterrorism system will ultimately redefine what constitutes legitimate humanitarian activities. Of course, we cannot foresee what might result. But we can begin to glimpse what it might look like by referring to existing requirements in certain contexts, such as obtaining preapprovals from governmental authorities to disperse life-saving assistance to particular civilian populations and using retinal scans on relief recipients.

Currently, the humanitarian community seeks to devise technocratic workarounds to safeguard as many of their services as possible in counterterrorism contexts. From our perspective, these efforts – even if successful – paper over bigger fault lines. Respect for impartial humanitarian activities is increasingly being framed in terms of whether those services comport with the counterterrorism architecture. In the process, some pillars of impartial humanitarian activities are at risk of political, legal and cultural erosion. It is time to articulate and enact a broader vision that elevates the values and ethical commitments that animate and compel the humanitarian imperative.

Counterterrorism, sanctions and financial access challenges: Course corrections to safeguard humanitarian action

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Abstract

This article provides an overview of the impact of United Nations (UN) sanctions and counterterrorism (CT) measures on humanitarian action. The mandatory requirements of UN Security Council Resolutions 1267 and 1373 on member States to prohibit the provision of “funds, financial assets or economic resources” to terrorists complicates the work of humanitarian actors delivering assistance in areas where groups designated under the 1267 regime control territory. After explaining the impact of sanctions and CT measures on humanitarian actors, the article explores three primary sets of challenges encountered by such actors: (1) lack of clarity and adequate legal protection for carrying out humanitarian activities in

countries subject to sanctions or areas in which designated entities operate; (2) financial access difficulties or de-risking by financial institutions limiting the ability of non-profit organizations (NPOs) to transfer funds to higher-risk jurisdictions due to banks' risk aversion or fear of regulatory scrutiny of such transactions; and (3) conditions placed in funding contracts by donors effectively offloading CT and sanctions risks onto beneficiaries. The article analyzes experience with UN humanitarian carve-outs (exceptions as employed in the Somalia sanctions regime and case-by-case exemptions utilized in the North Korea regime), explaining why exceptions are the optimal solution for humanitarian actors. New data are presented indicating that the scope and scale of financial access difficulties experienced by NPOs have grown. Financial institutions, concerned about regulatory requirements to counter terrorism financing, are increasingly reluctant to provide banking services to NPOs working in highly sanctioned jurisdictions, and the resulting de-risking by banks results in significant problems for humanitarian organizations needing to move funds abroad. Additionally, contractual conditions related to CT and sanctions compliance are routinely employed by donors, resulting in an offloading of risk onto recipients without appropriate clarity and guidance from donors. Numerous initiatives in recent years have called attention to the challenges that humanitarians face: stakeholder dialogues, high-level meetings and other discussion fora promote broader understanding among participants and acknowledgement of the impacts that these policies have on humanitarian action. UN action to renew the 1267 regime's mandate and the consideration of a humanitarian carve-out in Afghanistan in the aftermath of the Taliban's takeover represent opportunities to reform sanctions in order to better protect humanitarian action. Recommendations are presented for each of the three sets of challenges, with an urgent call for the Security Council to embrace the opportunity for reform and more effectively balance the equally critical objectives of countering terrorism and safeguarding humanitarian action.

Keywords: counterterrorism, sanctions, terrorist financing humanitarian action, UN Security Council.

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2021 marked the 20th anniversary of the 9/11 attacks, the seminal event spurring the creation of a global counterterrorism (CT) regime. Through the adoption of UN Security Council (UNSC) Resolution 1373,¹ the strengthening of UNSC Resolution 1267² sanctions on Al-Qaeda and the Taliban, and other measures such as the UN General Assembly's 2006 Global Counter-Terrorism Strategy, an expansive international CT architecture has been established, with unprecedented obligations on UN member States to enact legislation and implement measures to combat terrorism. As responding to the attacks and preventing future terrorist threats was the primary objective in 2001, little forethought was given to the potential unintended consequences of these extraordinary CT measures. Two

1 UNSC Res. 1373, 28 September 2001.

2 UNSC Res. 1267, 15 October 1999.

decades later, however, the effects of far-reaching CT measures on human rights and humanitarian action have been illuminated through multitudes of reports by civil society organizations and the UN's Special Rapporteurs.³

As other articles in this issue of the *Review* discuss, concerns over the impact of sanctions and CT measures on humanitarian action have escalated significantly in recent years. Groups providing humanitarian assistance in countries subject to sanctions or where designated entities operate (e.g., Syria, Iraq, Yemen, Somalia, Nigeria, Pakistan, Afghanistan) have detailed how broad CT measures restrict their ability to deliver impartial humanitarian assistance. In fact, an unprecedented number of reports⁴ are available describing the difficulties that humanitarian and other non-profit organizations (NPOs)⁵ experience while operating in regions of armed conflict, subject to sanctions, or where groups designated as “terrorists” operate.

While the reasons vary, most humanitarian actors attribute many problems to the impact of CT/sanctions measures on their ability to deliver impartial humanitarian assistance. Inadvertently providing support to designated entities

3 See reports by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, available at: www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx (all internet references were accessed in December 2021).

4 Reports in 2021 include Emanuela-Chiara Gillard, *IHL and the Humanitarian Impact of Counterterrorism Measures and Sanctions: Unintended Ill Effects of Well-Intended Measures*, Chatham House, September 2021, available at: [www.chathamhouse.org/sites/default/files/2021-09-03-ihl-impact-counterterrorism-measures-gillard.pdf](http://www.chathamhouse.org/sites/default/files/2021-09/2021-09-03-ihl-impact-counterterrorism-measures-gillard.pdf); Megan Corrado, Kay Guinane, Gabe Murphy and Liz Hume, *Preventing Peace: How “Material Support” Laws Undermine Peacebuilding*, Alliance for Peacebuilding and Charity & Security Network, July 2021, available at: www.allianceforpeacebuilding.org/afp-publications/preventing-peace-july2021; NYU Paris and EU Public Interest Clinic, *Bank De-Risking of Non-Profit Clients: A Business and Human Rights Perspective*, June 2021, available at: www.hscollective.org/assets/Uploads/NYU-HSC-Report_FINAL.pdf; InterAction, *Detrimental Impacts: How Counter-Terrorism Measures Impede Humanitarian Action*, April 2021, available at: www.interaction.org/wp-content/uploads/2021/04/Detrimental-Impacts-CT-Measures-Humanitarian-Action-Inter-Action-April-2021.pdf; Damascus-Based INGOs, *Understanding the Operational Impacts of Sanctions on Syria*, April 2021; Shukri Muhomed, Jerome Puri, Helen Stickler and Divya Sugand, *NGOs’ Due Diligence and Risk Management: A Holistic Approach*, LSE and Charity & Security Network, March 2021, available at: <https://charityandsecurity.org/wp-content/uploads/2021/04/NGOs-Due-Diligence-and-Risk-Mitigation.pdf>; Gillian McCarthy, *Adding to the Evidence: The Impacts of Sanctions and Restrictive Measures on Humanitarian Action*, VOICE Survey Report, March 2021, available at: <https://tinyurl.com/3yjsd46b>; Jonathan Altman, Brenda Cachay, Zach Miller, Clare Morneau, Nico Moscoso and Steven Orientale, *A Data-Based Approach for Understanding the Impact of AML/CFT/Sanctions on the Delivery of Aid: The Perspective of Nonprofit Organizations*, Yale University Capstone Study, January 2021 (Yale Study), available at: <https://jackson.yale.edu/the-impacts-of-sanctions-on-humanitarian-assistance-bringing-data-into-the-conversation/>. More than four dozen reports/resources related to CT, sanctions/anti-money laundering (AML)/countering the financing of terrorism (CFT) measures and humanitarian action exist from 2019–21 alone. A list of these references is available from the author.

5 The term “non-profit organization” used throughout this article is defined consistent with the Financial Action Task Force (FATF): “A legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of “good works.” FATF and Organisation for Economic Co-operation and Development (OECD), *Best Practices: Combating the Abuse of Non-Profit Organisations (Recommendation 8)*, Paris, June 2015, available at: www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf. Humanitarian organizations are a subset of the broader grouping of NPOs, but for the purposes of this article’s narrative, the terms are generally used interchangeably. It is important to note that international humanitarian law (IHL) applies only to impartial humanitarian actors.

could result in criminal penalties and the inability to access financial mechanisms to transfer funds to affected jurisdictions. For example, substantial delays and denials of wire transfers, account closures, and the inability to open bank accounts pose obstacles in getting assistance to populations in need. Fearful of running afoul of regulatory and due diligence requirements related to terrorism financing and sanctions, many financial institutions (FIs) have been reluctant to provide banking services to humanitarian groups operating in high-risk regions, a phenomena referred to as “de-risking”.⁶ In providing essential services for NPOs working internationally, banks are subject to extensive regulatory compliance requirements and must exercise enhanced due diligence on their charitable customers and international transactions to ensure that they do not facilitate terrorist activity.

Concomitant with rising concerns over the harmful effects of sanctions and CT policies on the delivery of humanitarian aid, the need for life-saving assistance has reached unprecedented levels. In December 2021, the UN Office for Coordination of Humanitarian Affairs (OCHA) estimated that 274 million people will need humanitarian assistance and protection in 2022. This number is a significant increase from 235 million people a year ago, which was already the highest figure in decades.⁷ In Afghanistan, nearly 23 million people (or 55% of the Afghan population) are estimated to be in crisis or food insecure, while 20 million people in Ethiopia are targeted for humanitarian assistance, including 7 million who are directly affected by the conflict in the north of the country.⁸ The COVID-19 pandemic has exacerbated the already perilous situation of vulnerable populations. Most of the countries identified as being in need of assistance and protection are in areas of armed conflict, to which international humanitarian law (IHL) applies.

During a UNSC General Debate in July 2021,⁹ Deputy Secretary-General Amina Mohammed warned of the “hurricane of humanitarian crises” taking place around the world. With the sheer scale of humanitarian needs being greater than ever before, she urged that CT measures should include clear provisions to preserve humanitarian space, minimize the impact on humanitarian operations, and ensure that humanitarian and health-care personnel are not punished for doing their jobs.¹⁰

This article provides an overview of the interplay between UN CT measures and sanctions and humanitarian action.¹¹ The mandatory requirements of UNSC

6 While there are varying definitions of de-risking, this article uses the FATF’s definition: “[D]e-risking refers to the phenomenon of financial institutions terminating or restricting business relationships with clients or categories of clients to avoid, rather than manage, risk in line with the FATF’s risk-based approach.” FATF and OECD, “FATF Clarifies Risk-Based Approach: Case-by-Case, not Wholesale De-Risking”, Paris, 23 October 2014, available at: www.fatf-gafi.org/documents/documents/rba-and-de-risking.html.

7 OCHA, “Global Humanitarian Overview 2022”, Geneva, 2021, available at: <https://gho.unocha.org/>.

8 OCHA, “Daily Noon Briefing Highlights: Afghanistan – Ethiopia”, 5 November 2021, available at: www.unocha.org/story/daily-noon-briefing-highlights-afghanistan-ethiopia-7.

9 UNSC, 8822nd Meeting (SC/14582), 16 July 2021, coverage available at: www.un.org/press/en/2021/sc14582.doc.htm.

10 UNSC, “Protection of Civilians in Armed Conflict: Preserving Humanitarian Space”, Amina Mohammed intervention, New York, 16 July 2021, available at: www.unmultimedia.org/avlibrary/asset/2642/2642275/.

11 As with all UN requirements flowing from a UNSC resolution adopted based on Chapter VII of the UN Charter, sanctions and CT measures are implemented through national laws and regulations to which

Resolutions 1267 and 1373 on member States to prohibit the provision of “funds, financial assets or economic resources”¹² to terrorists creates challenges for humanitarian actors working in areas where groups designated under the 1267 regime operate. Noting the impact of sanctions and CT measures on humanitarian action, especially the chilling effects, the article explores three challenges encountered by humanitarian actors: lack of legal protection, financial access problems, and donor conditions. Humanitarian carve-outs – exceptions as employed in the Somalia sanctions regime and case-by-case exemptions utilized in the Democratic People’s Republic of Korea (DPRK) regime – are analyzed, with exceptions being the optimal solution for humanitarian actors. Financial institutions, concerned for regulatory requirements to counter terrorism financing, are reluctant to provide banking services to NPOs working in highly sanctioned jurisdictions and often choose to de-risk, causing significant problems for humanitarian organizations needing to move funds to areas of conflict. The article presents new data, including from a Yale report,¹³ indicating that the scope and scale of financial access difficulties experienced by NPOs have grown. Conditions related to CT compliance by donors have also proven problematic for NPOs, resulting in an offloading of risk onto recipients without appropriate clarity and guidance by donors. Initiatives attempting to address the challenges that humanitarians face have expanded in recent years: stakeholder dialogues, high-level meetings and other discussion fora have promoted broader understanding and acknowledgement of the challenges posed by CT measures on humanitarian action, but concrete measures tackling these problems are still lacking. Of significance, however, is the opportunity to address humanitarian concerns through reform of the 1267 regime, as its mandate must be renewed before the end of 2021. Recommendations are presented for each of the three sets of challenges, with an urgent call for the UNSC to embrace the opportunity for reform of the current system and to establish a balance between the critical objectives of countering terrorism and safeguarding humanitarian action.

Overview of UN sanctions, counterterrorism measures and impacts on humanitarian action

Concerns about the impact of sanctions on humanitarian action are not new: the UN has long recognized the potential of sanctions to affect the delivery of humanitarian assistance and the need to protect humanitarian activities.

humanitarian groups are subject. The focus of this article, therefore, is on the UN Chapter VII mandates as the source of national measures which understandably vary by State. While some references are made to US, UK or EU sanctions because private sector actors and States pay close attention to these major actors, the article focuses on UN measures for the most part.

12 Al-Qaida Sanctions Committee, “Assets Freeze: Explanation of Terms”, 24 February 2015, available at: www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_assets_freeze_-_english.pdf

13 Yale Study, above note 4.

Sanctions adopted by the UNSC in 1968 (under UNSC Resolution 253) on Southern Rhodesia contained language exempting “supplies intended strictly for medical purposes, educational equipment and material for use in schools and other educational institutions, publications, news material and, in special humanitarian circumstances, food-stuffs” from the Chapter VII embargo.¹⁴ Humanitarian measures were also included in the comprehensive sanctions imposed by the UNSC on the Federal Republic of Yugoslavia (Serbia and Montenegro), Haiti and Iraq, which contained language exempting “supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs”.¹⁵

Controversy surrounding the humanitarian consequences of sanctions on Iraq, however, prompted the UN’s transformational shift away from comprehensive sanctions toward targeted measures. The primary factor driving this evolution was the outcry concerning the impact of sanctions on innocent Iraqis (including reports of “hundreds of thousands” of children who had died as a result of sanctions).¹⁶ With growing concerns that broad economic sanctions caused disproportional harm, the UNSC deliberately shifted to “targeted” or “smart” sanctions as a means of focusing measures on those decision-makers responsible for violations of international norms, and their principal supporters. Underlying the shift to targeted sanctions is the assumption that asset freezes and travel bans focused on leaders would not affect the general population. All UN sanctions since 1994 have been, in some manner, targeted.¹⁷

14 UNSC Res. 253, 29 May 1968, para. 1(d), available at: www.refworld.org/docid/3b00f27434.html.

15 Comprehensive UN sanctions include the Former Republic of Yugoslavia (Serbia and Montenegro), UNSC Res. 713/ 757/787/820/942 (1992–96); Haiti, UNSC Res. 841/873/917 (1993–94); and Iraq, UNSC Res. 661 etc. (1990–2003).

16 Estimates of Iraqi deaths attributable to sanctions vary, using different methodologies and addressing different timeframes. The figure of 500,000–600,000 child deaths has been widely cited: see Sarah Zaidi and Mary Smith Fawzi, “Health of Baghdad’s Children”, *The Lancet*, Vol. 346, No. 8988, 1995; Center for Economic and Social Rights, *Unsanctioned Suffering: A Human Rights Assessment of United Nations Sanctions on Iraq*, May 1996, available at: www.cesr.org/sites/default/files/Unsanctioned%20Suffering%201996.pdf; Barbara Crosette, “Iraq Sanctions Kill Children, U.N. Reports”, *New York Times*, 1 December 1995, available at: www.nytimes.com/1995/12/01/world/iraq-sanctions-kill-children-un-reports.html. See also Richard Garfield, *Morbidity and Mortality among Iraqi Children from 1990 through 1998: Assessing the Impact of the Gulf War and Economic Sanctions*, Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame and Fourth Freedom Forum, 1999, available at: www.fourthfreedomforum.org/publications/morbidity-and-mortality-among-iraqi-children-from-1990-to-1998-assessing-the-impact-of-economic-sanctions/. More recent research, however, contends that that figure was the result of survey data manipulated by the Saddam Hussein regime. Also, in response to the humanitarian consequences of sanctions, the UN created the Oil-for-Food Programme to permit Iraq to sell oil on the world market in exchange for food, medicine, and other humanitarian needs for ordinary Iraqi citizens. While laudable in its objectives, however, the Oil-for-Food Programme became mired in controversy, with revelations of corruption. See Geneva International Centre for Justice, “Razing the Truth About Sanctions against Iraq”, *GICJ Positions and Opinions*, available at: www.gicj.org/positions-opinions/gicj-positions-and-opinions/1188-razing-the-truth-about-sanctions-against-iraq; Tim Dyson and Valeria Cetorelli, “Changing Views on Child Mortality and Economic Sanctions in Iraq: A History of Lies, Damned Lies and Statistics”, *BMJ Global Health*, Vol. 2, No. 2, 2017.

17 See Thomas J. Biersteker, Sue E. Eckert and Marcos Touinho, *Targeted Sanctions: The Impacts and Effectiveness of UN Action*, Cambridge University Press, New York, 2016.

With the end of the Cold War, the UN began imposing sanctions with greater regularity, leading the 1990s to be characterized as the “sanctions decade”.¹⁸ From 1992 to 1999, targeted UN sanctions focused on conflicts within States, seeking to prevent or reduce armed violence, promote peace and reconciliation processes, or protect human rights, especially in African conflicts (Somalia, Liberia, Angola, Rwanda, Sudan and Sierra Leone). In addition, UN sanctions were also imposed on Libya and Sudan (for terrorism) and Haiti (for restoration of democratically elected leaders).

UNSC Resolutions 1267 and 1373

In response to the 1998 bombings of US embassies in East Africa, the UNSC imposed sanctions on the Taliban and Al-Qaeda and associated groups in order to thwart international terrorism. Following the Taliban’s refusal to turn over Osama bin Laden for prosecution and its hosting of training and sanctuary for international terrorist groups, the Council adopted Resolution 1267¹⁹ in October 1999, consisting of assets freezes and an aviation ban on the Taliban. The measures were adopted under Chapter VII of the UN Charter, making them binding on all member States under international law.

The terrorist attacks on 11 September 2001 represent an inflection point in the evolution of UN sanctions. The significantly expanded 1267 sanctions, along with the creation of the Counter-Terrorism Committee pursuant to UNSC Resolution 1373, placed new emphasis on stemming the financing of terrorism through the adoption of domestic legislation and implementation measures by member States. These two regimes form the bedrock of the UN’s CT architecture and have had the most consequential impact on humanitarian actors.

As the terrorist threat evolved, the Council adapted the 1267 regime. The measures (an arms embargo, travel ban and asset freeze) were expanded to individuals and entities associated with Al-Qaeda, and in 2015 to the Islamic State in Iraq and the Levant (ISIL). As such, the 1267/1989/2253 list of targeted individuals/entities is unique in its global rather than national or regional focus on non-State actors. The 1267 sanctions are also primarily preventative in nature in order to constrain targets from gaining access to essential resources (funds, people, commodities etc.), whereas other UN sanctions are principally coercive and designed to change behaviour.

Over time, the UNSC has modified the 1267 measures through more than a dozen successive resolutions, including adoption of exemptions for living expenses or travel for designated individuals.²⁰ In 2011, UNSC Resolutions 1988 and 1989 split the regime in two, establishing one committee for the Taliban (Resolution

18 David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Lynne Reiner, Boulder, CO, 2000.

19 UNSC Res. 1267, 15 October 1999.

20 Exemptions for living expenses have been referred to as “humanitarian” exemptions but are not to be confused with exceptions/exemptions permitting NGOs to provide impartial humanitarian assistance.

1988)²¹ and another for Al-Qaeda and affiliated groups (Resolution 1989,²² continuing other 1267 sanctions); this permitted the Council to address the specific situation related to the Taliban in Afghanistan. In addition, in 2009 the Council established an independent and impartial ombudsperson (UNSC Resolution 1904)²³ to whom 1267-designated individuals may directly appeal their designation and request de-listing. While some of these changes were a result of external pressures (especially as legal challenges by designated individuals grew in Europe), the 1267 sanctions regime has demonstrated institutional development and an ability to evolve over its two decades of existence.

There are two aspects of 1267 sanctions that pose the greatest challenge for humanitarian actors. Firstly, the designation of groups subject to 1267 sanctions is of concern, especially those “terrorist” entities that control territory or have a significant presence in areas where humanitarian assistance is required. Eighty-nine entities are included on the 1267 list, having a presence or operating in more than fifty States.²⁴ Secondly, the extraordinarily expansive definition of the asset freeze prohibition in 1267 (“funds, financial assets or economic resources”) is so broad as to encompass most conceivable activity. The Al-Qaida Sanctions Committee’s explanation of terms states:

Economic resources should be understood to include *assets of every kind*, whether tangible or intangible, movable or immovable, actual or potential, which potentially may be used to obtain funds, goods or services, such as:

- a. land, buildings or other real estate;
- b. equipment, including computers, computer software, tools, and machinery;
- c. office furniture, fittings and fixtures and other items of a fixed nature;
- ...
- l. any other assets.²⁵

UNSC Resolution 2368 further clarifies the obligation for member States

to prevent [their] citizens from making funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, *even in the absence of a link to a specific terrorist act*.²⁶

²¹ UNSC Res. 1988, 17 June 2011.

²² UNSC Res. 1989, 17 June 2011.

²³ UNSC Res. 1904, 17 December 2009.

²⁴ Irénée Herbet and Jérôme Drevon, “Engaging Armed Groups at the International Committee of the Red Cross: Challenges, Opportunities and COVID-19”, *International Review of the Red Cross*, Vol. 102, No. 915, 2021, available at: <https://tinyurl.com/2p82jwej>.

²⁵ Al-Qaida Sanctions Committee, above note 12 (emphasis added).

²⁶ UNSC Res. 2368, 20 July 2017 (emphasis added).

Given the scope of activity prohibited, it is understandable that NPOs providing programmes and services in areas in which designated entities operate are fearful of violating sanctions.

Of greatest significance for humanitarian NPOs, however, is the fact that there is no exception for humanitarian organizations from the prohibition on funds, assets and economic resources in successive 1267 resolutions. While paragraph 22 of Resolution 2368 calls on member States to “protect non-profit organizations, from terrorist abuse, using a risk-based approach, while working to mitigate the impact on legitimate activities”, there is no safeguard for humanitarian action from the broad scope of CT sanctions.²⁷

UNSC Resolution 1373, adopted in response to the 9/11 terrorist attacks, operates alongside the 1267 sanctions. Adopted on 28 September 2001 under Chapter VII of the UN Charter, it represents the foundation of the current global CT regime, requiring member States to prevent the financing of terrorist acts and to criminalize the wilful provision of funds for terrorist acts.

While the 1267 regime is targeted at individuals and entities listed by the 1267 committee, there is no 1373 list (designations are at national discretion); however, the broadly worded measures and far-reaching language in Resolution 1373 pose significant challenges for humanitarian actors working in areas in which designated groups operate or which they control. Prohibitions on “making any funds, financial assets or economic resources or financial or other related services available”²⁸ have been implemented by member States in order to preclude “material support” to terrorist groups, leaving NPOs fearful that activities permissible under IHL could be illegal under CT measures.²⁹

Impacts on humanitarian actors and activities

The concerns of NPOs have grown increasingly consequential in the past five years with the escalation of conflict and humanitarian crises in Syria, Yemen, Afghanistan and Somalia, among other countries where designated groups operate or control territory, or where one or more of the parties to conflict are designated entities. Experiences of humanitarian actors have been cited and documented, including impacts of sanctions and CT measures on principled humanitarian action. In some cases, impartial humanitarian organizations have been prevented from carrying out their activities in a manner consistent with IHL, leaving populations in situations of increased vulnerability and undermining principled humanitarian action. In other instances, humanitarian organizations fear that activities and possible diversion of benefits to sanctioned entities may expose them and their staff to criminal prosecution or penalties, possibility resulting in liability, reputational harm and loss of funding.

²⁷ *Ibid.*

²⁸ UNSC Res. 1373, 28 September 2001, para. 1(d).

²⁹ See Charity & Security Network, “The Prohibition on Material Support and Its Impacts on Nonprofits”, July 2019, available at: <https://charityandsecurity.org/sites/default/files/material%20support%20issue%20brief%202019.pdf>.

Numerous reports³⁰ note how sanctions and CT measures impact humanitarian action, both directly and indirectly, including by:

- limiting or preventing principled humanitarian action;
- criminalizing humanitarian action, including medical assistance;
- restricting access of financial services for humanitarian operations; and
- constraining the ability of humanitarian actors to engage with groups and persons permitted under IHL.

The “chilling effect” resulting from the complex regulatory framework related to 1267 sanctions and CT measures is the most oft-cited concern of NPOs. These requirements have multifaceted impacts on their organizations, limiting their ability to “implement programmes according to needs alone, and oblig[ing] them to avoid groups and agendas”, especially those areas controlled by groups designated by the 1267 regime, which the International Committee of the Red Cross (ICRC) estimates includes more than 60 million people.³¹ Fear of running afoul of requirements—national laws and regulations, conditions by donor agencies, and policies of private sector actors—related to sanctions and CT measures has led some humanitarian actors to be overly cautious, at times choosing to limit their activities beyond what is required. Financial institutions, reluctant to transfer funds into higher-risk jurisdictions where humanitarian actors frequently operate, have closed bank accounts of NPOs or denied and/or delayed financial transfers. Some humanitarian groups complain that programmatic decisions have come to be based on where banks will transfer funds to, rather than solely on basis of need. NPOs report the termination of programmes in areas where designated groups have a significant presence, resulting in populations and persons entitled to humanitarian assistance under IHL being denied critical aid. Humanitarian actors have also witnessed increasing conditions and funding restrictions in the form of donors’ contractual clauses in grant agreements, which have the effect of offloading risk onto NPOs. The following section explores these challenges in greater depth.

In response to such concerns and in recognition of the consequences of sanctions and CT measures on humanitarian action, the UNSC included provisions related to compliance with IHL in UNSC Resolution 2462, a consolidated resolution aimed at combating and criminalizing the financing of terrorism. Paragraph 5 calls for domestic law and regulations to be “consistent with obligations under international law, including international humanitarian law”; paragraph 6 “[d]emands that Member States ensure that all measures taken

30 From 2008 to 2014, five reports/resources addressing the impact of sanctions, CT measures and de-risking were found. That number increased to twelve in 2015, eleven in 2016, nineteen in 2017, seventeen in 2018, thirteen in 2019, twenty-two in 2020, and eight in the first half of 2021. The author maintains a list of related reports/resources which is available upon request.

31 Emma O’Leary, *Principles Under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, Norwegian Refugee Council (NRC), June 2018 available at: www.nrc.no/resources/reports/principles-under-pressure/; I. Herbet and J. Devron, above note 24.

to counter terrorism, including measures taken to counter the financing of terrorism ..., comply with their obligations under international law, including international humanitarian law”; and paragraph 24 “[u]rges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law”.³²

The inclusion of this language was welcomed by NPOs as positive step.³³ Resolution 2462 fell short, however, of providing forward-leaning measures to more fully protect humanitarian space; in particular, humanitarians advocated for explicit recognition that IHL permits impartial humanitarian organizations to offer their services to parties to armed conflict, irrespective of the latter’s designation as terrorists.³⁴ Inclusion of IHL-related language concerning allowable activities beyond providing food and medicine—such as repairing systems for water supply and sanitation, building medical facilities or clearing mines—would have protected humanitarian space more directly. The fact that clarifying language has not been adopted by the UNSC perpetuates debates about the role of IHL in CT contexts. As noted by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism,

these statements of principle are not sufficient to actively protect the integrity of humanitarian action and actors working in areas where terrorist groups are active. Indeed, humanitarian law already protects engagement for humanitarian purposes It is unacceptable for Member States and the United Nations to allow the present lack of clarity to persist and interfere with the delivery of humanitarian assistance and medical care.³⁵

Specific challenges encountered by humanitarian actors

This section elaborates three primary sets of challenges faced by humanitarian groups in relation to UN sanctions and CT measures. The first is the lack of clarity and adequate legal protection for carrying out humanitarian activities in

32 UNSC Res. 2462, 28 March 2019.

33 Nathalie Weizmann, “Painting within the Lines: The UN’s Newest Resolution Criminalizing Financing for Terrorists without Imperiling Humanitarian Activities”, *Just Security*, 29 March 2019, available at: www.justsecurity.org/63442/painting-within-the-lines-the-uns-newest-resolution-criminalizing-financing-for-terrorists-without-imperiling-humanitarian-activities/.

34 UNSC, “Combatting Financing of Terrorism Open Debate”, *Security Council Report*, 27 March 2019, available at: www.securitycouncilreport.org/whatsinblue/2019/03/combatting-financing-of-terrorism-open-debate.php.

35 UN Human Rights Special Procedures, *Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on United Nations Security Council Use of Counter-Terrorism Targeted Sanctions Regimes on Individuals & Entities and the Promotion and Protection of Human Rights and Fundamental Freedoms*, 2021, available at: www.ohchr.org/Documents/Issues/Terrorism/position-paper-unsrct-on-unsct-use-of-ct-targeted-sanctions.pdf.

countries subject to sanctions or areas in which designated entities operate. The second are financial access or de-risking problems limiting the ability of NPOs to transfer funds to higher-risk regions due to FIs' over-compliance with sanctions or fear of regulatory scrutiny for such transactions. The third are donor conditions and the offloading of risk by funders of humanitarian services onto NPOs and beneficiaries through contractual clauses related to CT and sanctions requirements.

Lack of legal protection – humanitarian “carve-outs”

As noted, comprehensive sanctions imposed by the UNSC previously included language acknowledging humanitarian impacts and protecting humanitarian activities to varying degrees. As the UN shifted in the 1990s to imposing only targeted measures on individuals and entities, sanctions committees adopted special procedures for listed individuals to apply for permission to access their frozen assets for specific purposes. These exemptions for basic or extraordinary expenses (such as rent, food, medicine or travel for judicial proceedings or religious reasons) became routine aspects of sanctions regimes, adopted by the 1267 (Al-Qaeda/ISIL), Democratic Republic of the Congo (DRC), Sudan, Libya, Guinea-Bissau, Central African Republic (CAR), Mali, Yemen and South Sudan sanctions committees. While referred to as “humanitarian exemptions”, these measures for individuals do not relate to the provision of impartial humanitarian assistance. Rather, humanitarian “carve-outs” apply to impartial humanitarian organizations and actors conducting principled humanitarian activities. There remains significant confusion, however, concerning humanitarian exception/exemption terminology.

For purposes of clarity, this article refers to two types of provisions currently utilized by the UNSC to address humanitarian concerns: exceptions and exemptions provided for humanitarian actors to operate in sanctioned jurisdictions under certain conditions. As detailed below, a humanitarian *exception* exists in the Somalia regime, which excludes or *excepts* a specific category of actors/activities from the financial prohibitions. Instituted in 2010, this has been a critically important measure that permits humanitarian groups to provide services, especially food aid, in order to address the Somali famine. A humanitarian exception “carves out legal space for humanitarian actors, activities, or goods within sanctions measures without any prior approval needed”.³⁶ Humanitarian *exemptions* utilized in the DPRK sanctions regime, however, also authorize humanitarian activities or projects, but *on a case-by-case basis* whereby the sanctions committee must approve the requests of member States or NPOs.

36 Alice Debarre, *Making Sanctions Smarter: Safeguarding Humanitarian Action*, International Peace Institute (IPI), December 2019, available at: www.ipinst.org/2019/12/making-sanctions-smarter-safeguarding-humanitarian-action.

Humanitarian exemptions have been authorized in the Yemen sanctions regime, but do not appear to have been implemented.³⁷

Humanitarian actors have advocated consistently for the inclusion of humanitarian safeguards to mitigate the impact of CT measures and sanctions. In a statement before the 11 July 2021 UNSC meeting on “Protection of Civilians in Armed Conflict: Preserving Humanitarian Space”, Robert Mardini, director-general of the ICRC, called on the UNSC to adopt well-crafted standing humanitarian exemptions and to require member States to develop specific measures to facilitate the work of impartial humanitarian organizations and carve out similar protections in domestic sanctions regimes.³⁸

The Somalia exception

The humanitarian exception to UN sanctions on Somalia was first introduced in 2010 in response to the dire famine resulting from environmental disasters (including floods, cyclones and unprecedented desert locust swarms) and persistent conflict. Somalia has consistently hosted one of the largest humanitarian operations in the world, but because there was no exception to sanctions at the time, assistance was suspended since it was not possible for humanitarian groups to operate in areas controlled by the Islamist insurgent terrorist group Al-Shabaab without some benefits (such as road tolls, taxes or stolen goods) accruing to it.

Paragraph 5 of UNSC Resolution 1916 notes that the Council

[d]ecides that for a period of twelve months from the date of this resolution, and without prejudice to humanitarian assistance programmes conducted elsewhere, the obligations imposed on Member States in paragraph 3 of resolution 1844 (2008) shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners, and decides to review the effects of this paragraph every 120 days based on all available

37 UNSC Res. 2511, 25 February 2020, para. 3, includes language similar to that of the DPRK regime, stating that the Council, “[e]mphasizing the importance of facilitating humanitarian assistance, *decides* that the Committee established in paragraph 19 of resolution 2140 (2014) ... may, on a case-by-case basis, exempt any activity from the sanctions measures imposed by the Security Council ... if the Committee determines that such an exemption is necessary to facilitate the work of the United Nations and other humanitarian organisations in Yemen”. As of December 2021, no procedures for applying for humanitarian exemptions have been listed on the Yemen sanctions website.

38 Robert Mardini, “Protection of Civilians in Armed Conflict: Preserving Humanitarian Space”, statement delivered to the UNSC, 16 July 2021, available at: www.icrc.org/en/document/humanitarian-space-must-be-protected-without-exception (noting member States (Switzerland, the Philippines, Chad, the EU and others) adopting CT legislation which expressly protects impartial humanitarian organizations carrying out humanitarian activities).

information, including the report of the Humanitarian Aid Coordinator submitted under paragraph 11 below.³⁹

All subsequent UNSC resolutions reauthorizing the Somalia sanctions have continued the exception, which excepts or excludes from the financial sanctions a range of humanitarian organizations and activities under the UN umbrella. UNSC Resolution 2551⁴⁰ further bolstered humanitarian access by extending the exception indefinitely rather than limiting it to twelve months with annual renewal. Some humanitarian actors have hesitated to rely upon the exception, however, often preferring to implement programmes that operate solely in government-held areas of Somalia in order to minimize potential penalties should they inadvertently provide support to designated entities.⁴¹

Still, the importance of the UN exception in the Somalia regime cannot be overstated. The exception seems to have worked well in facilitating the provision of humanitarian assistance to Somalia and is broadly supported by member States. In fact, in 2019 a proposal was made to move Al-Shabaab from being listed in the Somalia regime to the 1267 list based on its affiliation with Al-Qaeda. A critical mass of UNSC members opposed the transfer,⁴² primarily because of the anticipated impact on humanitarian assistance should the group fall under 1267 sanctions: with no humanitarian carve-out in 1267, NPOs would be unable to continue to provide assistance in Somalia. Based on conversations between the author and representatives of various member States, this proposal is likely to be tabled again as Kenya is on the UNSC in 2021–22.

The Somalia carve-out has become the preferred model of NPOs where humanitarian assistance is desperately needed but is inaccessible because of sanctions.⁴³ As recognition of the problems experienced by humanitarian organizations due to sanctions and CT measures grows, NPOs have called for similar Somalia-type exceptions to be replicated in other sanctions regimes.

The DPRK exemption

The DPRK sanctions regime under UNSC Resolution 1718⁴⁴ represents the other extant approach to authorizing humanitarian assistance in a sanctioned country. IHL currently does not apply to the DPRK, and as such, proliferation sanctions are outside the scope of this issue of the *Review*. Still, since the experience of the DPRK exemption is illustrative, it is included and analyzed here.

39 UNSC Res. 1916, 19 March 2010.

40 UNSC Res. 2551, 12 November 2020.

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

42 Sara Jerving, “Humanitarians Warn against Adding Al-Shabab to UN Sanctions List”, *Devex*, 16 August 2019, available at: www.devex.com/news/humanitarians-warn-against-adding-al-shabab-to-un-sanctions-list-95465.

43 A. Debarre, above note 36.

44 UNSC Res. 1718, 14 October 2006, para. 25.

UNSC Resolution 2397 includes language stating that sanctions are not intended to have adverse humanitarian consequences and authorizing the committee to exempt any activity from sanctions on a case-by-case basis:

[Resolution 2397 *reaffirms*] that the measures imposed [by this and other UNSC resolutions] are not intended to have adverse humanitarian consequences for the civilian population of the DPRK or to affect negatively or restrict those activities, including economic activities and cooperation, food aid and humanitarian assistance, that are not prohibited ..., and the work of international and non-governmental organizations carrying out assistance and relief activities in the DPRK for the benefit of the civilian population of the DPRK, *stresses* the DPRK's primary responsibility and need to fully provide for the livelihood needs of people in the DPRK, and *decides* that the Committee may, on a case-by-case basis, exempt any activity from the measures imposed by these resolutions if the committee determines that such an exemption is necessary to facilitate the work of such organizations in the DPRK or for any other purpose consistent with the objectives of these resolutions.⁴⁵

It establishes a process whereby member States, international organizations and NPOs may request an exemption from the sanctions committee to facilitate the delivery of humanitarian assistance or relief activities in the DPRK for the benefit of the civilian population on a case-by-case basis.⁴⁶ In addition, the committee created "Implementation Assistance Notice No. 7: Guidelines for Obtaining Exemptions to Deliver Humanitarian Assistance to the Democratic People's Republic of Korea" in 2018, which was updated on 30 November 2020.⁴⁷ The committee also maintains a list of current exemptions approved on its website. As of 3 November 2021, the committee had approved a total of eighty-three humanitarian exemption requests, with twenty-one that appear to be in effect. UN agencies (the World Food Programme, UNICEF and UNFPA) have eight of the current exemptions, member States ten (with six for the Republic of Korea), and NPOs three.⁴⁸

The implementation of the exemption process has been slow and problematic, however. As the humanitarian situation in the DPRK has deteriorated, the Panel of Experts for the DPRK sanctions has consistently included reports about the impacts of sanctions:

45 UNSC Res. 2397, 22 December 2017, para. 25.

46 UNSC, "Humanitarian Exemption Requests", available at: www.un.org/securitycouncil/sanctions/1718/exemptions-measures/humanitarian-exemption-requests.

47 Security Council Committee Established Pursuant to Resolution 1718 (2006), "Implementation Assistance Notice No. 7: Guidelines for Obtaining Exemptions to Deliver Humanitarian Assistance to the Democratic People's Republic of Korea", 6 August 2018 (updated 30 November 2020), available at: www.un.org/securitycouncil/sites/www.un.org/securitycouncil/files/ian7_updated_30nov20_2.pdf.

48 1718 Sanctions Committee, "Humanitarian Exemption(s) in Effect", available at: www.un.org/securitycouncil/sanctions/1718/exemptions-measures/humanitarian-exemption-requests.

Despite the exemption clauses and the Committee's efforts, United Nations agencies and humanitarian organizations continue to experience unintended consequences on their humanitarian programmes that make it impossible to operate normally in the Democratic People's Republic of Korea. The six main areas of concern communicated to the Panel are: delays in receiving exemptions; the collapse of the banking channel; delays in customs clearance; a decrease in willing foreign suppliers; the increased cost of humanitarian-related items and operations; and diminished funding for operations. These are negatively affecting their ability to implement humanitarian-related programmes. In particular, the sectoral sanctions are affecting the delivery of a number of humanitarian-sensitive items.⁴⁹

The Panel has advanced numerous recommendations to mitigate the potential adverse impacts of sanctions on the civilian population of the DPRK and on humanitarian aid operations. These include expediting the processing of exemption requests, publishing a white list of certain non-sensitive items used in humanitarian operations, requesting the Secretariat to carry out an assessment of the humanitarian impact of sanctions in the DPRK, and noting the importance of arrangements for re-establishing the banking channel.⁵⁰

It is important to note that the DPRK exemption is not a broad carve-out for humanitarian groups, as in Somalia. Each request must be approved by the fifteen committee members, which requires time for review, approval (and reapplication) of requests, and for the Committee Exemption Approval Letter to be prepared. The fact that exemptions often take months to be approved and are granted for a period of only nine months has been problematic for NPOs as they strive to deal with urgent humanitarian needs. Moreover, UNSC members may have national interests within a sanctioned jurisdiction and may thus be inclined to block the approval of exemption requests; concerns for some member States' predisposition against exemptions and use of approvals for political purposes also persist.⁵¹

The DPRK exemption model, therefore, fails to provide a consistent, reliable and readily accessible path for humanitarian NPOs: the process remains complex, bureaucratic, time-consuming, too limited, and costly in financial and human resources. While the exemptions framework allows for humanitarian assistance, the process itself is neither fit for purpose nor does it encourage or adequately facilitate such action.

49 *DPRK Panel of Experts Report*, UN Doc. S/2019/171, March 2019, available at: www.undocs.org/S/2019/171 (internal references omitted). See also the subsequent Panel of Experts reports, available at: www.un.org/securitycouncil/sanctions/1718/panel_experts/reports.

50 *Ibid.*

51 For an overview of the difficulties that NPOs have faced in providing humanitarian assistance to the DPRK, see Nazanin Zadeh-Cummings and Lauren Harris, *Humanitarian Aid in North Korea: Needs, Sanctions and Future Challenges*, Centre for Humanitarian Leadership, April 2020, available at: https://centreforhumanitarianleadership.org/wp-content/uploads/2020/04/CHL_North-Korea-Report_Final.pdf; Dan Jasper, *Engaging North Korea: A Toolkit for Protecting Humanitarian Channels amid "Maximum Pressure"*, American Friends Service Committee, June 2018, available at: www.afsc.org/sites/default/files/documents/Engaging%20North%20Korea%20Volume%20III%20WEB.pdf.

For these reasons, broad exceptions for categories of approved activity or other semi-automatic approvals, instead of a case-by-case process, is necessary for an effective humanitarian carve-out process. As noted previously, the exception employed in the Somalia sanctions regime has proven effective and is thus preferred by NPOs. As recommended by several Special Rapporteurs, “[h]umanitarian actions unambiguously should be exempted from UN counter-terrorism measures”.⁵²

Bank de-risking and financial access challenges⁵³

Mandatory UN CT and sanctions measures, as well as soft-law standards of the Financial Action Task Force (FATF)⁵⁴ related to anti-money laundering (AML), countering the financing of terrorism (CFT) and sanctions, must be transposed by UN member States into laws, regulations and policies at the national level. These regulatory measures impose compliance obligations on all stakeholders – businesses, FIs and NPOs alike. Banks that provide essential services for humanitarian and other non-profit organizations, for the purpose of conducting their activities internationally, are subject to extensive compliance requirements to exercise due diligence on their customers and transactions in order to ensure that they do not facilitate terrorist activity. Since humanitarian actors frequently operate in conflict areas, many FIs are reluctant to handle NPO accounts, engaging in risk-averse behaviour known as de-risking. While the drivers of de-risking are complex and include commercial profitability and reputational concerns, CT/sanctions issues play an outsized role in financial access restrictions.⁵⁵

52 *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions: Saving Lives is not a Crime*, UN Doc. A/73/314, 7 August 2018, para. 52; *Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/HRC/40/52, 1 March 2019, available at: <https://undocs.org/en/A/HRC/40/52>. These reports use the term “exempt”, but as defined by this paper, the action being recommended is an exception.

53 This paper generally refers to the collective problems experienced by NPOs as “financial access” issues rather than de-risking. Financial access is a more appropriate characterization because the difficulties that charities encounter are much broader than merely restricting or terminating accounts or failing to take on NPOs as clients. They also include delays in processing transfers, requests for additional information and other complicating actions. However, because de-risking has become a common catch-all term, it is unavoidable in discussing the issues addressed in this paper, especially in the context of previous reports and public characterizations.

54 The FATF is an intergovernmental body which seeks to develop and promote measures to combat money laundering, the financing of terrorism and other threats to the integrity of the international financial system. See the FATF website, available at: www.fatf-gafi.org/about/.

55 This section is based on numerous reports related to financial access/de-risking of NPOs, including the author’s own research and resulting report: Sue E. Eckert, Kay Guinane and Andrea Hall, *Financial Access for U.S. Nonprofits, Charity & Security Network*, February 2017, available at: [www.charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20\(2\).pdf](http://www.charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20(2).pdf); Tom Keatinge and Florence Keen, *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, Chatham House, April 2017, available at: www.chathamhouse.org/publication/humanitarian-action-and-non-state-armed-groups-impact-banking-restrictions-uk-ngos; Ministry of Finance of the Netherlands and Human Security Collective (HSC), *International Stakeholder Dialogue: Ensuring Financial Services for Non-Profit Organizations*, The Hague, February 2018, available at: www.humansecuritycollective.org/.

Humanitarian organizations are viewed as especially high-risk customers, in large part due to the FATF's adoption of Special Recommendation 8 in 2001.⁵⁶ Notwithstanding repeated guidance from the FATF and revision of Recommendation 8 in 2016 emphasizing that the standard applies to a subset of NPOs only, as well as official pronouncements that de-risking is inconsistent with a risk-based approach, NPOs continue to face significant financial access challenges.

Financial institutions may choose not to service NPO clients out of concern for regulatory risk and the negative consequences of being involved in transactions to higher-risk jurisdictions. As US sanctions violations are "strict liability" offenses—that is, a person can be liable for committing a civil violation of sanctions regardless of their knowledge or degree of fault—FIs engage in complicated risk calculations about the repercussions of being found to have violated sanctions. Banks face substantial penalties related to any transactions with individuals or entities designated under a sanctions regime and can be fined for a perceived lack of effective control over the end location and use of funds, even without an actual breach of sanctions. Consequences beyond legal action and penalties include compliance costs related to mitigating violations and reputational damage; this is in addition to the fact that NPO accounts usually are not highly profitable and are more costly because of enhanced due diligence. This calculus often leads FIs to conclude that NPOs are to be avoided. Even for banks maintaining NPO clients, additional due diligence requirements associated with such accounts frequently result in delays or other problems for NPOs trying to transfer funds. These problems have increased in recent years as FIs are less inclined to hold and transfer NPO funds since it is simpler to avoid, rather than manage and mitigate, the risks associated with charitable clients.

Financial access challenges can have dramatic effects for NPOs, at times leading to the cancellation of programmes, increased costs, and substantial delays for financial transactions and, by extension, in the delivery of aid. These impacts endanger the provision of timely, effective and necessary humanitarian assistance. NPOs report that financial access difficulties also discourage support from other private sector entities necessary in delivering humanitarian assistance (e.g., medicine or goods manufacturers, suppliers, and transportation and insurance companies), resulting in delays and/or increased costs.

hscollective.org/assets/Final-Report_Feb-15.pdf; Charity Finance Group, *Impact of Money Laundering and Counter-Terrorism Regulations on Charities*, March 2018, available at: <https://tinyurl.com/yckzjcju4>; World Bank and Association of Certified Anti-Money Laundering Specialists (ACAMS), *Stakeholder Dialogue on De-Risking: Financial Access for Nonprofit Organizations*, June 2018; WO=MEN and HSC, *Protecting Us by Tying Our Hands: Impact of Measures to Counter Terrorism Financing on Dutch NGO's Working on Women's Human Rights and Gender Equality*, April 2019 (WO=MEN/HSC Study), available at: www.hscollective.org/assets/Uploads/2019-04-Protecting-us-by-tying-our-hands.pdf; Yale Study, above note 4; G. McCarthy, above note 4.

56 See "FATF Treatment of NPOs", in S. E. Eckert, K. Guinane and A. Hall, above note 55, for an overview of the FATF's actions related to NPOs. The FATF made protection of the NPO sector from terrorist abuse a critical component of the global fight against terrorism and a necessary step for preserving the integrity of NPOs through the adoption of Special Recommendation 8 in October 2001. This action, however, resulted in enduring perceptions of NPOs as inherently high-risk.

To overcome such problems, NPOs have resorted to other, often informal transfer methods such as carrying cash, using *hawala*, and money service businesses (see the following data section for greater details). While informal value transfer systems are efficient and less costly ways of moving funds, such methods can increase risks for NPOs and lead to de-risking by FIs. Of greatest concern is the fact that the use of unregulated, informal systems and cash runs counter to AML/CFT objectives of transparency and traceability and can increase the risk of diversion.

Data indicative of de-risking/financial access challenges

Until relatively recently, there have been scant data available regarding financial access problems faced by NPOs. The present author's 2017 report, *Financial Access for US Nonprofits*,⁵⁷ based on a random sample survey of US NPOs, was the first empirical analysis of the scope and scale of de-risking. The study found that a significant proportion (two thirds) of NPOs conducting international work experienced obstacles in accessing financial services, constituting a serious and systemic challenge for the continued delivery of vital humanitarian and development assistance. The most common problems NPOs faced include delays of wire transfers (37%), unusual documentation requests (26%) and increased fees (33%). Account closures or refusal to open accounts were experienced by 16% of NPOs surveyed, and over 15% of NPOs encountered these financial problems constantly or regularly, with another 31% reporting occasional problems. Of significant concern, the data indicated that 42% of NPOs resort to carrying or sending cash when traditional banking channels become unavailable.

In 2018, the Charity Finance Group surveyed UK NPOs and released its report, *Impact of Money Laundering and Counterterrorism Regulations on Charities*.⁵⁸ Overall, the study found that nearly four fifths (79%) of respondents experienced problems in accessing or using mainstream banking channels.

The Dutch gender platform WO=MEN and the Human Security Collective (HSC) produced the study *Protecting Us by Tying Our Hands: Impact of Measures to Counter Terrorism Financing on Dutch NGO's Working on Women's Human Rights and Gender Equality* (WO=MEN/HSC Study) in 2019.⁵⁹ It found that 70% of NPOs surveyed had fund transfers delayed, and 45% had transfers denied (see [Figure 1](#)).

In autumn of 2020, a team of Yale University undergraduates working on a capstone project supervised by the present author developed and deployed a survey of NPOs to investigate current challenges faced in the delivery of humanitarian assistance abroad. This survey served to update data from the 2017 *Financial Access for US Nonprofits* study and queried new areas. The results are presented in the January 2021 report, *A Data-Based Approach for Understanding the Impact*

57 S. E. Eckert, K. Guinane and A. Hall, above note 55.

58 Charity Finance Group, above note 55.

59 WO=MEN/HSC Study, above note 55.

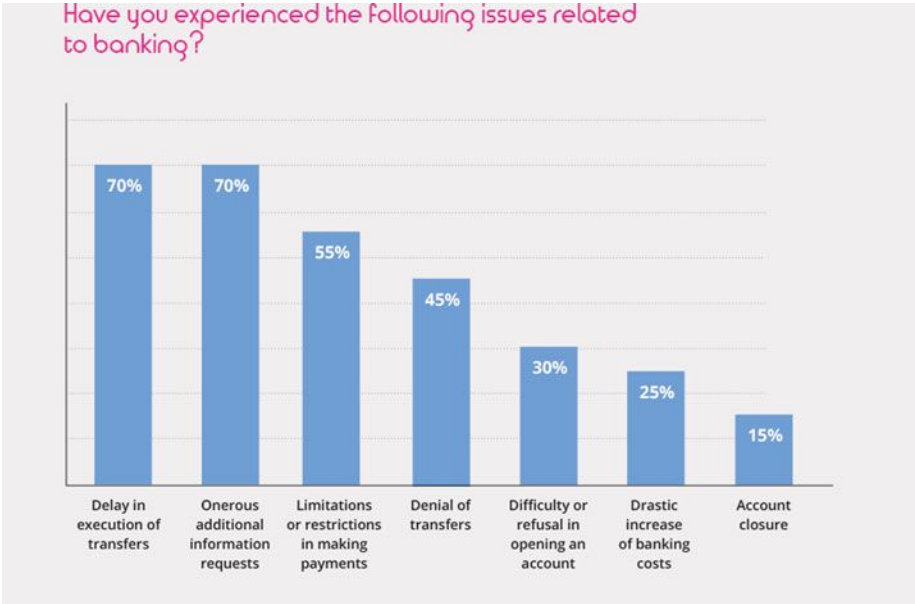


Figure 1. Financial access issues encountered by NPOs (2019). Source: WO=MEN/HSC Study, above note 55.

of AML/CFT/Sanctions on the Delivery of Aid: The Perspective of Nonprofit Organizations (Yale Study).⁶⁰

Overall, the Yale Study found that while the general percentage of NPOs experiencing financial access challenges has remained consistent (approximately two thirds of surveyed NPOs), the frequency with which NPOs experience these problems – frequently or constantly – has nearly tripled since 2017. Moreover, the challenges encountered have also increased, with multiple problems being experienced by more than 40% of respondents (delays and denials of fund transfers, inability to open accounts or account closures, and increased documentation requests – see Figure 2), indicating a broader range of financial access problems than previously found in 2017.

The 2021 data suggest that while the overall percentage of NPOs facing problems may not have increased, NPOs facing problems are encountering a broader range of difficulties than previously indicated.

60 Yale Study, above note 4. The survey was sent to global NPO networks, which then disseminated it to members of their organizations. In total, the survey received 117 responses from organizations of various sizes and locations. Data clean-up resulted in the evaluation of fifty-six complete responses. Because respondents did not identify the types of services their organizations deliver (humanitarian, development, peacebuilding, educational etc.), it is impossible to segregate out the impacts on humanitarian organizations alone.

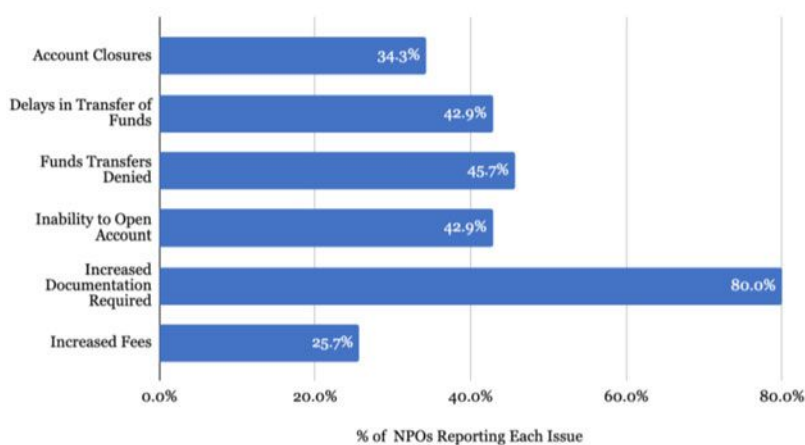


Figure 2. Financial access issues encountered by NPOs (2021). Source: Yale Study, above note 4.

The most common result of financial access difficulties noted was slowed or prevented delivery of assistance (see [Figure 3](#)). The data reveal that CT/sanctions measures problematize and, in some cases, prevent the provision of timely services due to delays or denials of transfers by FIs. This impact is felt most directly by the intended programme beneficiaries. Most frequently, assistance is delayed or prevented, costs increase, or the NPOs are forced to change the scope or scale of their programmes. Some NPOs reported that because of financial challenges, programmatic decisions are being made based on where they can transfer funds instead of based on humanitarian need.

Some NPOs were able to resolve issues with their FIs, but for those with chronic financial access problems, there is a need to find alternative ways to move funds. NPOs by and large have a “can do” attitude and find “work-arounds” when faced with obstacles. 89% of NPOs indicating financial access problems utilized alternative means to move funds, such as carrying cash and using informal value transfer systems such as *hawala*, similar to the 2017 survey, which reported a figure of about 90%. From the perspective of security and CT objectives, these findings are troublesome since informal transfer methods are risky and less transparent, making it more difficult to monitor financial flows.

While the 2021 Yale Study (see [Figure 4](#)) recorded about the same level (40%) of NPOs using cash as the 2017 and 2018 studies, the 2019 WO=MEN/HSC Study (see [Figure 5](#)) indicated that 60% of respondents resorted to carrying cash, which is riskier and more dangerous for NPOs. In addition, the 2019 survey reported that 50% of respondents used personal bank accounts to transfer funds, in order to avoid problems associated with enhanced scrutiny of NPOs’ accounts.

Overall, the data demonstrate that NPOs face serious and systemic financial access difficulties, which have grown in scope and scale over the past several years. When NPOs encounter difficulties in using the formal financial system to move funds, they revert to alternative methods that are less transparent, traceable and

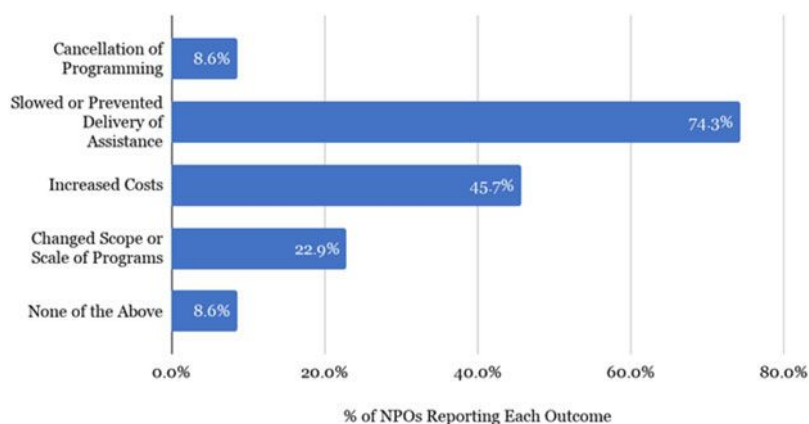


Figure 3. Impact of limited financial access on NPOs. Source: Yale Study, above note 4.

safe. The data speak to the need, both for humanitarian and CT objectives, to alter current practices in order to better facilitate NPOs' access to secure financial services. While sanctions and CT measures are not solely to blame, they are currently a significant factor in FIs' relationships with NPOs and willingness to support humanitarian transfers. De-risking and financial access for NPOs constitute a critical challenge impeding humanitarian action that will not be resolved without concerted action by all stakeholders.

Donor conditions and offloading of risk⁶¹

NPOs increasingly report that CT- or sanctions-related clauses in donor contracts constitute additional challenges for their activities. In providing funding to humanitarian actors, donors are routinely requiring greater assurances from recipients.⁶² In a recent case, a humanitarian organization reported that it had to forego an €800,000 grant from a European country for activities in Syria because of donor requirements which restricted activities in areas controlled by listed 1267 groups.

The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism commented on this issue, writing that "donors now frequently include counterterrorism clauses in humanitarian grant and partnership agreement contracts, requiring NPOs to provide onerous guarantees that their funds are not used to benefit terrorists or

⁶¹ This section also draws heavily on the Yale Study, above note 4.

⁶² While both government agencies and private donors include various forms of assurance against aid diversion, most of the concern expressed by NPOs relates to measures imposed by official aid organizations (USAID, DG ECHO and the UK FCDO) that are discussed here.

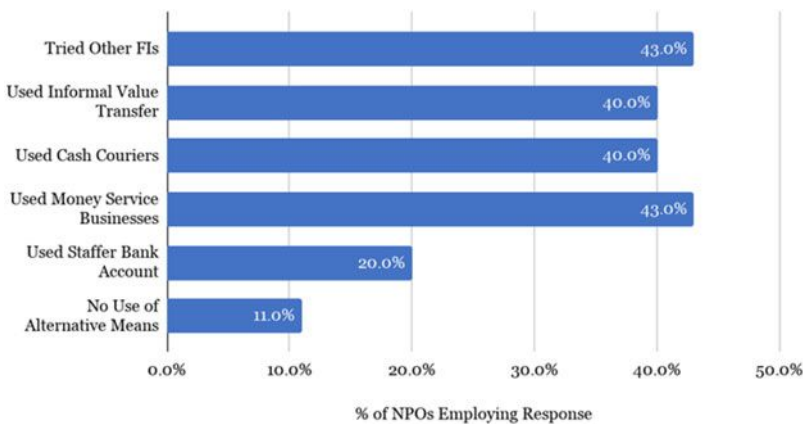


Figure 4. Responses of NPOs to financial access challenges (2021). Source: Yale Study, above note 4.

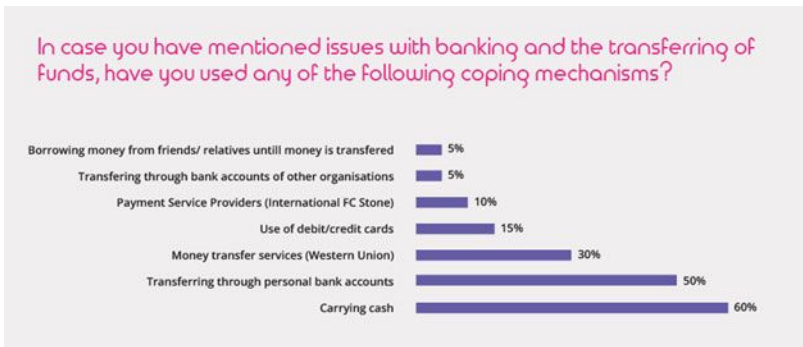


Figure 5. Responses of NPOs to financial access challenges (2019). Source: WO=MEN/HSC Study, above note 55.

to support acts of terrorism”.⁶³ Clarifying or negotiating such clauses can delay the delivery of humanitarian assistance, as they may require engagement with the donor regarding the interpretation of contractual clauses. A Norwegian Refugee Council (NRC) survey noted that 71% of respondents faced increased compliance and administrative burdens as a result of donor provisions; interviewees felt that

63 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/70/731, 18 September 2015, para. 33, available at: <https://undocs.org/pdf?symbol=en/A/70/371>.

vetting and due diligence requirements caused delays in implementation and an increase in costs.⁶⁴

According to the Counterterrorism and Humanitarian Engagement Project, “[t]he general purpose of these clauses is to help ensure that donors’ funds are not used to benefit terrorists or to support acts of terrorism”.⁶⁵ Donating entities, especially those affiliated with a government, need to ensure that they do not run afoul of their government’s own laws. If an NPO is found to have supported designated terrorists, the funding organization and its staff may face criminal penalties. To manage and mitigate risks associated with providing funds for humanitarian organizations’ work in higher-risk jurisdictions, donors require recipients to agree to prevent the diversion of funds to designated entities or affiliates.

Donor conditions data

To better understand the degree to which donor requirements affect the operations of humanitarian groups, the Yale Study asked a series of questions. 74% of respondents reported the inclusion of CT-related clauses in donor funding agreements, with 77% of those indicating that these clauses had become more onerous over the past three years.⁶⁶ A March 2021 study by VOICE also reported that 85% of the donors funding members’ activities in certain countries require clauses relating to sanctions and CT measures in their funding agreements.⁶⁷

In terms of impacts of donor conditions, more than 80% of respondents to the Yale Study reported that donor contractual clauses had affected their organization noticeably or significantly. The most frequently cited result was the introduction of new procedures, followed by funding delays, limits on areas where funds could be dispersed, and the transfer of risks to downstream partners (see Figure 6). The data demonstrate that donor contractual clauses related to CT are indeed widespread and impactful, and that they have grown consequential for NPOs in recent years.

Overall, donor conditions contribute to difficulties that the humanitarian sector faces by shifting risks from donors to recipients, requiring extra due diligence by NPOs, distorting relations between large and small humanitarian

64 E. O’Leary, above note 31.

65 Counterterrorism and Humanitarian Engagement Project, *An Analysis of Contemporary Counterterrorism-Related Clauses in Humanitarian Grant and Partnership Agreement Contracts*, Harvard Law School and Brookings Institution, May 2014, available at: http://blogs.harvard.edu/cheproject/files/2013/10/CHE_Project_-_Counterterrorism-related_Humanitarian_Grant_Clauses_May_2014.pdf.

66 Yale Study, above note 4.

67 G. McCarthy, above note 4. The countries are Syria, Lebanon, Mali, the Occupied Palestinian Territory, Venezuela, Afghanistan, Burundi, the CAR, the DRC, Haiti, Iraq, the DPRK, Somalia, South Sudan, Sudan, Turkey, Yemen, Iran, Myanmar, Ukraine, Zimbabwe, Egypt, Guinea, Guinea-Bissau, Bosnia and Herzegovina, Libya, Tunisia, Nicaragua and Russia.

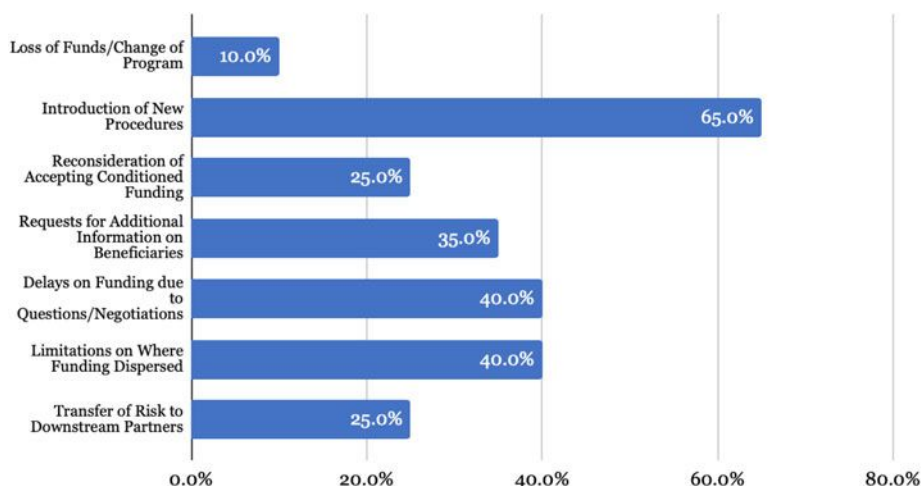


Figure 6. Impact of donor clauses. Source: Yale Study, above note 4.

groups, and promoting an environment of risk intolerance or avoidance. CT measures also appear to disadvantage smaller NPOs. The 2017 report *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security* noted that CT requirements make giving directly to grassroots organizations more difficult, as these organizations are viewed as less able to manage risks in sanctioned countries or where designated entities operate.⁶⁸

Moreover, humanitarian organizations consider CT/sanctions requirements to be lacking in clarity, specificity and consistency.⁶⁹ Uncertainty regarding these provisions and related donor requirements increases operational difficulties for NPOs, potentially leading to over-compliance. Some NPOs have even decided to forego government funds out of concern for liability and costs associated with such conditions. While some donors have provided unwritten assurances that NPOs will not be held liable for violations if proper risk mitigation measures are taken, NPOs report that, notwithstanding such assurances, auditors reviewing cases years later have held NPOs to account for violations.⁷⁰ Even with the best of intentions, donors' efforts to reassure recipients have failed to alleviate humanitarians' concerns regarding such conditions.

68 Duke Law International Human Rights Clinic and Women Peacemakers Program, *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security*, Durham, NC, 2017, available at <https://law.duke.edu/sites/default/files/humanrights/tighteningpursestrings.pdf>.

69 The NRC found that nearly half of respondents felt CT measures were unclear, and over 30% wanted more guidance from donors. See E. O'Leary, above note 31.

70 Abby Stoddard, Monica Czwarno and Lindsay Hamsik, *NGOs and Risk: Managing Uncertainty in Local-International Partnerships*, US Agency for International Development (USAID) and InterAction, Washington, DC, 7 March 2019, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/Risk-Global-Study.pdf>.

Offloading of risk

Overall, there is a strong view in the NPO community that donors are seeking to avoid risk-sharing via contractual clauses. InterAction has noted that “[m]any [international NPOs] interviewed observed that their national NPO partners are exposed to high levels of risk, often without support or training”.⁷¹ Humanitarian organizations deliver assistance and manage all the attendant risks while donors frequently offer neither guidance nor support. Evidencing this sentiment, one respondent to the Yale Study wrote that the NPO sector should push risks back to other stakeholders: “NPOs should not be the only ones taking on the risks, they should be shared.” Another asked for “greater risk-sharing between contracting agency and contractor/implementing partner”.⁷²

In many donor contracts, the risk burden on humanitarian actors is explicit and represents a wholesale offloading of risk onto NPOs. For example, the UK Foreign, Commonwealth and Development Office (FCDO) grant template⁷³ includes language stating that “the Partner is solely accountable for compliance with the provisions of this Arrangement including where the Partner engages any Downstream Partners”. This clause explicitly places the burden to ensure compliance on the recipient and fails to detail any obligations of support by the donor. The document further states that “the Partner will manage all risks in relation to this project unless otherwise agreed as part of the risk register and in writing with the Fund Manager”. This provision demonstrates the default position that recipients must manage risks without donor support. The reality may be more nuanced, but the example reaffirms perceptions that donors seek to offload risks onto NPOs and generally do not appear to be interested in risk-sharing. To address these concerns, the FCDO is engaged with NPOs in developing a new template for CT language for grant agreements, calling for more reasonable steps, increasing the use of comfort letters to support humanitarian projects, and streamlining due diligence requirements.⁷⁴

Donors disagree with NPOs’ contention that there is no risk-sharing, pointing to efforts to increase communications with smaller NPOs about risks and mitigation approaches. Some donors now consider the extra costs incurred by NPOs for risk management; the US Agency for International Development

71 Abby Stoddard, Katherine Haver and Monica Czwarno, *NGOs and Risk: How International Humanitarian Actors Manage Uncertainty*, InterAction, Washington, DC, February 2016, available at: www.interaction.org/wp-content/uploads/2019/03/ngos_and_risk_-_february_2016.pdf. See also Humanitarian Outcomes and InterAction, *NGO Risk Management: Principles and Promising Practice*, Washington, DC, 2 March 2021, available at: www.interaction.org/wp-content/uploads/2019/02/ngo_risk_management_-_principles_and_promising_practice.pdf.

72 Yale Study, above note 4. See also NRC, *Practical Guide: Project Cycle Management and Counterterrorism Risks*, Oslo, 20 March 2020, available at: www.nrc.no/resources/reports/practical-guide-project-cycle-management-and-counterterrorism-risks/.

73 UK FCDO, Accountable Grant Arrangement Template, available at: www.ukaiddirect.org/wp-content/uploads/2020/05/FCDO-Accountable-Grant-Template_UKAD3-and-JCMG-Network_September-2020_web.pdf.

74 Based on discussions between the author and humanitarian organizations and officials subject to the Chatham House rule.

(USAID) allows for the inclusion of negotiated indirect cost rate agreements as part of approved reimbursable expenses under grants. NPO risk management efforts, especially the development of organizational principles, can be categorized as an indirect cost, providing an example of donor support for covering some of the costs associated with NPOs' risk management efforts.⁷⁵

In response to NPO concerns about excessive screening requirements, the Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO) has, as of 2021, included new provisions in its grant agreements that explicitly exclude the vetting of final beneficiaries. The language states:

The need to ensure the respect for EU restrictive measures must not ... impede the effective delivery of humanitarian assistance to persons in need in accordance with the humanitarian principles and international humanitarian law. Persons in need must therefore not be vetted.⁷⁶

All other individuals and entities – staff, partners, suppliers – will continue to be required to be screened.⁷⁷

Finally, donor conditions pose dilemmas for NPOs by potentially conflicting with fundamental humanitarian principles of providing assistance based on need, irrespective of whether someone is a designated entity. CT provisions prohibiting interaction with certain individuals or groups or requiring screening of beneficiaries are inconsistent with humanitarian actors' obligations under IHL. As one NPO noted, donor requirements often prohibit "direct or indirect contact" with designated groups – but in certain areas, it may be impossible to access populations in need without risk of interaction with a designated group. To avoid conflicts between IHL principles and donor obligations, some humanitarian organizations choose to discontinue operations, leaving needy people without assistance.⁷⁸

Complications arising from donor conditions in funding agreements⁷⁹

USAID requires each of its award recipients to sign an anti-terrorism certification (ATC) and the Standard Provision on Preventing Transactions

75 USAID, *An Indirect Cost Rate Guide for Non-Profit Organizations*, Washington, DC, 2016, p. 9, available at: www.usaid.gov/sites/default/files/documents/1868/OCC_A_Guidefor_NonProfit_Indirect_CostRate_Oct31_16_Version1.01.pdf; USAID, "Infographic: Negotiated Indirect Cost Rate Agreement (NICRA)", available at: www.usaid.gov/work-usaid/resources-for-partners/indirect-cost-rate-guide-non-profit-organizations.

76 DG ECHO, "Sanction Clauses", 2021, available at: www.dgecho-partners-helpdesk.eu/sanctions/sanction-clauses.

77 DG ECHO, "The Humanitarian Aid Model Grant Agreement (HA MGA) for NGOs", 2021, available at: www.dgecho-partners-helpdesk.eu/ngo/the-humanitarian-aid-model-grant-agreement-ha-mga-for-ngos.

78 E. O'Leary, above note 31, p. 20.

79 This box is based on examples provided in the Yale Study, above note 4.

with, or the Provision of Resources or Support to, Sanctioned Groups and Individuals (Standard Provision).⁸⁰ The following is long-standing language from the ATC which has proven problematic:

The Recipient, to the best of its current knowledge, did not provide, within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide, material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated, or participated in terrorist acts.⁸¹

The phrase “all reasonable steps” is not defined, contributing to NPOs’ discomfort over the lack of clarity. A commentator to one study remarked that, generally, the meaning of this clause is vague and can encompass a broad swathe of actions.⁸² While this leeway can be beneficial in that it provides flexibility to NPOs in structuring their operations, it also opens NPOs to the risk of misinterpreting obligations that, if breached, could result in serious consequences.⁸³

Donor conditions in CT clauses can also lead to legal action. In 2018, USAID alleged that Norwegian People’s Aid (NPA) had violated the above ATC clause because its programming in Iran and Gaza led to the provision of some assistance to a designated terrorist group. NPA signed the ATC in reference to its work in South Sudan, and not Iran or Gaza, but eventually acceded to USAID’s claims.⁸⁴ The dispute demonstrates the breadth of the ATC and how the lack of clarity regarding scope and interpretation of its provisions can lead to problems for NPOs. The ten-year stipulation referred to above has also opened up NPOs to legal action: it was used by the Zionist Advocacy Center to argue that a USAID grant recipient had violated the ATC as the recipient had previously provided material support to groups designated as terrorist in Palestine.⁸⁵

The ATC provision cited above, along with others in the ATC and the Standard Provision, was revised in 2020 after engagement between the NPO sector and USAID.⁸⁶ The ATC now requires recipients to “not, within the previous three years, knowingly engage in transactions with, or provide material support or resources to, any individual or entity who was, at the time, subject to sanctions administered by the OFAC [Office of Foreign Assets

80 Charity & Security Network, “USAID Revises Grantee Documents relating to Anti-Terrorism Requirements”, 21 May 2020, available at: <https://charityandsecurity.org/news/usa-id-revises-grantee-documents-relating-to-anti-terrorism-requirements/>.

81 NRC, above note 72.

82 Counterterrorism and Humanitarian Engagement Project, above note 65.

83 K. Mackintosh and P. Duplat, above note 41.

84 NRC, above note 72.

85 Charity & Security Network, above note 80.

86 *Ibid.*

Control]”.⁸⁷ According to the Charity and Security Network, these revisions increase clarity by stipulating that violations must involve recipients knowingly engaging with designated groups, rather than the more unclear standard of “to the best of its current knowledge”.⁸⁸ While they are positive steps, these changes are unlikely to resolve the broader concerns of NPOs discussed above.

In summary, donor conditions related to CT and sanctions pose substantial challenges for NPOs. The lack of clarity and certainty in contractual clauses, inconsistency with humanitarian principles and offloading of risk onto NPOs by donors increase the difficulties that NPOs face in delivering humanitarian assistance in sanctioned countries or areas in which designated groups operate or control territory.

Initiatives to address humanitarian challenges

Over the past five years there has been increasing recognition of the challenges that humanitarian and other non-profit organizations face related to sanctions and CT measures. The sheer volume of research, reports, webinars, surveys and anecdotal examples NPOs have raised regarding the effects on humanitarian action has begun to have an impact. Even while government officials voice scepticism and continue calls for “evidence” of direct impact of CT/sanctions policies on humanitarian action, a growing number of policy fora are acknowledging humanitarian concerns and responding.⁸⁹

Stakeholder dialogues

In 2020, the UN Global Counter-Terrorism Forum (GCTF) launched the Initiative on Ensuring the Implementation of Countering the Financing of Terrorism Measures while Safeguarding Civic Space, engaging a wide range of stakeholders, including policy-makers, CFT practitioners, civil society organizations, human rights defenders and humanitarian actors. The effort focused on fostering linkages and dialogue among stakeholders to ensure that CFT policies and practices do not negatively affect civic space, human rights or humanitarian action. Co-led by the Netherlands, Morocco and the UN Office of Counter-Terrorism, and implemented by the Global Center on Cooperative Security, the GCTF convened a series of global consultations and expert-level workshops to identify lessons and

87 USAID, “Certifications, Assurances, Representations, and Other Statements of the Recipient”, May 2020, available at: www.usaid.gov/sites/default/files/documents/1868/303mav.pdf.

88 Charity & Security Network, above note 80.

89 In the author’s experience, requests for evidence of impact of CT policies on humanitarian action are routine aspects of engagement of NPOs with member States and international organizations, although overt scepticism is rarely on the record. What constitutes adequate evidence varies and is subject to opinion.

develop a GCTF Good Practice Memorandum which was endorsed by GCTF members and released to the UN community in October 2021.⁹⁰ Several of the work streams addressed issues of specific concern to humanitarian actors: CFT legal and policy frameworks, de-risking and financial access challenges, and multi-stakeholder dialogues. Endorsed good practices include applying CFT measures consistent with States' obligations under international law, including IHL; enhancing reporting on the impacts of CFT measures on NPOs and humanitarian actors; protecting principled humanitarian action through safeguards in CT sanctions; and considering the potential effects of CFT measures on exclusively humanitarian activities.

National-level stakeholder dialogues are under way in several countries. In the United Kingdom, the Tri-Sector Working Group is a mechanism for dialogue between the UK government, international non-governmental organizations (INGOs) and FIs for resolving practical issues arising from INGOs working in high-risk jurisdictions and for banks who facilitate that work.⁹¹ As a result of dialogue which began in 2018, the Working Group documented evidence of the problems faced by INGOs and was successful in getting the UK government to agree to address these problems. The concept was originated through the formal recommendation of the Independent Reviewer of Terrorism Legislation, David Anderson QC, that "a dialogue be initiated to explore how to achieve the objectives of anti-terrorism law without unnecessarily prejudicing NGO's ability to deliver humanitarian aid and peace-building in parts of the world where designated and proscribed groups are active".⁹²

As discussed in the article by Lia van Broekhoven and Fulco van Deventer of the HSC in this issue of the *Review*, the Netherlands has been a leader in multi-stakeholder dialogues aimed at addressing financial access challenges. Under the leadership of the HSC as far back as 2014, meetings have been organized to discuss the experiences of Dutch NGOs and the requirements and concerns of FIs in order to explore possible solutions for Dutch stakeholders. In 2020, the Roundtable on De-Risking and Access to Financial Services for Non-Profit Organizations was formalized through an agreement of the Dutch Ministry of Finance and Ministry of Foreign Affairs, the HSC and the Dutch Association of Banks. The objective of the Roundtable is to create and maintain a confidential consultation structure in which the involved stakeholders can exchange information about the effects that NPOs experience as a result of CT financing measures to high-risk areas and sanctioned countries.

90 See Global Counterterrorism Forum, *Good Practices Memorandum for the Implementation of Countering the Financing of Terrorism Measures while Safeguarding Civic Space*, September 2021, available at: <https://tinyurl.com/yckzvm48>.

91 For information on the Tri-Sector Working Group, see Teresa Dumasy, "Balancing Risk and Benefit: Bank De-Risking and the Work of NGOs", August 2018, available at: www.c-r.org/news-and-insight/balancing-risk-and-benefit-bank-de-risking-and-work-ngos.

92 David Anderson, "The Independent Review of UK Terrorism Law," *New European Journal of Criminal Law*, Vol. 5, No. 3, 2014, p. 434.

In the United States, the World Bank and the Association of Certified Anti-Money Laundering Specialists (ACAMS) organized in 2017 the Stakeholder Dialogue on De-Risking with participants from government (policy, regulatory and law enforcement authorities), international organizations, FIs and NPOs to discuss the difficulties that humanitarian organizations and charities were experiencing with financial access.⁹³ The objectives were to foster greater understanding between NPOs, FIs and government, improve the regulatory and policy environment, and develop tools to facilitate information-sharing. Specific work streams were organized to develop standardized lists of information that banks require to conduct due diligence on NPO customers; clarify regulatory requirements and risk guidance, specifically through revision of the *BSA/AML Examination Manual* to implement FATF Recommendation 8;⁹⁴ explore technological solutions to facilitate NPO transfers to areas of higher risk and help lower FIs' compliance costs in providing banking services to NPOs (e.g. NPO KYC utility, e-credits, blockchain); and promote greater understanding of NPOs and broader financial access challenges through online resources and outreach. While reports and proposals were developed and the dialogue proved successful in promoting greater understanding between NPOs and banks, the effort was suspended due to a lack of engagement by US government agencies.⁹⁵

In autumn of 2021, however, continued concerns by NPOs along with renewed interest in this set of issues by the Biden administration led to the establishment of the Multi-Stakeholder Financial Access Working Group by the Center for Strategic and International Studies.⁹⁶ This renewed stakeholder dialogue seeks to promote greater understanding and trust among stakeholders in order to address de-risking/financial access challenges affecting humanitarian action; provide a forum for stakeholders to collaboratively explore practical options to address de-risking trends and manage risk associated with operating in high-risk jurisdictions; and develop proposals for ways in which the US

93 World Bank Group, *Stakeholder Dialogue on De-Risking: Supporting Financial Access for Humanitarian Organizations and Charities*, Washington, DC, February 2017, available at: <https://tinyurl.com/2p92e9pj>. The author participated in the first meeting and then became a consultant to the World Bank to help manage the multi-stakeholder process. See also the report of the successor initiative, the Consortium for Financial Access, *Banking Nonprofit Organizations—the Way Forward*, June 2019, available at: <https://tinyurl.com/yckmbn4p>. This report reflects many of the findings of the World Bank/ACAMS initiative.

94 A proposal was developed by NPOs and financial institutions as part of the World Bank/ACAMS dialogue and presented to the Federal Financial Institutions Examination Council in October 2017 to revise the NGO Section of the *BSA/AML Examination Manual*. No revision of the Manual has been made, but the US Office of the Comptroller of the Currency released a fact sheet in November 2020. See Office of the Comptroller of the Currency, "Joint Fact Sheet on Bank Secrecy Act Due Diligence Requirements for Charities and Non-Profit Organizations", 19 November 2020, available at: www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-155a.pdf.

95 Ministry of Finance of the Netherlands, World Bank Group and HSC, *International Stakeholder Dialogue: Ensuring Financial Services for Non-Profit Organizations*, The Hague, 15 February 2018, available at: www.hscollective.org/assets/Final-Report_Feb-15.pdf.

96 For more information on the Working Group, see Center for Strategic and International Studies, "Humanitarian Agenda", 2021, available at www.csis.org/programs/humanitarian-agenda. The author is affiliated with the Humanitarian Agenda and is a manager of the Working Group.

government can help NPOs to manage terrorism financing, export control and sanctions risks while enabling principled humanitarian, peacebuilding and sustainable development programmes to flourish.

In 2019–20, the Swiss government sponsored a series of technical meetings known as the Compliance Dialogue on Syria-Related Humanitarian Payments,⁹⁷ which resulted in the publication of the *Risk Management Principles Guide for Sending Humanitarian Funds into Syria and Similar High-Risk Jurisdictions*.⁹⁸ The Guide provides background information and practical tips on how banks, humanitarian organizations and donors can work together to ensure that aid can reach civilians in need of assistance within Syria, in a manner which is compliant with EU/US/UN sanctions and wider regulatory obligations.

In 2020, ACAMS, the largest international membership organization dedicated to enhancing the knowledge, skills and expertise of AML/CTF, sanctions and other financial crime prevention professionals, established the International Sanctions Compliance Task Force to facilitate dialogue among sanctions specialists and subject-matter experts across a wide range of sectors.⁹⁹ Of particular note, in early 2021, the Humanitarian-Sanctions Technical Dialogue Forum was formed to promote public/private discussion on risk management of permissible humanitarian transactions into highly sanctioned jurisdictions.¹⁰⁰ The Forum includes participants from the financial sector, global corporations, international organizations, member States, humanitarian actors and sanctions regulatory authorities; it is led by Dr Justine Walker, head of global sanctions and risk at ACAMS, and co-chaired by representatives of the World Bank and European Commission.¹⁰¹ Following an initial focus on Yemen, Syria and Iran, the Forum is addressing how relevant actors can work within existing legal frameworks (sanctions regimes, national legislation, administrative procedures etc.) to promote viable, safe and transparent payment channels in support of international humanitarian activity involving highly sanctioned jurisdictions, with efforts in autumn 2021 specifically focused on the humanitarian situation in Afghanistan.

In addition, the French government has committed to a tripartite dialogue between bank representatives, the government (Ministry of Finance and Ministry of Foreign Affairs) and some NGOs; humanitarian actors have been calling for this dialogue since 2017. In response to NGOs' concerns around over-compliance by

97 Graduate Institute Geneva, "The Compliance Dialogue on Syria-Related Humanitarian Payments", 29 May 2020, available at: www.graduateinstitute.ch/communications/news/compliance-dialogue-syria-related-humanitarian-payments.

98 Justine Walker, *Risk Management Principles Guide for Sending Humanitarian Funds into Syria and Similar High-Risk Jurisdictions*, May 2020, available at: <http://files.acams.org/pdfs/2020/The-Risk-Management-Principles-Guide-for-Sending-Humanitarian-Funds-into-Syria-and-Similar-High-Risk-Jurisdictions.pdf>.

99 ACAMS, "The ACAMS International Sanctions Compliance Task Force", 2021, available at: www.acams.org/en/sanctions#thought-leadership-6b2e9de0.

100 ACAMS Sanctions Space, "Public Statement: ACAMS International Sanctions Compliance Task Force: Humanitarian-Sanctions Technical Dialogue Forum", 1 March 2021, available at: www.acams.org/en/media/document/16941.

101 The author currently co-chairs the ACAMS Humanitarian-Sanctions Technical Dialogue Forum.

banks with regulations related to CFT and sanctions, a round table was organized as part of the National Humanitarian Conference in December 2020.¹⁰² President Macron announced that practical solutions would be advanced within six months, including guidelines on “good banking practices” and procedures for requesting exemptions so that “the NGOs and the banks’ compliance departments can stabilise, structure and secure these financing channels without putting the NGOs and the banks at risk”.¹⁰³ Numerous meetings organized between French NGOs and banks have reportedly addressed some aspects of the issues involved, but banks remain reluctant to address financial access-related issues. France, as president of the Council of the European Union for the first half of 2022, announced plans for a European Humanitarian Forum in early 2022, including a session focused on the impact of sanctions on humanitarian aid and the issue of bank de-risking.¹⁰⁴

Stakeholder dialogues are also reportedly being organized or have taken place in Germany, Sweden and the Czech Republic, while discussions regarding the establishment of a potential stakeholder engagement with the EU in Brussels and the UN in New York are ongoing.

All of these discussion fora have been important in promoting greater understanding among stakeholders of mutual perspectives, and generally have resulted in better working relationships among participants, especially between NPOs and FIs. However, concrete progress in addressing the underlying problems that humanitarian actors face has been lacking. Notwithstanding the considerable efforts that have been devoted to these stakeholder dialogues, humanitarian groups and FIs remain frustrated by the absence of specific action to help remedy the financial access challenges they continue to encounter.

Increasing attention to the need to safeguard humanitarian action, and opportunities for action

Within UN bodies, there is a growing acknowledgement that humanitarian groups and other NPOs have been affected adversely by CT measures and sanctions. Numerous meetings at the UN have been organized calling for enhanced protection of humanitarian actors and action. In April 2019, Germany and France announced a “call to action” to strengthen respect for IHL and principled humanitarian action;¹⁰⁵ this was presented to the UNSC in September 2019, with

102 Défis Humanitaires, “The National Humanitarian Conference 2020: Undeniable Advances in the Field of Law”, 8 March 2021, available at: <https://defishumanitaires.com/en/tag/national-humanitarian-conference/>. See also Ministry of Europe and of Foreign Affairs of France, “National Humanitarian Conference: A Forum for Dialogue Bringing Together all Humanitarian Stakeholders”, 17 December 2020, available at: www.diplomatie.gouv.fr/en/french-foreign-policy/emergency-humanitarian-action/news/article/national-humanitarian-conference-a-forum-for-dialogue-bringing-together-all.

103 G. McCarthy, above note 4.

104 European Commission, “European Humanitarian Forum”, 2021, available at: https://humanitarian.forum.europa.eu/index_en.

105 Federal Foreign Office of Germany, “Protecting Humanitarian Aid Workers: Germany and France in the UN Security Council”, 1 April 2019, available at: www.auswaertiges-amt.de/en/aussenpolitik/themen/humanitarianassistance/security-council-humanitarian-assistance/2206470.

the support of forty-eight member States and the EU, with the aim of identifying concrete commitments that member States can make to better protect humanitarian space.¹⁰⁶

On 16 July 2021, the UNSC held a ministerial meeting on the “Protection of Civilians in Armed Conflict”,¹⁰⁷ and on 11 August 2021, an Arria-Formula Meeting on “Humanitarian Action: Overcoming Challenges in Situations of Armed Conflict and Counter-Terrorism Operations” was convened.¹⁰⁸ The EU, together with France, Germany, Mexico, Niger, Norway and Switzerland, organized a series of discussions in New York from March to June 2021 focused on “Ensuring the Protection, Safety, and Security of Humanitarian Workers and Medical Personnel in Armed Conflicts”; the objective was to identify the main challenges for humanitarian and medical workers in armed conflicts and to explore practical solutions that can be adopted by the international community.¹⁰⁹ Many side meetings have also been convened on the topic of CT and humanitarian action, such as the International Peace Institute’s (IPI) session of 24 June 2021, entitled “Safeguarding Humanitarian Action in Counterterrorism Contexts: Addressing the Challenges of the Next Decade”, and a working round table of all stakeholders on 4–5 February 2021 focused on safeguarding humanitarian action in the 1267 regime.¹¹⁰

In addition to events drawing public attention to the challenges that humanitarians face, UNSC Resolution 2462 explicitly addressed the broad set of issues through language calling on member States to “ensure that measures taken to counter the financing of terrorism ... comply with their obligations under international law, including international humanitarian law”.¹¹¹ This language was reflected in the 7th Global Counter-Terrorism Strategy adopted in June 2021, noting that member States need to “take into account ... the potential effect of [CT] measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law”.¹¹² The Strategy also urges States to ensure that “counter-terrorism legislation and measures do not impede humanitarian and

106 Ministry of Europe and of Foreign Affairs of France, “The Call for Humanitarian Action: A Call for Action to Bolster Respect for International Humanitarian Law”, 21 September 2021, available at: www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/multilateralism-a-principle-of-action-for-france/the-call-for-humanitarian-action/.

107 UNSC, *Protections of Civilians in Armed Conflict*, UN Doc. S/PV.8822, 16 July 2021, available at: <https://tinyurl.com/mr3e3t79>.

108 “Security Council: Overcoming Challenges in Situations of Armed Conflict and Counter-Terrorism Operations”, *UN Web TV*, 11 August 2021, available at: <https://media.un.org/en/asset/k1p/k1pikud42f>.

109 European Union, France, Germany, Mexico, Niger, Norway and Switzerland, *Discussion Series: Ensuring the Protection, Safety and Security of Humanitarian Workers and Medical Personnel in Armed Conflicts*, 2021, available at: https://eeas.europa.eu/sites/default/files/outcome_document_-_discussion_series.pdf.

110 IPI, “Safeguarding Humanitarian Action in Counterterrorism Contexts: Addressing the Challenges of the Next Decade”, 24 June 2021, available at: www.ipinst.org/2021/06/safeguarding-humanitarian-action-in-counterterrorism-contexts#6.

111 As cited at above note 32.

112 UNGA Res. 75/291, 30 June 2021, para. 60.

medical activities or engagement with all relevant actors as foreseen by international humanitarian law”.¹¹³

Welcoming these changes as positive steps, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism noted that CT measures and sanctions “play a central role in impeding humanitarian action” and that “statements of principle are not sufficient to actively protect the integrity of humanitarian action and actors working in areas where designated groups are active”. Accordingly, she proposed recommendations to protect humanitarian action.¹¹⁴

Throughout 2021, some members of the UNSC consistently proposed the inclusion of humanitarian language in resolutions renewing the mandates of sanctions regimes. Drawing on language from previous resolutions, including Resolution 2462, new language was added to resolutions renewing sanctions in the CAR, DRC and Mali regimes. For example, Resolution 2582 on the DRC included new language stressing that the sanctions are “not intended to have adverse humanitarian consequences for the civilian population of the DRC” and demanding that all measures taken by States to implement sanctions “comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, as applicable”.¹¹⁵ Reportedly, proposals to include a humanitarian carve-out in various sanctions regimes did not receive support.

At the end of 2021, the Security Council had opportunities to adopt new measures protecting humanitarian activities in various resolutions. Mandates of the 1267 sanctions, the 1267 and 1988 (Taliban) Monitoring Teams and the Counter-Terrorism Executive Secretariat (CTED) were addressed in December 2021, but none contained significant measures advancing the consideration of humanitarian assistance.¹¹⁶ The IPI, as part of its project on sanctions and humanitarian action, hosted a series of stakeholder meetings and consultations during 2021 in preparation for the UNSC’s consideration of the renewal for the 1267 sanctions regime and prepared options for language protective of humanitarian action in a policy brief.¹¹⁷ During the negotiations for UNSC Resolution 2610 renewing the 1267 sanctions, nearly half of the members indicated support for a humanitarian carve-out, but it was not included in the final version.

As a result of the Taliban’s takeover of Afghanistan on 15 August, however, the primary locus of discussions within the UNSC of humanitarian carve-outs shifted to the 1988 (Taliban) regime. The complications that long-standing UN

113 *Ibid.*, para. 109.

114 UN Human Rights Special Procedures, above note 35.

115 UNSC Res. 2582, 29 June 2021.

116 UNSC, “December 2021 Monthly Forecast”, *Security Council Report*, 30 November 2021, available at: www.securitycouncilreport.org/monthly-forecast/2021-12/counter-terrorism-9.php.

117 IPI, *Options to Safeguard Humanitarian Action in the 1267 UN Sanctions Regime*, December 2021. Recommendations in the following section are based in part on IPI discussions about ways to strengthen the protection of humanitarian actors and respect for IHL in sanctions regimes.

sanctions on members of the Taliban pose for the delivery of urgently needed humanitarian assistance focused the Council's attention on the need for a humanitarian exception to the financial sanctions.

Afghanistan: Exemplar of the challenges that humanitarian actors face from sanctions/CT/de-risking measures

The most recent and consequential archetype of the challenges that humanitarian actors routinely experience related to sanctions, CT measures and financial access is epitomized in the humanitarian crisis unfolding in Afghanistan as a result of the 15 August 2021 Taliban takeover.

Even before the Taliban's return to power, Afghanistan was experiencing one of the worst humanitarian crises in the world. Decades of conflict, the COVID-19 pandemic, climatic changes and the 2021 drought had left the country in a precarious situation – it was largely dependent on foreign assistance, with 50% of its GDP provided by donors. When the Taliban took control of the Afghan government and appointed interim leaders, nearly two dozen of the country's ministries became headed by Taliban members subject to long-standing UN sanctions under the 1988 regime.¹¹⁸

UN sanctions prohibit member States from providing any “funds, financial assets and economic resources” to designated parties, raising questions as to whether entire ministries or even the government of Afghanistan are sanctioned. While the United States authorized general licenses for the delivery of humanitarian assistance for basic human needs in late September and December, other member States (such as the UK, Australia and the EU) indicated that they could not issue derogations to UN sanctions without an explicit humanitarian exception in a UNSC resolution.

Although many NGOs continued assistance in Afghanistan, the complications of sanctions have become overwhelming, leading the humanitarian community to call for a carve-out from the 1988 sanctions. In a statement to the UNSC Special Joint Meeting on terrorist financing threats and trends and the implementation of UNSC Resolution 2462, Ms Laetitia Courtois, ICRC permanent observer to the UN, stated: “Today we are calling for a clear carve-out in the 1988 sanctions regime for impartial humanitarian organizations engaged in exclusively humanitarian activities, and for its translation into

118 The 1988 regime targets individual members of the Taliban (but not the Taliban itself) and consists of 135 individuals plus five entities (including the Haqqani Network and four *hawaladars*). At least four members of the Haqqani Network are in charge of Afghan ministries (Interior, Telecommunications, Higher Education and Refugees). See UN, “Security Council Committee Established Pursuant to Resolution 1988 (2011)”, 2021, available at: www.un.org/securitycouncil/sanctions/1988.

domestic legislation. The situation in Somalia in 2010 led to a carve-out in that regime, and the need for doing so for Afghanistan now exists.”¹¹⁹

On 22 December 2021, after weeks of difficult negotiations, the Council unanimously adopted UNSC Resolution 2615 creating a standing exception for humanitarian assistance and other activities that support basic human needs in Afghanistan. It is not time-limited and does not include the onerous reporting requirements about which NGOs were concerned. The carve-out is essential in providing legal protection for humanitarian activities in Afghanistan, and significant in explicitly permitting “the processing and payment of funds, other financial assets or economic resources, and the provision of goods and services necessary to ensure the timely delivery of such assistance or to support such activities”.¹²⁰ Even with the humanitarian exception, however, FIs demonstrate ongoing reluctance in handling payments concerning Afghanistan, in part because of the complicated interaction between UN sanctions and US domestic sanctions that target the Taliban as a group. Continuing problems that humanitarian actors (including UN agencies) face moving funds into the country make the development of safe payment channels even more vital to ensure that humanitarian assistance reaches the nearly 18 million Afghans at risk of starvation this winter.

Policy recommendations to address humanitarian challenges

The following section provides recommendations for ways to address the range of challenges that humanitarian organizations encounter in sanctioned jurisdictions and areas controlled by 1267-designated groups.

Safeguarding humanitarian action in UN sanctions and CT regimes through the adoption of legal protections

Given the impact of sanctions and CT measures on humanitarian activities and uncertainty and risk that NPOs face in sanctioned jurisdictions or areas where designated groups operate, clear legal safeguards enshrined in UNSC resolutions are necessary to protect humanitarian action and actors.

1. The UNSC should adopt resolutions excepting impartial humanitarian assistance from UN sanctions and counterterrorism measures. A range of options for safeguarding humanitarian action are possible either through amendment of the

119 ICRC, “International Committee of the Red Cross Calls for Humanitarian Carve-Out in UN Security Council 1988 Afghanistan Sanctions Regime”, 19 November 2021, available at: www-icrc-org.cdn.ampproject.org/c/s/www.icrc.org/en/document/international-committee-red-cross-calls-humanitarian-carve-out-un-security-council-1988?amp.

120 UNSC Res. 2615, 22 December 2021.

1267 regime or by separate UNSC decisions. The boldest action would be to create a standing exception for impartial humanitarian assistance from all counterterrorism and sanctions measures.¹²¹

- A. *Adopt a Chapter VII resolution explicitly excepting principled humanitarian activities from the scope of all UN sanctions and counterterrorism measures.* UNSC adoption of a standing humanitarian exception for impartial humanitarian actors from UN sanctions and counterterrorism measures represents the most effective way to protect humanitarian assistance. Such an exception would clarify that NPOs providing principled humanitarian assistance are free of risk of sanctions or CT violations, ensuring uniform treatment of NPOs (not just those that are implementing partners of the UN), as is the case in the Somalia sanctions regime. As the most ambitious option, this would likely be opposed by P5 States as creating risks of aid benefitting sanctioned entities and failing to differentiate risk in different geographic areas. In some States, it would likely require legislative changes and changes of national policies to implement general licenses and derogations.
- B. *Adopt a humanitarian exception in the 1267 sanctions regime.* The second option introduces into the 1267 regime an exception along the lines of the current humanitarian carveout in the Taliban and Somali sanctions regimes. The scope could be limited to UN implementing partners (as in Somalia) or expanded to the broad range of groups providing humanitarian assistance (as in the Taliban regime). Limiting the exception to 1267 sanctions (and not broader UN CT measures) would address some problems that humanitarian actors face when implementing programmes in areas where designated groups operate, but would not resolve the ambiguities of Resolution 1373 prohibitions. Relying on the precedent of the Somali exception, which has worked well in alleviating burdens on humanitarian actors, is consistent with UNSC practice, but some member States would be concerned for the broad application of the exception, arguing that circumstances differ by location, group, and other factors unique to each situation. A similar proposal was made during the most recent negotiations for the 1267 mandate, and while at least seven member States were reportedly supportive of the carve-out, it was opposed by P5 members.
- C. *Adopt a humanitarian exemption process for the 1267 sanctions regime.* Based on procedures currently utilized in the DPRK sanctions regime, this option would authorize NPOs and States to apply for humanitarian exemptions on a case-by-case basis. Because of the problems associated with exemptions previously elaborated – i.e., they are complex, time-consuming, limited,

121 The High Level Review of United Nations Sanctions (HLR) recommended standing exemptions for UN humanitarian actors and implementing partners. Note that under the definition applied in this article, the intent of the HLR was for an exception, but the distinction was not made between exception/exemption at the time. See Brown University Watson Institute and Compliance & Capacity Skills International, *Compendium: High Level Review of United Nations Sanctions*, New York, November 2015, available at: www.onpcsb.ro/pdf/HLR_Compendium_2015.pdf.

uncertain and costly – this option is not recommended and is not preferred by humanitarian providers.

2. The UNSC should:

- A. *Clarify overly broad and vague terms that impede humanitarian action.* The Council should modify the definition of “funds, financial assets and economic resources” to exclude payments and transfers for impartial humanitarian activities, as well as clarifying “material support” to designated groups, “services” and “assistance to” or “association with” “terrorist” organizations in order to address the criminalization of humanitarian activities. Measures aimed at criminally repressing acts of terrorism should be crafted so as not to impede humanitarian action and so as to distinguish between the legal frameworks governing IHL and terrorism.
- B. *Create a UN mandate and mechanism for routine assessment and reporting on the impact of sanctions and CT measures on humanitarian action.* The Council should establish a mandate and provide resources for formal consultation with humanitarian agencies and organizations, as well as regular assessments of any adverse impacts of sanctions and CT measures on humanitarian action. CTED prepared a report, as part of the implementation of Resolution 2462, concerning how CT measures affect humanitarian actors,¹²² but there is no formal process for conducting such assessments on an ongoing basis. Responsibility for this mandate could be given to existing UN entities (such as the 1267 Monitoring Team, OCHA or CTED), with the Monitoring Team being the most logical entity to assume such tasks; resources would need to be allocated to ensure implementation. Alternatively, a new entity within the UN bureaucracy could be created as a focal point for NPOs to report on the impact of sanctions and CT measures and to provide regular updates to the UNSC, perhaps as part of sanctions committees’ mandate renewals.
- C. *Incorporate in all sanctions regimes and CT measures the requirement for member States to comply with international law, including IHL, international human rights law and humanitarian principles in carrying out UN requirements.* All sanctions resolutions should include language clarifying that the measures are not intended to affect humanitarian activities and that member States’ implementation must comply with IHL.¹²³ Additional measures should also be incorporated into sanctions regimes requiring member States to take steps to mitigate the potential effects of sanctions on humanitarian activities.

122 Released in January 2022, *The Interrelationship between Counter-Terrorism Frameworks and International Humanitarian Law* is significant in that it is the first UN CT body to acknowledge and address the impact of terrorism and CT measures on humanitarian action. Available at: www.un.org/securitycouncil/ctc/sites/www.un.org/securitycouncil.ctc/files/documents/2022/Jan/cted_ihl_ct_jan_2022.pdf.

123 Language previously included in other UNSC resolutions could be used, such as the language included in the sanctions regimes for the DPRK, CAR, DRC and Mali, as well as UNSC Res. 2462.

Bank de-risking and financial access challenges

Data discussed in this article reaffirm that financial access remains a serious and systemic challenge for NPOs that must be recognized and addressed as an impediment to humanitarian action.

1. Convene stakeholder dialogues at the national and international levels to address financial access challenges faced by NPOs. To enhance understanding by banks and governments of NPOs' needs, and by NPOs of regulatory requirements and expectations by governments and banks, sustained engagement and interaction among all stakeholders – governments (regulators, donors, policy and enforcement agencies), humanitarian organizations and FIs – is necessary. All stakeholders must recognize humanitarian assistance as a priority and take steps to work together for a shared view that ensures balance between mitigating sanctions and CT risks and the ability to support movement of funds necessary to deliver humanitarian assistance.

Moreover, there is a need for greater discussion of these issues on an international basis. Numerous multilateral fora address aspects of financial access challenges, but there is no existing forum or systematic discussion for stakeholders to compare experiences and jointly explore potential solutions. Options for an international stakeholder forum on de-risking and humanitarian activities should be explored.

2. Develop safe payment channels for humanitarian transactions. When FIs are not able to meet the needs of NPO customers doing humanitarian work in high-risk jurisdictions, new mechanisms to facilitate the transfer of funds into such areas may be necessary. International institutions such as the UN or World Bank, central banks, or even national embassies in conflict regions could be potential channels for securely delivering humanitarian funds. Such options may be complicated in terms of ensuring compliance with sanctions and preventing diversion, but concerted efforts by like-minded governments, banks and NPOs, and international organizations are likely the only option to provide humanitarian assistance to regions where need is greatest but where banks will not go without special assurances. The situation in Afghanistan is a case in point in which even with a humanitarian exception, financial institutions remain hesitant to transfer funds. OCHA, together with the World Bank, is working to set up a humanitarian exchange facility that will facilitate local cash in-country to support humanitarian operations while allowing legitimate commercial entities to pay for imports – something that has been nearly impossible due to the cash liquidity crisis.¹²⁴

124 David Ignatius, "How the U.S. Is Helping Vulnerable Afghans without Recognizing the Taliban", *Washington Post*, 18 January 2022, available at: <https://www.washingtonpost.com/opinions/2022/01/18/how-us-is-helping-vulnerable-afghans-without-recognizing-taliban/>.

For NPOs that have lost their accounts entirely, a public entity such as a government or a regional development bank could provide a means of facilitating the movement of funds into high-risk areas, even on an emergency basis, and could put risk management procedures in place. Other proposals include the creation of special banks devoted to humanitarian activities.

3. Explore incentives for financial institutions to provide banking services to NPOs. Stakeholders should develop a menu of measures to incentivize banks to keep NPOs' accounts and encourage efforts to engage with NPOs. Monetary incentives, such as tax credits, and reputational incentives, such as recognizing FIs who engage in – rather than avoid – effective risk management of NPOs and other customers perceived as high-risk, should be explored.

4. Create a “safe harbour” for inadvertent violations related to humanitarian transfers. Another means of incentivizing banks to take on humanitarian clients is to provide relief from enforcement actions to FIs who provide banking services to NPOs in good faith and meet certain criteria should inadvertent violations take place. Adopting a safe harbour would give US banks confidence that they can do business with higher-risk customers and regions, provided they maintain rigorous risk mitigation controls.

To provide greater assurance to NPOs, the US sanctions regulatory agency OFAC adopted a policy in 2014 recognizing the inherent risks that humanitarian actors face operating in conflict areas: “In circumstances involving a dangerous and highly unstable environment combined with urgent humanitarian need, OFAC recognizes that some humanitarian assistance may unwittingly end up in the hands of members of a designated group. Such incidental benefits are not a focus for OFAC sanctions enforcement.” Such guidance, however, does not have the force of law.¹²⁵

Were this policy to be formalized and to gain the force of law (statutorily or via executive order), banks with effective internal compliance systems in place could be assured that they would not suffer significant penalties for unintentional diversion of funds. In this manner, FIs would be incentivized both to have effective compliance controls and to take on humanitarian clients. Limits to financial penalties could significantly change the calculus for FIs, encouraging greater willingness to service humanitarian actors.

5. Explore technological options to facilitate NPO transfers. Technological developments have the potential to play a significant role in lowering banks' compliance costs and helping to facilitate NPOs' access to financial services. Some banks have begun deploying blockchain solutions to secure transactions and ensure that funds reach their intended destinations. Several humanitarian

125 OFAC, “Guidance Related to the Provision of Humanitarian Assistance by Not-for-Profit Non-Governmental Organizations”, US Department of the Treasury, Washington, DC, 17 October 2014, available at: https://home.treasury.gov/system/files/126/ngo_humanitarian.pdf.

groups are exploring new fintech approaches, including closed-loop voucher systems, to minimize diversion of humanitarian payments.¹²⁶ In addition, the concept of creating a specialized NPO utility or repository of comprehensive information on NPOs for banks' use in due diligence reviews has been proposed.¹²⁷

Donor conditions

Donors funding humanitarian activities must move away from a zero-tolerance approach to CT- and sanctions-related risk-sharing. The complexities of operating in conflict environments necessitate open discussion of challenges as they arise. Donors and humanitarian organizations must share responsibilities and commitments in ensuring that assistance reaches those most in need.

While some donor agencies are engaged in stakeholder dialogues or other helpful consultations with NPOs on ways to better address the compliance burdens of CT-related requirements, specific initiatives should be pursued to promote more uniform donor conditions and risk management policies.

1. **Donors, in consultation with NPOs, should develop common templates for CT/sanctions clauses in contracts and for comfort letters to encourage FIs to facilitate humanitarian transfers.** Some States have begun discussing new language in grant agreements and engaging NPOs to explore the use of comfort letters in support of humanitarian projects and streamlining of due diligence requirements, but these limited efforts have not resulted in adequate progress. These initiatives should be prioritized, and deadlines should be established for new procedures.
2. **National and international donor agencies should establish a forum to meet, share information and practices, and develop more standardized policies.** No coordinated mechanism exists for donors to discuss the challenges that conditions represent for NPOs. Whether through an existing forum for donor discussions or the establishment of a new dialogue, donors need to engage collaboratively with NPOs to understand and consider harmonized policies.
3. **Donors, humanitarian organizations and FIs should engage in dialogue to promote risk-sharing measures and jointly develop risk mitigation strategies and guidelines for complying with sanctions and CT measures.** While most stakeholders support risk-sharing in theory, few donors have policies or guidelines in place that promote the effective sharing of risks encountered by

126 Fintech for International Development (F4ID) is a new financial technology partnership between the NGO Save the Children and FIs Barclays and Standard Chartered aimed at creating digital solutions to help deliver humanitarian assistance to hard-to-reach communities. F4ID is designed as an efficient, low-cost, safe and trusted digital tool that gives communities flexibility and choice as well as reducing fraud and aid diversion risks. See Save the Children, "New Fintech Company Creates Tools to Help Communities Thrive", 22 November 2021, available at: www.savethechildren.net/news/new-fintech-company-creates-tools-help-communities-thrive#; and the F4ID website, available at: www.f4id.org.

127 S. E. Eckert, K. Guinane and A. Hall, above note 55, pp. 98–99 (regarding an NPO facility modelled on TechSoup's NGO Source).

NPOs operating in conflict areas. Both sets of stakeholders must recognize inherent risks and jointly develop strategies to mitigate those risks.

Concluding reflections

Two decades of experience with the global CT regime under Resolution 1373 and sanctions pursuant to Resolution 1267 reaffirm the urgent need for the UNSC to reform the current system in order to strike a balance between the fundamental objectives of countering terrorism and safeguarding humanitarian action.

As this article and the extensive range of reports and analysis on the subject aptly demonstrate, humanitarian action has been adversely affected by expansive CT measures and sanctions. NPOs working to provide life-saving aid to the more than 270 million people in need of humanitarian assistance¹²⁸ face growing challenges in countries subject to sanctions and regions in which designated groups operate. While the percentage of NPOs experiencing financial access difficulties has remained roughly the same for several years—still a shocking two thirds of those operating internationally—the frequency and scope of such barriers are increasing substantially. This is an alarming indication that the consequences of these policies are expanding. At the same time, humanitarian needs are accelerating, with intensified conflicts in Ethiopia, Yemen and Syria as well as the humanitarian catastrophe unfolding in Afghanistan. The *status quo* in which CT policies continue undisputed and inviolable while humanitarian action is impeded is no longer sustainable or defensible considering overwhelming needs. Humanitarian actors cannot perform their life-saving work when programmatic decisions are being made on the basis of where banks will transfer funds instead of based on need; nor should compliance with regulatory policies force humanitarians to act against the fundamental principle of impartiality.

The current UN system of sanctions and CT measures impedes humanitarian action, thereby increasing the suffering of civilians. Systemic reform is required, and this article enumerates a range of recommendations for necessary changes. For the challenges to be effectively addressed, however, all relevant stakeholders—the UN, member States with their respective humanitarian, donor, CT and sanctions agencies, and humanitarian actors and FIs—must come together to better understand each other's perspectives and find common ground to advance solutions.

No humanitarian group, FI or government wants to support terrorism, and each acts in ways to avoid doing so. The overarching problem is that these risk-averse practices are fundamentally incompatible with providing humanitarian assistance in regions of the world where risk abounds. Risk can be managed but not eliminated, and the current system fails to acknowledge this basic point. The most tragic result of this policy dilemma is that the victims are vulnerable

128 OCHA, above note 7.

populations – real people suffering and dying when humanitarian assistance cannot reach them.

The UNSC must act to except principled humanitarian activities from the scope of UN sanctions and CT measures. As demonstrated in the case of the Somalia sanctions regime, humanitarian exceptions are effective in promoting legitimate humanitarian assistance without creating broad loopholes. This example, and the recent adoption of a humanitarian exception in the 1988 (Taliban) regime, should be replicated and formally embedded broadly within the UN system and at national levels implementing sanctions domestically. Another essential step that the international community must take is to develop safe payment mechanisms to facilitate humanitarian transfers into higher-risk jurisdictions where need is greatest but where banks will not go without special assurances. Afghanistan is a tragic case in point.

Reform of the current system to strike a proper balance between the equally critical objectives of countering terrorism and safeguarding humanitarian action will not be easy, but practical options are possible to advance both objectives. It is time for member States truly committed to humanitarian principles to act.

Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action

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Abstract

For some time, the impact of counterterrorism (CT) measures and sanctions on humanitarian action did not attract the attention that it merited. However, owing to a surge in awareness of this issue over the past two years, the fact that CT measures and sanctions can have negative consequences for principled humanitarian action is now widely accepted by a broad range of actors, and is

* The views expressed in this article are the author’s alone and do not necessarily reflect the Norwegian Refugee Council’s institutional position.

supported by a strong body of research identifying and analyzing these impacts. This article adds to this existing work by examining recent developments related to this issue. It looks at the impact of growing risk aversion in relation to CT measures and sanctions among donors, humanitarian organizations and other actors on principled humanitarian action, and highlights recent efforts to address and mitigate these impacts. The central argument is that CT and sanctions risks cannot be eliminated from humanitarian action. As such, policy change is needed to protect principled humanitarian action from further detrimental impacts and to ensure that people can access the assistance they need, regardless of where they are located.

Keywords: principled humanitarian action, counterterrorism, sanctions, risk.

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Introduction

The impact of counterterrorism (CT) measures and sanctions on principled humanitarian action is not a new challenge, but it is only in recent years that the issue has attracted the widespread attention that it merits from a broad range of stakeholders, including of course humanitarian organizations, but also donors, diplomats, civil servants and policy-makers responsible for developing these measures at international and domestic level. This increased attention has come with a growing acceptance of the fact that the application of humanitarian action’s ethical and operational framework—the principles of humanity, impartiality, neutrality and independence—is increasingly threatened by CT measures and sanctions.¹

The legal basis for humanitarian action in situations of armed conflict is provided by international humanitarian law (IHL). The four principles of humanity, impartiality, neutrality and independence are incorporated into IHL via the Geneva Conventions.² The aim of principled humanitarian action as provided for in IHL is to relieve the suffering of individuals, wherever it may be found, guided solely by their needs, and to give priority to the most urgent cases

1 See, for example, Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and Norwegian Refugee Council (NRC), July 2013; Jessica S. Burniske and Naz K. Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict, March 2017; Emma O’Leary, *Principles under Pressure: The Impact of Counter-Terrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, NRC, June 2018.

2 For more on the links between humanitarian action, IHL and the normative background to the humanitarian principles, see Kate Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law: Study 4*, Humanitarian Policy Group (HPG) Report No. 5, in Overseas Development Institute (ODI), *The Politics of Principle: The Principles of Humanitarian Action in Practice*, London, March 2000; Jérémie Labbé and Pascal Daudin, “Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross”, *International Review of the Red Cross*, Vol. 97, No. 897–898, 2016.

of distress.³ This objective, captured in the principle of humanity, reflects a moral imperative that views the individual as a human being alone and “refuses to take anything else into consideration”.⁴

Strongly linked with humanity is the principle of impartiality, which covers non-discrimination and proportionality, reflecting the fact that humanitarian assistance should be delivered according to the severity of needs alone. The principles of neutrality and independence enable the operationalization of humanity and impartiality by seeking to ensure that humanitarian actors do not take sides in conflicts, and operate independently of political, military or other objectives.⁵ These principles are not referred to explicitly in the Geneva Conventions, but the concept of non-participation (direct or indirect) in hostilities by those providing assistance is at the core of the Conventions.⁶ These four principles have been reaffirmed in various United Nations (UN) resolutions and integrated into frameworks developed by humanitarian organizations to guide their work.⁷

Delivering assistance in conflict-affected settings presents many challenges, and adherence to the humanitarian principles involves constant compromises. Depending on the circumstances, an organization may decide to provide assistance to displaced people in a camp that is effectively a place of internment, or to accept a military escort to enable it to provide assistance to communities in an area under siege. Acting in a principled manner means using the principles as both a guiding ethical framework and an operational risk management tool to identify what is an acceptable compromise and what amounts to unacceptable interference in humanitarian action.⁸ The application of the principles helps organizations to ensure that needs are met and the potential for manipulation of aid is minimized. In the absence of this framework, institutional, political, security and other considerations could dominate decision-making in relation to humanitarian action.⁹

Two such considerations are sanctions and CT measures. There is now widespread and increasing recognition of the fact that these can represent barriers

3 International Committee of the Red Cross (ICRC), *The Fundamental Principles of the International Red Cross and the Red Crescent Movement*, Geneva, August 2015, available at: www.icrc.org/sites/default/files/topic/file_plus_list/4046-the_fundamental_principles_of_the_international_red_cross_and_red_crescent_movement.pdf (all internet references were accessed in August 2021).

4 J. Labbé and P. Daudin, above note 2, p. 186.

5 OCHA, “OCHA on Message: What are the Humanitarian Principles?”, June 2012, available at: www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf.

6 K. Mackintosh, above note 2, p. 13.

7 UNGA Res. 46/182, 19 December 1991; UNGA Res. 58/114, 5 February 2004. See also ICRC and International Federation of Red Cross and Red Crescent Societies, *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations in Disaster Relief*, Geneva, 1994; Sphere, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response*, Geneva, 2018.

8 Katherine Haver and William Carter, *What It Takes: Principled Pragmatism to Enable Access and Quality Humanitarian Aid in Insecure Environments*, Secure Access in Volatile Environments Research Programme, Humanitarian Outcomes, November 2016, p. 37.

9 Nicholas Leader, *The Politics of Principle: The Principles of Humanitarian Action in Practice*, HPG Report No. 2, ODI, London, March 2000, p. 4.

to the application of the humanitarian principles during crisis response, with the risk that people living in areas impacted by them will have diminished access to humanitarian assistance and protection as a result. A strong body of research detailing how this might happen exists, illustrating that CT measures and sanctions can limit humanitarians' engagement with non-State armed groups which may be in control of areas where people in need of aid are located, encourage donors to attach restrictive conditions on funding, raise challenges in access to vital support services from financial institutions and others, and encourage the avoidance of associated legal, reputational and other risks rather than appropriate risk management.¹⁰

This article begins by framing the issue and then seeks to build on, and add to, the existing work by highlighting some recent challenges to principled humanitarian action that have arisen as a result of growing risk aversion in relation to CT measures and sanctions on the part of donors, humanitarian organizations and others, drawing on the author's operational experience. The article then analyzes some of the recent efforts to mitigate these impacts, many of which have been made as a result of advocacy efforts by an increasingly engaged and mobilized humanitarian community, before looking at the way forward.

CT, sanctions and principled humanitarian action: What's the problem?

To understand recent developments in relation to the impact of CT measures and sanctions, it is first necessary to understand the origin of these measures as they relate to principled humanitarian action. Since 9/11, there has been a proliferation of measures designed to prevent funds or other assets from directly or indirectly benefiting groups or individuals targeted by CT measures or sanctions. While the targets and goals of sanctions and CT measures can differ, both generally seek to achieve their aims by stemming the flow of funds to certain groups or individuals.

At the international level, the UN Security Council has introduced sanctions against a number of groups and individuals, imposing asset freezes and requiring member States to prevent financial support from directly or indirectly benefiting them.¹¹ In addition, the Security Council has developed CT measures that require all States to criminalize financial transactions carried out with the intention or knowledge that they are to be used for the benefit of "terrorist organizations or individuals", without providing a definition of such organizations or individuals.¹² At present only one Security Council sanctions

10 See, for example, K. Mackintosh and P. Duplat, above note 1; J. S. Burniske and N. K. Modirzadeh, above note 1; E. O'Leary, above note 1; Alice Debarre, *Making Sanctions Smarter: Safeguarding Humanitarian Action*, International Peace Institute, December 2019; InterAction, *Detrimental Impacts: How Counter-Terror Measures Impede Humanitarian Action*, April 2021.

11 See UN Security Council, "Sanctions", available at: www.un.org/securitycouncil/sanctions/information.

12 UNSC Res. 2462, 28 March 2019; UNSC Res. 1373, 28 September 2001.

regime, that in relation to Somalia, includes an exemption excluding humanitarian actors, allowing them to deliver their services without the risk of contravening the regime.¹³

CT measures and sanctions at regional and national level

Member States must transpose these Security Council decisions regarding sanctions and CT domestically.¹⁴ In the absence of a universally agreed definition of terrorism, States have a very broad scope with which to interpret and apply Security Council decisions related to CT, and they unsurprisingly do so in ways that reflect their own political and security aims. In addition to transposing these Security Council decisions domestically, member States, including both donor and host States, can also develop and apply their own sanctions and CT measures. Some States have given their courts extra territorial reach in relation to CT measures and sanctions.¹⁵ Regional organizations, like the European Union (EU), also develop their own sanctions regimes and CT measures, which relevant States must also reflect at national level.¹⁶ In addition to asset freezes, other forms of sanctions can be imposed – for example, the EU’s prohibition on the purchase of crude oil or petroleum products in its Syria sanctions regime, which contains an exemption meaning that it does not apply to humanitarian organizations that receive funding from the EU or its member States; and the United States’ export ban in relation to some countries, which requires humanitarian organizations and others to apply for licences to gain permission for the export of some goods and technology to relevant contexts.¹⁷

CT measures and sanctions in grant agreements

In addition to international and national measures, humanitarian organizations that are reliant on funding from institutional donors are also bound by CT and sanctions-related clauses that may be included in some grant agreements.¹⁸ These clauses can mean that organizations are contractually required to comply with sanctions regimes that they would otherwise not be bound by as they have no other legal obligation to the donor state. In some cases, CT and sanctions-related requirements in grant agreements go further than requirements imposed by

13 UNSC Res. 751, 24 April 1992.

14 Charter of the United Nations, 26 June 1945, Chap. V, Art. 25.

15 See, for example, European Parliament, Directorate-General for External Policies, *Extraterritorial Sanctions on Trade and Investments and European Responses*, requested by the European Parliament’s Committee on International Trade, November 2020.

16 For an overview of these, see the EU Sanctions Map, available at: www.sanctionsmap.eu/#/main.

17 EU, Council Regulation 2016/2137 Amending Regulation (EU) No. 36/2012 concerning Restrictive Measures in View of the Situation in Syria, 6 December 2016; US Department of Commerce, Bureau of Industry and Security, Export Administration Regulations, March 2020.

18 NRC, *Toolkit for Principled Humanitarian Action: Managing Counterterrorism Risks*, May 2020, available at: www.nrc.no/toolkit/principled-humanitarian-action-managing-counterterrorism-risks/.

domestic legislation.¹⁹ It has become increasingly common for donors to espouse “zero tolerance” for risks related to sanctions and CT.²⁰ While there is no standard definition of the term “zero tolerance”, use of the phrase by donors indicates an expectation that grantees will eliminate exposure to relevant risks. This generally reflects an effort to address donors’ legal and financial risks, ultimately by transferring these risks on to humanitarian organizations.

How do CT measures and sanctions impact principled humanitarian action?

States’ broad interpretations of prohibitions on providing support to groups and individuals targeted by sanctions and CT measures result in a real risk that activities carried out by humanitarian organizations trying to respond to crises in an impartial, needs-based manner may fall under their scope.²¹ Activities that could potentially fall foul of these measures may include trainings in IHL or the provision of medical care to members of groups that are sanctioned or designated as terrorists.²² Incidental payments that humanitarians may need to make in the course of operations, or aid that is diverted, could also fall under the scope of these measures.²³

If found to be in violation of sanctions or CT measures, humanitarian organizations and their staff may face risks of fines or prosecution, as well as associated reputational risks and the risk of loss of funding. Strongly linked with these possibilities is the fact that, in seeking to comply with sanctions and CT measures and avoid exposure to legal and reputational issues, particularly in the wake of a number of high-profile scandals,²⁴ donors and humanitarian organizations are growing increasingly risk-averse, in some cases basing operational decisions on the need to accommodate the constraints imposed by these measures, rather than on humanitarian needs. This section explores some recent examples of risk aversion in relation to CT measures and sanctions.

19 An example of this can be found in grant agreements of the US Agency for International Development (USAID): USAID, *Certifications, Assurances, Representations, and Other Statements of the Recipient: A Mandatory Reference for ADS Chapter 303*, May 2018, pp. 4–5, available at: www.usaid.gov/sites/default/files/documents/1868/303mav.pdf.

20 See International Council of Voluntary Agencies, *Risk and Humanitarian Culture: An ICVA Briefing Paper*, Geneva, January 2020, p. 6.

21 Emanuela-Chiara Gillard, *Recommendations for Reducing Tensions in the Interplay between Sanctions, Counterterrorism Measures and Humanitarian Action*, Chatham House, London, August 2017, p. 6.

22 Supreme Court of the United States, *Holder v. Humanitarian Law Project*, 561 U.S. (2010), Nos 08-1498, 09-89, 21 June 2010; Marine Buissonniere, Sarah Woznick and Leonard Rubenstein, *The Criminalization of Healthcare*, Johns Hopkins, Safeguarding Health in Conflicts and University of Essex, June 2018.

23 E.-C. Gillard, above note 21, p. 2.

24 Jessica Alexander and Hannah Stoddard, “Then and Now: 25 Years of Sexual Exploitation and Abuse”, *The New Humanitarian*, 11 February 2021, available at: www.thenewhumanitarian.org/feature/2021/2/11/25-years-of-sexual-exploitation-and-abuse; Philip Kleinfeld, “Congo Aid Scam Triggers Sector-Wide Alarm”, *The New Humanitarian*, 11 June 2020, available at: www.thenewhumanitarian.org/investigation/2020/06/11/Congo-aid-fraud-corruption-Mercy-Corps.

Risk aversion among donors

This risk-averse approach is reflected in decision-making and compliance requirements imposed by donors, which can sometimes go further than what is required by CT legislation and sanctions themselves. In some cases, donors' risk aversion may be influenced by increasing public and media scrutiny of how their funds are spent. Efforts to protect increasingly limited aid budgets by avoiding reputational damage can result in risk-averse decisions. In 2019, the UK's then Department for International Development (DFID) suspended support for cash assistance in northeast Syria following the movement of people from areas that had been controlled by the so-called Islamic State (IS). An estimated 50,000 people were impacted by the decision.²⁵ DFID described this as a "precautionary measure due to the risks associated with the dispersal of *Daesh* members"²⁶ and stressed in communications with grantees that the decision was not a result of any suspected diversion. The move reflected the donor's concern that those moving from IS-held areas were somehow linked with, or were sympathizers of, the group, and a belief that they should not be given cash-based assistance owing to the potential for negative publicity and reputational damage if this were reported on.²⁷ In trying to avoid reputational risks, this decision limited beneficiaries' access to cash—a form of aid that DFID itself considered "faster (and) safer"²⁸ than others—on the basis of possible affiliation with IS, contrasting with a principled approach which requires that beneficiaries be selected on the basis of needs alone, regardless of political, religious or other affiliations.

Other donors have made efforts to minimize exposure to risk through the use of wording in grant agreements that limits who grantees can assist. In 2018, the US Agency for International Development (USAID) inserted a standard clause in its agreements with grantees in northeast Nigeria obligating funding recipients to obtain written approval before providing assistance to individuals known to have been "formerly affiliated" with Boko Haram, including "individuals who may have been kidnapped by Boko Haram or ISIS-West Africa but held for periods of greater than six months and those under the control or acting on behalf of the same".²⁹ Variations on the same clause appeared in USAID grant agreements in other contexts.

25 Ben Parker, "UK Keeps Limits on Cash Aid in Syria Over Counter-Terror Fears", *The New Humanitarian*, 16 May 2019, available at: www.thenewhumanitarian.org/news/2019/05/16/uk-keeps-limits-cash-aid-syria-over-counter-terror-fears.

26 Campbell MacDiarmid and Jack Dutton, "UK Cuts Cash Aid to Northeast Syria, Citing Fear of Funding ISIS", *The National*, 22 April 2019, available at: www.thenationalnews.com/world/mena/uk-cuts-cash-aid-to-northeast-syria-citing-fear-of-funding-isis-1.851970.

27 B. Parker, above note 25.

28 Department for International Development, *Saving Lives, Building Resilience, Reforming the System: The UK Government's Humanitarian Reform Policy*, London, September 2017.

29 For the full text of the clause, see Lindsay Hamsik, *NGOs and Risk: Managing Uncertainty in Local-International Partnerships—Case Studies: Northeast Nigeria and South Sudan*, InterAction, USAID and Humanitarian Outcomes, March 2019, p. 10.

The clause appeared to have stricter parameters than US government prohibitions on the provision of material support, which impose penalties on anyone who “knowingly provides material support or resources to a foreign terrorist organisation, or attempts or conspires to do so”.³⁰ In potentially targeting individuals such as those who have been kidnapped, and those that have been coerced into marriages with non-State armed group (NSAG) members, the clause implied that those who could reasonably be seen as victims of the conflict may be affiliated with the very groups that victimized them, and that they could lose access to assistance as a result.

In some instances, donors have required humanitarian grantees to ensure that beneficiaries of assistance that they fund do not appear on sanctions lists through beneficiary vetting (sometimes referred to as screening). Vetting of beneficiaries is generally considered a red line for humanitarian organizations: to ensure an impartial response, beneficiaries are selected on the basis of need alone, and affiliation with political or other groups cannot form part of the selection criteria. In contexts where IHL applies, assistance that aims at preserving life, preventing and alleviating human suffering, and maintaining human dignity cannot be denied on the basis of sanctions or CT measures. Vetting beneficiaries jeopardizes this approach.

The requirement to vet beneficiaries principally arises with some development donors who take the position that their funds must be used in a manner compliant with their obligations under CT measures and sanctions, and that as they are development-focused, IHL and the humanitarian principles are not relevant to the activities they support. The increasing involvement of development donors in conflict-affected settings in recent years,³¹ in line with the humanitarian–development nexus, means that this issue has become a pressing challenge for humanitarian organizations that are seeking to partner with development donors.

Insistence that humanitarians vet beneficiaries has resulted in organizations turning down significant funding opportunities in conflict-affected environments. In 2020, a consortium of humanitarian organizations responding to the Syrian crisis decided to forgo approximately €14 million in funding because of the donor’s requirement that the beneficiaries of humanitarian assistance under that project be vetted. In another case, a donor in Iraq rejected an application for a \$3.3 million grant after the applicant indicated that it could not comply with the donor’s requirement that beneficiaries of the project be vetted.

Governments’ and donors’ desire to ensure that funding is spent appropriately is legitimate. Humanitarian organizations share the aim of ensuring that assistance reaches people in need and have strict internal policies and procedures in place to see to it that this happens.³² However, humanitarian

30 United States Code, 2006 ed., Title 18, “Crimes and Criminal Procedure”, Chap. 113B, Sec. 2339B, “Providing Material Support or Resources to Designated Foreign Terrorist Organizations”.

31 See, for example, Lydia Poole and Vance Culbert, *Financing the Nexus: Gaps and Opportunities from a Field Perspective*, UN Food and Agriculture Organization, NRC and UN Development Programme, June 2019.

32 NRC, above note 18.

action takes place in complex and volatile environments and inherently involves exposure to a broad range of risks, including those related to CT and sanctions. Those most in need of assistance and protection are often located in conflict-affected environments, which may have weak civil and government institutions targeted by sanctions, or the presence of NSAGs that could be designated as terrorists. A commitment to providing aid in these areas necessitates accepting a high degree of risk. These risks can be managed, but they cannot be eliminated. Under such conditions, a zero-tolerance approach is not an effective risk management strategy. It discourages open engagement on challenges and dilemmas which would allow for the mitigation of risks where possible and the acceptance of risks where necessary.

Risk aversion among humanitarian actors

In the absence of an acceptance of risks by governments, some organizations consider it both safer and easier to limit operations to areas where CT and sanctions-related risks may not arise, regardless of where needs might be greatest.³³ This has resulted in some organizations altering programmes, or limiting or avoiding operations, in contexts impacted by sanctions or CT measures, reflecting a growing risk aversion within the sector that is further damaging adherence to the humanitarian principles and moving away from a needs-based response. This can be seen in some conflict-affected contexts where humanitarian organizations are crowded into government-controlled areas, leaving people in areas controlled by NSAGs without the assistance they need.

By extension, efforts to avoid exposure to CT and sanctions risks also affect how humanitarian actors are perceived by parties to conflicts. If humanitarians do not engage with parties to a conflict in a neutral manner, they may themselves be perceived as taking sides, with a corresponding impact on staff security. In contexts like northeast Nigeria, where some donors have imposed restrictive CT compliance requirements in their grant agreements, as mentioned above, and where the government has utilized CT measures to restrict humanitarian operations, limiting access to NSAG-controlled areas, the impact of these measures on how humanitarians are perceived is clear.³⁴

In August 2020, an article published in IS's weekly magazine *Al-Naba* called for the targeting of staff of humanitarian organizations, describing them as "partners in combat even if their personnel do not carry weapons or participate in combat".³⁵ Coming shortly after the killings of five humanitarians in Nigeria by Islamic State West Africa Province, the piece defended these killings, espousing a view that humanitarian workers are not neutral and are therefore legitimate targets for attack. In the absence of the ability to engage directly with such groups, it is extremely difficult for humanitarians to challenge this perception.

33 E. O'Leary, above note 1, p. 23.

34 *Ibid.*, p. 21; L. Hamsik, above note 29.

35 International NGO Safety Organisation, "A Declaration of Global Intent", The Hague, October 2012, p. 5.

Risk aversion among banks

Donors and humanitarian organizations are not the only actors whose risk appetite is impacted by CT measures and sanctions. Banks must also comply with these measures, and in order to minimize their exposure to risk of liability, many have significantly curtailed the services they offer to humanitarian actors operating in contexts perceived as “high-risk”, with the result that organizations can struggle to get funding to areas where it is needed. A survey of international non-governmental organizations (INGOs) working in Damascus indicated that in 2020, 56% of transfers requested were either not successful or were subject to significant delays.³⁶ Similar issues have arisen in other contexts, including Iran.³⁷ With banks having no incentive to provide transfers to areas they perceive as risky, and the availability of banking channels declining, the impact on principled humanitarian action is clear. If this issue is not addressed, banks, rather than needs, will ultimately dictate where humanitarian organizations work.

What has been done to address the issue?

The past decade has seen some significant efforts to safeguard principled humanitarian action from the impact of CT measures and sanctions and to mitigate the associated risks. These initiatives have taken a variety of forms, including exemptions that exclude humanitarian organizations from the scope of CT measures and sanctions, improved language in grant contracts, and guidance for humanitarians and private sector actors such as banks. These have come about largely because of extensive lobbying by a number of organizations within the humanitarian community, sometimes with the support of concerned States and intra-governmental bodies, in line with the increasing awareness of the negative impacts of CT measures and sanctions.

Perhaps most notable among these developments was the 2010 UN Security Council decision to include a humanitarian exemption in its Somalia sanctions regime, stating that the sanctions “shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia”.³⁸ Introduced owing to concerns that the sanctions’ asset freeze targeting Al-Shabaab would limit the humanitarian response to famine in areas under the control of that group, the exemption represented an effort to share risks between States and humanitarian organizations. It acknowledged the challenges of aid delivery in Somalia, and clearly indicated that the delivery of needs-based humanitarian assistance should

36 Damascus-Based INGOs, *Understanding the Operational Impacts of Sanctions on Syria II: Damascus-Based INGOs and Bank De-Risking*, April 2021.

37 NRC, “Future of Aid Work at Risk in Iran Due to U.S. Sanctions”, 5 August 2019, available at: www.nrc.no/news/2019/august2/aid-work-in-iran-at-risk-due-to-u.s.-sanctions/.

38 UNSC Res. 751, 24 April 1992.

be prioritized over enforcement of the sanctions.³⁹ The Somalia exemption remains the only such exemption in a Security Council sanctions regime.

This and a number of other efforts to safeguard principled humanitarian action from the impact of CT measures and sanctions over the past ten years have been analyzed extensively elsewhere.⁴⁰ This section of the article focuses primarily on highlighting the significant number of developments since 2019, during which time there has been a notable increase in engagement on this issue within the humanitarian community, largely because the impacts of CT measures and sanctions on principled humanitarian action have become so prominent that they can no longer be ignored. In recent years, advocacy by humanitarians to mitigate the impacts of CT measures and sanctions on their work has broadly, though not exclusively, focused on the following: UNSC action to safeguard principled humanitarian action; improved language in donor grant agreements; clearer guidance and more dialogue regarding sanctions and bank de-risking; the use of derogations and licenses; and extending the use of humanitarian exemptions.

Reflecting growing acceptance of the fact that solutions to this issue cannot be found among humanitarians alone, many recent initiatives have involved action by sanctions and CT policy-makers, as well as financial institutions. While the resulting steps have certainly not gone so far as to eliminate the difficulties that CT measures and sanctions pose to principled humanitarian action, they have provided strong precedents on which to build future efforts.

Improved language in UN Security Council resolutions

Since 2004, preambular paragraphs in various UN Security Council resolutions have stated that CT measures should comply with IHL.⁴¹ When, in March 2019, the Security Council began to negotiate a new resolution on countering the financing of terrorism, a surge in awareness of the impact of CT measures and sanctions meant that the move was met with a galvanized humanitarian community and with several member States that were attuned to the problem and concerned about the potential impacts that the resolution could have if it passed in the absence of language which safeguarded humanitarian action.⁴² Intense lobbying efforts resulted in the inclusion of new language to protect humanitarian action in Security Council Resolution 2462. While the resolution is not without its problems from a humanitarian perspective,⁴³ the inclusion of this safeguarding

39 K. Mackintosh and P. Duplat, above note 1, pp. 73–75.

40 See, for example, K. Mackintosh and P. Duplat, above note 1; E. O’Leary, above note 1; European Center for Non-Profit Law, *A String of Successes in Changing Global Counter-Terrorism Policies that Impact Civil Space*, Budapest, July 2016.

41 UNSC Res. 1535, 26 March 2004.

42 Information on the negotiations for Resolution 2462 can be found in UN Security Council, “Combatting the Financing of Terrorism Open Debate”, 27 March 2019, available at: www.securitycouncilreport.org/whatsinblue/2019/03/combatting-financing-of-terrorism-open-debate.php.

43 Fionnuala Ní Aoláin, “The Massive Perils of the Latest U.N. Resolution on Terrorism”, *Just Security*, 8 July 2019, available at: www.justsecurity.org/64840/the-massive-perils-of-the-latest-u-n-resolution-on-terrorism/.

language created a strong precedent at Security Council level and represented a significant step forward in efforts to ensure that principled humanitarian action is not impeded by CT measures.

- For the first time in the operative paragraphs of a Chapter VII resolution, Resolution 2462 included a legally binding decision that States shall establish criminal offences “in a manner consistent with” IHL, a demand that States ensure that their CT financing measures “comply with” IHL, and the urging of States to “take into account the potential effect” of measures to counter the financing of terrorism on exclusively humanitarian activities.⁴⁴
- Resolution 2462 was followed four months later by Resolution 2482 on the links between organized crime and CT. This resolution goes further than Resolution 2462 in that it refers to CT measures in general, not solely to CT financing efforts. It urges member States to ensure that all measures taken to counter terrorism “comply with their obligations under international law, including international humanitarian law”, and “urges States to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities”.⁴⁵

Improved language in grant agreements

CT- and sanctions-related language in grant agreements has been a key concern of humanitarian actors for some time. Advocating for adjustments to these clauses to ensure that they do not negatively impact principled humanitarian action has proved difficult, partly owing to the fact that donors do not always inform partners when they change the wording of CT clauses or when they introduce new clauses. As a result, problematic wording often comes to light when partnership discussions are at an advanced stage, making negotiations challenging. This is exacerbated by an increasingly competitive funding environment, which disincentivizes some organizations from pushing back on potentially harmful requirements. Nevertheless, in recent years, focused collective advocacy efforts by humanitarian organizations have resulted in several donors making positive changes to the language in their grant agreements.

- In December 2020, the EU’s humanitarian donor ECHO released its new grant agreement which explicitly mentions that respect for EU restrictive measures must not impede effective and principled humanitarian responses. It states that “persons in need must therefore not be vetted”.⁴⁶
- In 2020, USAID⁴⁷ published significant revisions to its anti-terrorism requirements for grantees. The update to the Anti-Terrorism Certification⁴⁸

⁴⁴ UNSC Res. 2462, 28 March 2019.

⁴⁵ UNSC Res. 2482, 19 July 2019.

⁴⁶ European Commission, *Humanitarian Aid General Model Grant Agreement*, Directorate-General for European Civil Protection and Humanitarian Aid Operations, June 2020, Art. 18, p. 76.

⁴⁷ USAID, above note 19.

⁴⁸ *Ibid.*

pertains to assurances that the grantee has not provided material support to any designated terrorist groups, anywhere in the world, regardless of the source of funding, within the last three years (reduced from the previous requirement of ten years). The second change, to USAID's Standard Provisions, prohibits grantees from engaging in unlicensed transactions with entities or persons on the US government or UN terrorist lists. This revision eliminated the broad requirement that all publicly available information be considered when screening partners and other parties.⁴⁹

Guidance and dialogue in relation to sanctions and bank de-risking

Reflecting the widespread acceptance of the multifaceted nature of the issue of bank de-risking, several initiatives have focused on clarifying compliance requirements in relation to sanctions for both financial institutions and humanitarian organizations. These have been complemented in some contexts by multi-stakeholder dialogues that convene relevant stakeholders from government, banks and humanitarian organizations to try to address various aspects of the problem. These include the UK's Tri-Sector Working Group and the Swiss Development Corporation and ECHO-hosted Compliance Dialogue on Syria-Related Humanitarian Payments.⁵⁰ Such initiatives are valuable in clarifying some key issues and in building a mutual understanding of the problem, but in the absence of concrete policy and regulatory change by States, non-binding guidance and dialogue have not proven sufficient to increase banks' risk appetite in dealing with humanitarian organizations.

- At the start of the COVID-19 pandemic, concerns were raised about the potential impact of sanctions on the ability of humanitarian organizations to respond to the crisis.⁵¹ In May 2020, the European Commission produced its *Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures*.⁵² The first version of the guidance note covered Syria, with later versions⁵³ expanding beyond the COVID-19 response and covering other contexts. Most

49 Charity & Security Network, "USAID Revises Grantee Documents Relating to Anti-Terrorism Requirements", May 2020, available at: <https://charityandsecurity.org/news/usa-id-revises-grantee-documents-relating-to-anti-terrorism-requirements/>.

50 Graduate Institute Geneva, "The Compliance Dialogue on Syria-Related Humanitarian Payments", 29 May 2020, available at: www.graduateinstitute.ch/communications/news/compliance-dialogue-syria-related-humanitarian-payments.

51 NRC, "Review Sanction Regimes to Facilitate Covid-19 Response", April 2020, available at: www.nrc.no/news/2020/april/review-sanction-regimes-to-facilitate-covid-19-response/.

52 European Commission, *Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures*, C (2020) 3179 final, Brussels, 11 May 2020, available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200511-syria-humanitarian-aid-guidance-note_en.pdf.

53 European Commission, *Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures*, C (2020) 7983 final, Brussels, December 2020, available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/201116-humanitarian-aid-guidance-note_en.pdf.

significantly for humanitarians, the guidance note stresses the primacy of aid delivery, noting that “where no other option is available, the provision of humanitarian aid should not be prevented by EU restrictive measures”.⁵⁴ The guidance note also clearly states that beneficiaries must not be vetted: “The identification as an individual in need must be made by the Humanitarian Operators based on these [IHL and the humanitarian] principles. Once this identification has been made, no vetting of the final beneficiaries is required.”⁵⁵ In relation to bank de-risking, the guidance note highlights that “EU restrictive measures should not lead to over-compliance”.⁵⁶

- Similarly, in April 2020 the US Office of Foreign Assets Control (OFAC) released a fact sheet on “Provision of Humanitarian Assistance and Trade to Combat COVID-19”.⁵⁷ The fact sheet does not contain new information but highlights the relevant exemptions and exceptions for humanitarian assistance and trade under various sanctions regimes. In a statement that preceded the release of the fact sheet, OFAC expressed its commitment “to working with financial institutions and non-profit organizations in their efforts to mitigate risks and allow humanitarian assistance and associated payments to flow to those who need it”.⁵⁸

Increased use of licenses and derogations for humanitarian activities

In the absence of consensus among States on the use of humanitarian exemptions, some States and regional bodies have introduced licenses (known as derogations at EU level) within their sanctions regimes. Rather than excluding humanitarian organizations from the scope of these measures from the outset, as exemptions do, these allow for case-by-case exceptions to be made, sometimes on the basis of applications made by humanitarian organizations. While the use of these measures reflects efforts to protect humanitarian action from the impact of sanctions, the increasing reliance on them as a means to do so has attracted criticism from humanitarian organizations owing to the fact that they can be limited to certain activities, organizations or amounts of funding, and because application processes can be opaque and bureaucratic, with slow response times that make them incompatible with emergency response and with a principled approach.⁵⁹

⁵⁴ European Commission, above note 52, p. 9.

⁵⁵ *Ibid.*, p. 12.

⁵⁶ *Ibid.*, p. 10.

⁵⁷ US Department of the Treasury, “Publication of a Fact Sheet on the Provision of Humanitarian Assistance and Trade to Combat COVID-19”, 4 April 2020, available at: <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20200416>.

⁵⁸ US Department of the Treasury, “Treasury Underscores Commitment to Global Flow of Humanitarian Aid in Face of COVID-19 Pandemic”, Washington, DC, 9 April 2019, available at: <https://home.treasury.gov/news/press-releases/sm969>.

⁵⁹ Peter Maurer, “Without Urgent Action to Protect Essential Services in Conflict Zones We Face Vast Humanitarian Disaster”, speech given to the UN Security Council Open Debate on the Protection of Objects Indispensable to the Survival of the Civilian Population, 27 April 2021, available at: www.icrc.org.

- Following its exit from the EU, the UK put in place an independent sanctions regime under the Sanctions and Anti-Money Laundering Act.⁶⁰ Lobbying by humanitarian organizations resulted in the Act incorporating provisions for the UK to issue general licences.⁶¹ While the process, criteria and political will to actually issue general licences are not yet clear, there is now legal scope for this under UK law which did not exist previously.
- In January 2021, in response to widespread concern about the potential impact of the designation of Ansar Allah as a terrorist group on the humanitarian response in Yemen, OFAC introduced four broad general licenses authorizing a wide range of activities. These included those “by non-governmental organisations to support humanitarian projects, democracy building, education, non-commercial development projects, and environmental protection in Yemen”.⁶² The designation was revoked shortly after taking effect.
- The EU has included the possibility for humanitarian organizations to apply to member States for derogations in several of its sanctions regimes.⁶³ In 2021, the European Commission launched an EU-level contact point for humanitarian organizations to provide information and guidance on the practicalities of requesting humanitarian derogations under EU sanctions.⁶⁴ As yet, it is too early to tell whether the contact point has proved a useful resource for the humanitarian community.

Increased used of exemptions

To date there has been a reluctance on the part of some States to expand the use of humanitarian exemptions beyond the few existing examples, which include the exemptions found in the UN Security Council’s Somalia sanctions regime and the EU’s Syria fuel sanctions.⁶⁵ For some time, humanitarians were also slow to advocate for exemptions, often owing to a lack of awareness and understanding of the issues involved. Due to broader consciousness of the impact of CT and sanctions, this has changed, with many humanitarian organizations now actively

[org/en/document/without-urgent-action-protect-essential-services-conflict-zones-we-face-vast-humanitarian.](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/eu-level-contact-point-humanitarian-aid-environments-subject-eu-sanctions_en)

60 UK Sanctions and Anti-Money Laundering Act, c. 13, 2018, available at: www.legislation.gov.uk/ukpga/2018/13/contents.

61 Simmons & Simmons, “Overview of UK Financial Sanctions Regime Post Brexit”, February 2020, available at: <https://tinyurl.com/3vkxcsnm>.

62 US Department of the Treasury, “Issuance of Counter Terrorism General Licenses and related FAQs; Counter Terrorism Designations; Venezuela-Related Designations; CAATSA – Russia-Related Designations; Yemen-Related Designations Updates”, January 2021, available at: <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210119>.

63 See, for example, EU, above note 17.

64 European Commission, “EU-Level Contact Point for Humanitarian Aid in Environments Subject to EU Sanctions”, 2021, available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/eu-level-contact-point-humanitarian-aid-environments-subject-eu-sanctions_en.

65 UNSC Res. 2551, 12 November 2020; European Commission, *Commission Frequently Asked Questions on EU Restrictive Measures in Syria*, Brussels, September 2017, p. 7.

advocating for humanitarian exemptions.⁶⁶ Some States have included exemptions at domestic level, often as a result of advocacy efforts by humanitarians.

- The UK's 2019 Counter-Terrorism and Border Security Act contains an exemption for "providing aid of a humanitarian nature".⁶⁷ The Act gives the government the power to make it a criminal offence for British nationals and residents to enter or remain in designated countries and regions unless they can provide a "reasonable excuse" for being there. Initially, only government workers were explicitly exempted from this clause, leaving humanitarian workers exposed to the risk of police investigation and a ten-year prison sentence. Lobbying by humanitarian organizations that were concerned about the impact of this clause on their staff resulted in the inclusion of the exemption.⁶⁸ Humanitarian organizations have also lobbied for an exemption in similar legislation introduced in the Netherlands.⁶⁹
- In Chad, a law on the suppression of acts of terrorism passed in 2020 contains a clause stating that "nothing in this law may be interpreted as derogating from international humanitarian law and international human rights law", as well as a humanitarian exemption stating that "activities of an exclusively humanitarian and impartial nature carried out by neutral and impartial humanitarian organisations are excluded from the scope of application of the present law".⁷⁰
- A law passed in Switzerland in 2020 included the offence of support to terrorist organizations, which could have criminalized essential humanitarian activities such as the provision of medical care or engagement with NSAGs for humanitarian purposes. Advocacy by humanitarian actors helped to ensure that the law included an exemption for humanitarian activities carried out by impartial humanitarian actors on the basis of Article 3 common to the four Geneva Conventions.⁷¹

66 See, for example, Action Against Hunger *et al.*, "Counter-Terrorism Frameworks and Safeguarding Humanitarian Space: Humanitarian Recommendations ahead of the UNGA High Level Side Event", *Reliefweb*, 23 September 2019, available at: <https://reliefweb.int/report/world/counter-terrorism-frameworks-and-safeguarding-humanitarian-space-humanitarian>; ICRC, "Counter-Terrorism Measures Must Not Restrict Impartial Humanitarian Organizations from Delivering Aid", 12 January 2019, available online at: www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations.

67 UK Counter-Terrorism and Border Security Act, c. 3, 2019, available at: www.legislation.gov.uk/ukpga/2019/3/contents.

68 Karen McVeigh, "MPs Pass Counter-Terror Bill Amendments to Protect Aid Workers", *The Guardian*, 23 January 2019, available at: www.theguardian.com/global-development/2019/jan/23/mps-pass-counter-terror-bill-amendments-to-protect-aid-workers.

69 Jan Egeland, "New Dutch Terror Bill Must Not Target Aid Workers", *EU Observer*, 14 October 2019, available at: <https://euobserver.com/opinion/146230>.

70 Republic of Chad, Law No. 003/PR/2020, available at: www.unodc.org/documents/westandcentralafrica/Loi_terrorisme_du_Tchad_2020.pdf.

71 Geneva Call, "An Exemption for Humanitarian Activities in the New Swiss Counter-Terrorism Law: A Much-Needed Safeguard and a Welcome Step Protecting the Humanitarian Space", 6 October 2020, available at: www.genevacall.org/an-exemption-for-humanitarian-activities-in-the-new-swiss-counter-terrorism-law-a-much-needed-safeguard-and-a-welcome-step-protecting-the-humanitarian-space/.

- At the 2020 French National Humanitarian Conference, President Macron announced the issuing of a new directive from the Ministry of Justice to all French prosecutors recalling the “specific nature and mandate of humanitarian organisations, including their protection under IHL”,⁷² with the intention of avoiding the possible criminalization or prosecution of aid workers.

The developments outlined above are positive and much-needed responses to growing calls for safeguards for the humanitarian community. The sheer variety of recent initiatives by such a broad range of actors aimed at protecting principled humanitarian action from the negative impacts of CT measures and sanctions must be interpreted as a widespread acceptance that these impacts exist, and that they should be addressed. However, some efforts go further than others in terms of dealing with the core problems. Because they are binding, humanitarian exemptions in domestic CT legislation and safeguarding language in Security Council resolutions carry more weight than non-binding guidance in relation to sanctions compliance. Derogations and licenses are not a suitable solution for safeguarding efficient and principled humanitarian action. Application procedures can be confusing, cumbersome and slow, thereby delaying the delivery of vital assistance. In some contexts, humanitarian organizations adjust programmes to avoid delays as a result of having to apply for derogations or licenses, with a corresponding impact on the quality of aid provided to people in need.⁷³ Requiring humanitarian organizations to seek permission from political bodies to carry out activities in some contexts can also affect the perception of humanitarian organizations as neutral, impartial and independent, with a corresponding impact on the safety of staff. While multi-stakeholder dialogues are welcome and necessary for developing a shared understanding of the challenges involved, they form just one part of a wider set of tools for addressing this issue and should not be thought of as stand-alone solutions in and of themselves. Meanwhile, in the absence of the application of comprehensive solutions, negative impacts continue to affect principled humanitarian action and, as a result, people’s ability to access the assistance they need.

Accepting and sharing risks: The most effective solution

Ultimately, the clearest solution to the challenges outlined in this article lies in humanitarian exemptions that exclude the activities of impartial humanitarian organizations from the scope of sanctions regimes and CT measures. Humanitarian exemptions “create a space in sanctions and counterterrorism regimes for forms of principled humanitarian action, allowing humanitarian

72 “Conclusion by President Emmanuel Macron of the National Humanitarian Conference”, Élysée, 17 December 2020, available at: www.elysee.fr/emmanuel-macron/2020/12/17/conclusion-par-le-president-emmanuel-macron-de-la-conference-nationale-humanitaire.

73 Damascus-Based INGOs, *Understanding the Operational Implications of Sanctions on Syria: Insights from Damascus-Based INGOs*, June 2020.

actors to deliver their services without the risk of contravening those measures".⁷⁴ Exemptions are now widely accepted by humanitarian organizations, and by some States, as the most effective way to reconcile States' obligations under IHL with the political and security-related objectives of CT measures and sanctions. Crucially, the use of exemptions would provide much-needed support in addressing the trend of risk aversion in relation to principled humanitarian action, by reassuring donors, humanitarian organizations and banks. If carefully worded and well-framed, such exemptions could allow States to share risks and to safeguard principled humanitarian action without impacting the effectiveness of CT measures and sanctions as foreign policy and security tools.

Those States that oppose the increased use of exemptions tend to cite concerns about the creation of loopholes which may be open to abuse by non-humanitarian actors. It should be noted that to date, there have been no public reports of such abuse of the Somalia or Syria exemptions. The limiting of the exemptions to impartial humanitarian actors would naturally exclude organizations with political or other non-humanitarian motives.

Exemptions may not provide a blanket solution to all of the challenges posed to principled humanitarian action by CT measures and sanctions. It is possible, for example, that development donors would not accept humanitarian exemptions, covering impartial humanitarian organizations, as applicable to activities that they fund. Further policy action is needed to comprehensively address the entrenched issue of bank de-risking.

For their part, significant advocacy efforts have been made by humanitarian organizations to limit the ethical and operational impact of these measures. Recognizing that risks related to the application of the humanitarian principles should form part of humanitarian risk management approaches, the Norwegian Refugee Council's *Toolkit for Principled Humanitarian Action: Managing Counterterrorism Risks*⁷⁵ outlines practical steps that humanitarian organizations can take to strengthen risk management through an approach underpinned by these principles. Joint advocacy efforts increasingly focus on limiting the impacts of new CT measures and sanctions on humanitarian action, with some notable successes, as outlined above.

However, like donors, humanitarian organizations also need to demonstrate greater recognition of the fact that risks cannot be eliminated from humanitarian response. More open discussion on what amounts to an acceptable compromise in relation to the application of the humanitarian principles, and what amounts to inappropriate influencing by politically motivated actors, is a crucial part of pushing back against the growing impact of CT measures and sanctions on humanitarian action.

74 Katie King, Naz K. Modirzadeh and Dustin A. Lewis, *Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict Counterterrorism and Humanitarian Engagement Project, April 2016, p. 8.

75 NRC, above note 18.

Conclusion: Where do we go from here?

The negative consequences of CT measures and sanctions for principled humanitarian action are clear. These measures directly and indirectly impact many aspects of the provision of humanitarian assistance, from the locations in which humanitarian organizations operate and who they assist, to the modalities they can use. They do so by limiting organizations' ability to engage with groups for the purposes of gaining and maintaining access, through the imposition of donor requirements that prevent a needs-based response, by constraining the use of suppliers of crucial services who may be sanctioned, and by making it increasingly difficult to transfer funding needed to support operations to where it needs to go.

These impacts are clear not only to humanitarian organizations but also to other key stakeholders, including donors and CT and sanctions policy-makers. This is evident from the variety of efforts undertaken in recent years to safeguard humanitarian action in the development of these measures. These efforts reflect the fact that while States use sanctions and CT measures as effective instruments of security and foreign policy, many of these States are also major donors with the goal of supporting principled humanitarian action. These two aims are not mutually exclusive, but current policy inconsistencies mean that humanitarian organizations are being granted funds to support activities by donor governments and are then unable to deliver fully on their objectives because of restrictions applied by the same governments.

Humanitarian organizations will inevitably continue to face challenges in the application of the humanitarian principles. Wider acceptance of the fact that risk is inherent in aid delivery, accompanied by a move away from a zero-tolerance, risk-averse approach to humanitarian action, would allow for a more nuanced, open discussion of how these challenges are engaged with and resolved. Ultimately this would support an improvement both in people's access to assistance and in the quality of aid provided.

COUNTERTERRORISM AND SANCTIONS

How counterterrorism throws back wartime medical assistance and care to pre- Solferino times

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Abstract

Domestic counterterrorism (CT) frameworks have been increasingly employed to criminalize impartial medical care to wounded and sick from non-State armed groups labelled as criminal or terrorist in non-international armed conflicts (NIACs). It has also contributed to legitimize attacks and incidental damage on medical facilities in armed conflicts overlooking the international humanitarian law (IHL) protection afforded to the wounded and sick as well as to medical personnel and facilities. This article compares the treatment of the wounded and sick in both international armed conflicts (IACs) and NIACs in the context of the global war on terrorism. It demonstrates the impacts that CT measures have on the IHL protection of the medical mission while demonstrating the increased acceptance that some incidental damages, such as the downgrading of IHL core protections, are tolerated, by some countries in the global fight against terrorism. The article further illustrates how the special criminal status of wounded and sick from non-State armed groups in armed conflicts that are evolving in a CT context can mechanically contaminate the status of impartial humanitarian medical activities, facilities and personnel in such contexts. It also shows how the simultaneous application of CT and IHL in numerous contexts of armed conflict as well as the involvement of State armed forces under those two different bodies of

law contributes to blurring the lines between IHL and CT, between protected or “criminal” humanitarian and medical activities. In contexts of complex military operations, this reality creates a mind-set conducive to legal mistakes and security incidents on the medical mission. Although there is a distinction between the protection from attacks and the protection from prosecution under IHL, in practice, numerous military operations to arrest are launched in ways similar to attacks and can end up with some killings. The article concludes that States could easily limit the impact of CT on IHL by adding an exemption in their CT framework for humanitarian and medical assistance that is compatible with IHL. This is the first necessary condition – even if obviously not a sufficient one – to end the legal ambiguity between IHL and State domestic law as to the criminalization or loss of the IHL protected status for the much necessary needed medical assistance and care activities in times of armed conflict that are evolving in a CT context.

Keywords: protection of the medical mission, global war on terrorism, counterterrorism measures, non-State armed groups, criminalization of humanitarian aid or actors, humanitarian exemption.

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Introduction

Since 2001, the “global war against terrorism” has entered the international vocabulary,¹ and has challenged long-standing rules established by international humanitarian law (IHL).² It should be noted that this concept of a global war

- 1 The Washington Post, “President Bush’s Address to a Joint Session of Congress and the Nation”, 20 September 2001, available at: https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html (all internet references were accessed in October 2021); Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, “Legislating Against Humanitarian Principles: A Case Study on the Humanitarian Implications of Australian Counterterrorism Legislation”, *International Review of the Red Cross*, Vol. 97, No. 897–898, 2015, pp. 235–61; Kathleen Gleeson, *Australia’s “War on Terror” Discourse*, 1st ed., Routledge, London, 2016; Jethro Mullen and Margot Haddad, “France is at War,” President Francois Hollande Says After ISIS attack”, CNN, 16 November 2015, available at: <https://edition.cnn.com/2015/11/16/world/paris-attacks/index.html>, quoting the then French President: “We are in a war against terrorism, jihadism, which threatens the whole world. [...] Terrorism will not destroy France, because France will destroy it.” However, from 2009, the then President of the United States, Barack Obama, rebranded the term of global war against terrorism to the one of “Overseas Contingency Operations”. See David R. O’Leary, *The United States’ Overseas Contingency Operations/Global War on Terror: A Military Revolution?*, Master’s Thesis, Homeland Security Digital Library, 21 May 2014, available at: <https://www.hsdl.org/?view&did=760770>; and Scott Wilson and Al Kamen, “‘Global War on Terror’ is Given New Name”, *Washington Post*, 25 March 2009, available at: <https://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html?hpid=topnews>; John Davis, “Assessing Obama’s Efforts to Redefine the War on Terror”, in John Davis (ed.), *The Barack Obama Presidency: A Two Year Assessment*, Palgrave Macmillan, New York, 2011.
- 2 Marko Milanovic, “Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007; Mary Ellen O’Connell, “The Legal Case Against the Global War on Terror”, *Case Western Reserve Journal of International Law*, Vol. 36, No. 2, 2004; Humanitarian Policy Group, “Humanitarian Action and the ‘Global War On Terror’: A Review of Trends and Issues”, *HPG Briefing*, Overseas Development Institute, London, July 2003, available at: <https://cdn.odi.org/media/documents/355.pdf>.

against terrorism had already been invoked in 1999 by the Russian authorities in the context of the second Chechen war.³

The fight against terrorism is largely referred to today to describe the use of armed force against non-State armed groups that are fighting for a new political–religious national order.⁴

Terrorism offences are governed by a specific set of rules in international law⁵ as well as in domestic criminal law. However, they do not belong to a legal

3 Vladimir Putin, “Opinion: Why we Must Act”, *The New York Times*, 14 November 1999, available at: <https://www.nytimes.com/1999/11/14/opinion/why-we-must-act.html>.

4 Ministère de l’Europe et des affaires étrangères, “La force conjointe G5 Sahel et l’Alliance Sahel”, *France Diplomatie*, February 2021, available at: <https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/securite-desarmement-et-non-proliferation/terrorisme-l-action-internationale-de-la-france/l-action-de-la-france-au-sahel/article/la-force-conjointe-g5-sahel-et-l-alliance-sahel>; U.S. Department of State, “The Global Coalition to Defeat ISIS”, *About Us*, available at: <https://www.state.gov/about-us-the-global-coalition-to-defeat-isis/>; Global Coalition to Defeat Daesh/ISIS, available at: <https://theglobalcoalition.org/en/>. See also for example, the qualification by the governments of Chad, Central African Republic (CAR), Ethiopia, Indonesia and Myanmar of the opposition groups with the “terrorist” label. Ethiopia: On 6 May 2021, the House of Peoples’ Representatives unanimously adopted Resolution No. 10/2021 by majority vote to designate the Tigray People’s Liberation Front (TPLF) and Oromo Liberation Army (OLA)/Shene as terrorists, endorsing the resolution adopted by the Council of Ministers on 1 May 2021; Elisa Meseret, “Ethiopia Charges Prominent Opposition Figure with Terrorism”, *AP News*, 19 September 2020, available at: <https://apnews.com/article/race-and-ethnicity-addis-ababa-abi-yahya-ethiopia-terrorism-c5b1f95bb4eb2258767c2676e665a2dd>. Chad: The Chadian transitional government has purportedly referred in the preamble of its transitional Charter to the Front for Change and Concord in Chad (FACT) rebels as terrorists: see N’Djaména Act, “Charte de Transition de la République du Tchad”, 21 April 2021, available at: <https://www.ndjamenaactu.com/charte-de-transition-de-la-republique-du-tchad/>. However, it seems that the signed version of the Charter changed the term from “terrorists” to “mercenaries”: *Charte de Transition de la République du Tchad*, available at: <https://presidence.td/wp-content/uploads/2021/04/charte-de-transition-tchad.pdf>, but the “terrorist” version of the Charter still remains online. See also, Paul-Simon Handy, *Chad: Democratisation Challenges and Limits of International Intervention (ARI)*, Real Instituto Elcano, 6 June 2008, available at: http://www.realinstitutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/sub-saharan+africa/ari59-2008: “The increased oil revenues particularly enhanced Deby’s ability to further militarise his regime by (mis)using the terrorist metaphor and attracting international support. By describing his political opponents as terrorists, Deby is not only postponing necessary democratic reforms but he is also trying to secure military support from countries like France and the US.” CAR: In a communiqué released on 20 April 2021 (No. 009/MISP/DIRCAB/SP.21), the Government of CAR declared the armed groups Anti-balaka, Retour, Réclamation et Réhabilitation (3R), Mouvement patriotique pour la Centrafrique (MPC), Unité pour la paix en Centrafrique (UPC), Front populaire pour la renaissance de la Centrafrique (FPRC) and the Coalition of Patriots for Change (CPC) as terrorist groups and no longer as politico-military groups (copy available with the author). Myanmar: The Tatmadaw have labelled the National Unity Government a terrorist group. Reuters, “Myanmar’s Junta Brands Rival Government A Terrorist Group”, 8 May 2021, available at: <https://www.reuters.com/world/asia-pacific/myanmars-junta-brands-rival-government-terrorist-group-2021-05-08/>. Indonesia: Indonesia has designated West Papuan independence fighters as “terrorists”. New Zealand Herald, “Terrorist Tag in West Papua Could Worsen Racism: Rights Group”, 7 May 2021, available at: <https://www.nzherald.co.nz/world/terrorist-tag-in-west-papua-could-worsen-racism-rights-group/G3LB5UWQV5LNT2RMOMBCRFEOI/>.

5 The 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft; The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; The 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; The 1979 International Convention against the Taking of Hostages; The 1980 Convention on the Physical Protection of Nuclear Material; The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; The 1988 Protocol for the

category under IHL. The lack of agreement on an international definition for the concept of terrorism⁶ contributes to blurring the right of individuals (labelled as terrorists), who are part of a non-State armed group in a non-international armed conflict (NIAC), to the legal protections afforded by IHL in the course of the conduct of hostilities. Indeed, these individuals will usually fall under domestic terrorism laws, the application of which, in several cases of observed practice, supersedes IHL and subtracts them from a protection that they would normally benefit as a non-State party to a conflict. Conflation of IHL and domestic criminal terminology has become inherent to the effective implementation of IHL in these situations.

This confusion is even more aggravated by the ambiguity created by the choice to use terms such as “war” or “combat” to refer to the fight against individuals and groups labelled as terrorists at the national and international level.⁷ It also contributes to blurring the lines between criminal law and the legal framework applicable to armed conflict. Recent reference to “armed terrorist groups” by State military representatives⁸ further crystalizes this risk. Indeed, in determining if the commission of certain acts meets the threshold of an armed conflict, the labelling of individual or non-State armed groups as being terrorist is irrelevant. What matters is the intensity of the violence used between the opposing State and non-State parties to the conflict – government forces against the non-State armed group.⁹

Terrorism is a broad criminal qualification that materializes in two different and intertwined ways: special criminal procedure in front of tribunals and special military operations in the battlefield. It has also been broadly used by governments in many NIACs to qualify groups and individuals affiliated to non-State armed groups and to deprive them of IHL provisions, notably about

Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; The 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; The 1997 International Convention for the Suppression of Terrorist Bombings; The 1999 International Convention for the Suppression of the Financing of Terrorism.

6 A draft convention that would include a definition of terrorism in its article 2 has been under negotiation since 1996 (for now twenty-five years) by the United Nations General Assembly (UNGA) (*Draft Comprehensive Convention on International Terrorism*). For more information, see United Nations, *Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, available at: <https://legal.un.org/committees/terrorism/>.

7 States keep their own sovereignty in deciding which groups or individuals shall be considered as terrorist within their domestic jurisdiction without prejudice of other international procedures such as the one under the United Nations Security Council (UNSC).

8 See the reference made by the French to “armed terrorist groups” (GAT in French): Ministère des Armées, *Communiqué de presse, Opération Barkhane: Frappe contre un rassemblement de membres d'un groupe armé terroriste dans la région de Douentza*, 7 January 2021, available at: https://www.defense.gouv.fr/english/salle-de-presse/communiques/communiquede-presse_operation-barkhane_frappe-contre-un-rassemblement-de-membres-d-un-groupe-arme-terroriste-dans-la-region-de-douentza; Ministère des Armées, *Réaction du ministère des Armées au rapport de la Minusma sur les frappes de janvier au Mali*, 30 March 2021, available at: <https://www.defense.gouv.fr/actualites/articles/reaction-du-ministere-des-armees-au-rapport-de-la-minusma-sur-les-frappes-de-janvier-au-mali>.

9 International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Fatmir Limaj et al.*, Judgment (Trial Chamber II), IT-03-66-T, 30 November 2005, paras. 135–70.

detention and interrogation¹⁰ but also in connection with the provision of impartial medical care. Indeed, beyond international designation of terrorist individuals and groups, each country takes its own decision regarding such designation. While attention has been given to attacks on medical care as a generic issue, more elaboration on their typology and triggers is necessary to identify effective leverage. Better acknowledgement of the adverse effects of counterterrorism (CT) measures on the humanitarian action and the way the fight against terrorism is conducted is needed to shield IHL's legitimacy and its legal protection from pervasive CT criminal frameworks.

These practices are a direct challenge to the rules of IHL applicable in situations of NIACs. IHL is meant to apply equally to all Parties to the conflict including non-State parties in today's most common situation of NIACs. IHL also recognizes the status of "Party to the conflict" to non-State armed groups under the condition that they are sufficiently organized and under responsible command capable to carry out sustained and concerted military operations.¹¹ All parties, including non-State armed groups, are thus bound to respect IHL during the conduct of hostilities and to respect the right to medical assistance and care for victims of armed conflict. It should not be forgotten that individuals affiliated with non-State armed groups are liable to prosecution for war crimes under IHL for any acts amounting to it while also being liable to national criminal prosecution for the mere participation in hostilities. Indeed, they do not benefit from the "combatant privilege" that is afforded solely to members of a State armed group according to the Third Geneva Convention. Therefore, non-State armed group members can be so prosecuted, regardless of the labelling of the offence they are accused of committing (terrorism or not). However, any violation of IHL committed by members of non-State armed groups does not deprive these non-State armed groups of their status of Party to the conflict and the ensuing IHL protections, nor do they release States Parties to the conflict

10 *Djamel Ameziane (United States)*, Inter-American Commission on Human Rights, Merits Report No. 29/20, Case 12.865, 22 April 2020, paras. 126–7, 131 and 133.

11 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 1(1); International Criminal Tribunal for Rwanda, *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment and Sentence (Trial Chamber I), 27 January 2000, para. 257; International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005, para. 89; *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 April 2008, para. 60; *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, paras. 194–205. Under Article 3 common to the four Geneva Conventions, it would be an even lower threshold. See the International Committee of the Red Cross (ICRC) Commentary of 2021 to Article 3 Common to the Four Geneva Conventions, paras. 463 ff, and its accompanying footnotes. See <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096>. In order for a non-State armed group to be sufficiently organized to become a Party to a NIAC, it must possess organized armed forces. Such forces "have to be under a certain command structure and have the capacity to sustain military operations". (emphasis added).

from their obligations – in case of detention, *hors de combat*, etc. – under IHL in the conduct of their military operations.¹²

Article 3 common to the four Geneva Conventions acknowledges the specificity of NIACs and takes into account the legal asymmetry between the State and the non-State party to such conflicts. It specifies, in sub-article 2, that application of IHL provisions shall not affect the legal status of the Parties to the armed conflict. The primary purpose of that last sentence at the end of common Article 3 was to emphasize that the application of IHL – rights and obligations – to non-State armed groups does not grant them a “legal status” that would shield them from prosecution under domestic law for taking up arms against the *de jure* government.¹³ This concretely means that the legal status of the non-State party to the armed conflict remains defined by domestic law as a criminal one – which has been widened by new CT regulations and practices.

As this article will demonstrate, the layering of IHL and the CT criminal framework in most armed conflicts involving non-State actors has been made at the expense of the integrity of IHL essence and rules, including the most ancient ones regarding medical care to wounded combatants whichever nation they belong to.¹⁴ Two main factors may be identified. The first is the special nature of CT criminal law that challenges the judicial protection system with regard to

12 ICRC Commentary of 2021 to Article 3 Common to the Four Geneva Conventions, paras. 915 and 916. See <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096>. Para. 915: “The recognition that serious violations of common Article 3 amount to war crimes has opened new avenues for both international courts and tribunals and domestic courts to prosecute alleged offenders. *International courts and tribunals, such as the ICTY, the ICTR, the ICC, the SCSL and the Iraqi Special Tribunal, have been set up to prosecute alleged offenders for serious violations of common Article 3, among other international crimes.*” (emphasis added). Para. 916: “Alleged perpetrators can be prosecuted by the courts of the State on whose territory the offences were committed, the State of nationality of the victim, or the State of their own nationality. In non-international armed conflicts, these three possible States will mostly be one and the same, namely the territorial State.”

13 This purpose is clear from the ICRC Commentary of 2016 to GC I on Article 3 Common to the Four Geneva Conventions, paras. 861 and 864. See <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>. Para. 861: “This clause, which affirms that ‘[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict’, is essential. It addresses the fear that the application of the Convention, even to a very limited extent, in cases of non-international armed conflict may interfere with the *de jure* government’s lawful suppression of armed activity. This clause makes absolutely clear that the object of the Convention is purely humanitarian, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the essential rules of humanity which all nations consider as valid everywhere, in all circumstances.” Para. 864: “This provision confirms that the application of common Article 3 – or, perhaps more accurately, a State’s acknowledgement that common Article 3 and customary IHL obligations apply to a conflict involving a non-State armed group – does not constitute any recognition by the *de jure* government that the adverse Party has any status or authority of any kind; it does not limit the government’s right to fight a non-State armed group using all lawful means; and it does not affect its right to prosecute, try and sentence its adversaries for their crimes, in accordance with its own laws and commensurate with any other international legal obligations that may apply to such procedures. The same holds true in respect of the conclusion of special agreements. Indeed, the application of common Article 3 to a non-international armed conflict does not confer belligerent status or increased authority on the non-State armed group.” (footnote citation omitted).

14 *Convention de Genève du 22 août 1864 pour l’amélioration du sort des militaires blessés dans les armées en campagne*, Art. 6 (Convention of 1864).

investigation, arrest, detention and prosecution. The second is the absence of explicit reference in domestic law to the medical and humanitarian immunity provided by IHL.¹⁵ This omission exposes humanitarian and impartial medical assistance to the suspicion and threats stemming from the current wide definition¹⁶ (and application)¹⁷ of complicity, association with, and support to terrorism offences.

IHL applies in situations of armed conflict regardless of the criminal classification done by States of the status of individuals or armed groups. Conversely, the qualification of non-State armed group fighters as “terrorists”, including when they are wounded and sick, contaminates the legitimacy of the series of IHL provisions that protects medical and humanitarian assistance in armed conflicts.

Beside the duty to collect and care for wounded and sick without discrimination as provided in common Article 3, the medical mission¹⁸ – broadly speaking – itself is defined and protected as such under IHL since 1864 in international armed conflict (IAC) and since 1977 in NIAC. This protection covers the specific status of wounded and sick, medical personnel as well as medical facilities and transport.¹⁹ It was drawn for military and later extended to civilians.²⁰ In 1977, the Additional Protocols to the Geneva Conventions have merged the protection for the military and civilian categories of the medical mission. However, domestic criminal law still frames and limits the way wounded

15 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art.16(1); and AP II, Art. 10(4).

16 See, for example, the definition put forward in 18 U.S. Code (United States), Arts 2339A and 2339B; Criminal Code (Canada), Arts 83.03(b) and 83.19; Criminal Code (Niger), Art. 399.1.21; see also UNGA, *Note by the Secretary-General on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/73/314, para. 33; Dustin A. Lewis, Naz K. Modirzadeh and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, Legal Briefing, Harvard Law School Program on International Law and Armed Conflict, September 2015, pp. 63 and 100.

17 United States District Court for the Southern District of New York, *United States v. Shah*, 474 F. Supp. 2d 494 (S.D.N.Y. 2007); UNGA report, UN Doc. A/73/314, para. 34; P. Wynn-Pope, Y. Zegenhagen and F. Kurnadi, above note 1, p. 247, for the examples of trials in the United States; see also the examples given on Afghanistan at para. 8 and of accusations against the non-governmental organization (Interpal) of having financed terrorism activities for the sole fact of having been present and working only in Palestinian territories at para. 10 in François Lenfant, Lia van Broekhoven and Frank van Lierde, “Les conséquences de la guerre contre le terrorisme sur le monde des ONG”, *Cultures & Conflicts*, Vol. 76, 2009, available at: <https://journals.openedition.org/conflicts/17779>. See Sen Kasturi and Tim Morris, *Civil Society and the War on Terror*, Intrac, Oxford, 2008; Nolan Guigley and Belinda Pratten, *Security and Civil Society: The Impact of Counter-Terrorism Measures on Civil Society Organisations*, National Council for Voluntary Organisations, London, 2007, which both demonstrate that most accusations levelled against non-governmental organizations were unfounded at para. 10.

18 This article uses the term “medical mission” in its broad sense to describe the entire set of medical activities, medical personnel, units, duties, equipment and transports aimed at the civilian population in general, and in particular to all wounded and sick persons, without discrimination, in times of armed conflict.

19 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 16–22; AP I, Arts 8–31; AP II, Arts 7–12; and Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (Customary IHL Rules), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>, Rules 25–30, 109 and 111.

20 *Ibid.*

and sick from non-State armed groups can receive medical care which leads to “mistake” attacks and incidental damage on the medical mission.²¹

At the international level, the scale of the attacks committed against the medical mission in armed conflicts such as those of Afghanistan, Syria and Yemen led the Member States of the United Nations Security Council (UNSC), in 2016, to reaffirm the protection of this mission in the framework of its resolution 2286.²² During this process, it became apparent that the violence perpetrated against the medical mission was systemic and that it significantly involved armed State actors that were carrying action in the course of their global fight against terrorism.²³

The United Nations General Assembly (UNGA) has developed for several years a strategy to fight terrorism that relies on the prerogatives of the UNSC under Chapter VII of the United Nations Charter, adopting international sanctions against specific countries but also against non-State armed groups and individuals listed as terrorists.²⁴ In addition to international treaties prohibiting terrorism, the UNSC passed international sanctions against designated groups and individuals and required all States to adopt criminal measures that demonstrate their good faith commitment to the fight against terrorism.²⁵ For a while, such resolutions only intended to remind States of their obligation, while fighting terrorism, to respect international law, including human rights law, refugee law and IHL.²⁶ However, recent UNSC and UNGA resolutions have scaled up their concerns of ensuring the respect of IHL while combatting terrorism.²⁷ These resolutions call on all States to take into account the impact of their CT legislations on exclusively humanitarian actions, including medical activities carried out by impartial humanitarian organizations in accordance with IHL.²⁸ These renewed concerns from the United Nations have been fuelled by the worrying trends of attacks on the medical mission in numerous situations of armed conflict.

21 Françoise Bouchet-Saulnier and Jonathan Whittall, “An Environment Conducive to Mistakes? Lessons Learnt From the Attack on the Médecins sans Frontières Hospital in Kunduz, Afghanistan”, *International Review of the Red Cross*, Vol. 100, No. 1-2-3, 2018.

22 UNSC Res. 2286, 3 May 2016.

23 Médecins sans Frontières (MSF), “MSF International President to UN Security Council: ‘This Failure Reflects a Lack of Political Will’”, 28 September 2016, available at: <https://www.msf.org/msf-international-president-un-security-council-failure-reflects-lack-political-will>. World Health Organization, Report on Attacks on Health Care in Emergencies, 2016, p. 7, available at: <https://www.who.int/hac/techguidance/attacksreport.pdf>.

24 UNGA Res. 60/288, 20 September 2006. See the updated 2021 strategy: UNGA, *The United Nations Global Counter-Terrorism Strategy: 7th Review: Draft Resolution/Submitted by the President of the General Assembly*, available at <https://digitallibrary.un.org/record/3930201?ln=fr>.

25 UNSC Res. 373, 28 September 2001; and UNSC Res. 1624, 14 September 2005. See the UNSC CT Committee, description available at: <https://www.un.org/securitycouncil/ctc/content/our-mandate-0>.

26 UNSC Res. 1456, 20 January 2003, para. 6; UNSC Res. 1787, 10 December 2007, preamble; UNSC Res. 2129, 17 December 2013, preamble, paras. 18 and 21; UNSC Res. 2220, 22 May 2015, preamble, paras. 2 and 3; UNSC Res. 2354, 24 May 2017, preamble, para. 2(e); UNSC Res. 2396, 12 December 2017, preamble, paras. 22 and 34; UNSC Res. 2427, 9 July 2018, preamble, paras. 12 and 13.

27 See, for example, UNGA Res. 72/133, 16 January 2018, para. 68; UNGA Res. 72/180, 30 January 2018, paras. 1, 5(a), 5(o) and 7; UNGA Res. 72/284, 26 June 2018, para. 79; UNGA Res. 73/139, 17 January 2019, para. 69; and UNGA Res. 73/174, 17 January 2019, paras. 2 and 14.

28 UNSC Res. 2462, 28 March 2019, p. 1 and paras. 5–6, 20 and 24; UNSC Res. 2482, 19 July 2019, p. 2 and para. 16.

It is important to recall that the criminal and terrorist characterization of non-State armed groups active on a territory depends on the policy of each country and the content of its criminal law. This qualification therefore goes far beyond the groups and individuals listed as terrorists by the UNSC resolutions²⁹ and puts humanitarian and medical personnel under additional pressure and criminal threats. At the national level, few States have already taken legal action to rectify this by including specific humanitarian exemptions in their criminal CT regulations. These legislative evolutions reflect lucid and responsible acknowledgement by the concerned States of the current weakening of IHL protections which is due to the criminalization of medical and humanitarian activities under CT criminal law measures.³⁰

This article will examine how the CT criminal framework is virtually destroying the fragile balance between IHL and the already existing criminal status of non-State armed groups under domestic law, notably by obliterating the medical duties in situations of armed conflict toward the wounded and sick affiliated to non-State armed groups as provided by IHL. The success of Henry Dunant after the Solferino battle to ensure that wounded enemies receive impartial medical care in IAC, extended to NIACs in 1949 through common Article 3, needs to be put back on track. Indeed, this should be done so that wounded fighters receive this impartial medical care and also to allow the civilian population living in disputed areas or under the control of non-State armed groups, labelled as terrorist, to benefit from unimpeded humanitarian assistance.

From the historical consensus on medical care to the military wounded and sick on the battlefield

The international consensus surrounding the duty to care for the wounded and sick on the battlefield emerged from the direct witnessing of their fate in Solferino by Henry Dunant, a civilian from a neutral country who published his book “A Memory of Solferino”. In 1864, the very first of the Geneva Conventions established the IHL framework providing impartial medical care for the military wounded and sick and protecting them as well as those assisting them. Wartime impartial medical care is therefore the starting point and at the heart of the oldest protections laid out in contemporary IHL.

Although this right may be seen as self-evident, it is important to understand the difficulties that had to be overcome in 1864 before it could make

²⁹ See above notes 4 and 26.

³⁰ See UNSC, Letter Dated 3 June 2020 from the Chair of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism and the Chair of the Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning Islamic State in Iraq and the Levant (Da’esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities Addressed to the President of the Security Council, UN Doc. S/2020/493, 3 June 2020, para. 84; see also UNGA, above note 16, paras. 48–52, 84, 85(a) and (b), 86, 89(d) and (g) and 90(a).

its appearance in the law of IAC. These difficulties can shed light on underlying factors of the multiple violations observed today, particularly in the context of NIACs.

Claiming that providing medical care to wounded and sick from the armed forces was mandatory, military neutral and not a support given to the adverse Party to the armed conflict was a new assumption that required a solid legal framework. From the outset, legal and practical difficulties had to be overcome for the principle, that the wounded and sick must be collected and cared for without discrimination, to be enshrined in IHL.

The first legal difficulty was the legal “neutralization” of the enemy’s wounded and sick—belonging to the armed forces—so that care would not be assimilated with a contribution to the war effort or with any form of participation in the hostilities. The wounded and sick benefit from the protections of IHL, as long as they do not participate to the hostilities.³¹ This status offers a protection that has a dual component which includes the obligation of the Parties to the armed conflict to facilitate medical care, as well as the prohibition on attacking the wounded and sick and the medical facilities, transport and personnel that care for them.

The 1864 Geneva Convention based the protection of the wounded and sick on the fact that they were no longer taking an active part into the hostilities. Therefore, those combatants would be considered as legally protected in the armed conflict and could not be attacked. Indeed, as the wounded and sick combatants no longer pose a military threat, there was no military necessity to attack them. Moreover, from a humanitarian perspective,³² as these persons are suffering, they needed to be treated. Furthermore, States Parties were to collect, treat and care for the wounded and sick combatants without any adverse distinction, i.e. of whichever nation they may belong to.³³ This obviously created an incentive for all parties to the armed conflict, as with it, they were given the same guarantee regarding their own wounded and sick. The protection of medical personnel, facilities and transport was also built on the medical neutrality agreement stipulating that ambulance and military hospitals shall be recognized as neutral and protected against any attacks.³⁴ The personnel performing medical, administrative and transportation duties of those hospitals as well as ambulances were to benefit from the same neutrality.³⁵ It also specified that acting in the

31 See Convention of 1864, above note 14, Art. 6; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 12; and Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 12.

32 The principle of humanity forbids the infliction of all suffering, injury or destruction not necessary for achieving the legitimate purpose of an armed conflict.

33 Convention of 1864, above note 14, Art. 6.

34 In that regard, the 1864 Geneva Convention adopted a distinctive emblem (the Red Cross) at its article 7, to signal the neutral status of medical personnel, facilities and transport. However, no such provision has been provided in AP II regarding the use of the medical protective emblem under the control of non-State parties to the armed conflict.

35 Convention of 1864, above note 14, Arts 1–4.

name of humanity conferred neutrality to the people bringing assistance to the wounded and sick.³⁶ Interestingly, while the issue of capture and arrest of wounded and sick enemy is a contentious practice, the very first Geneva Convention, in 1864, did not mention the right to capture or arrest wounded and sick from the enemy but rather provided that they could be directly rendered at the front line.³⁷

Another practical issue to which health personnel were confronted was the pressures from State security agents and military forces with regard to provision of medical care to some wounded and sick in armed conflict contexts. Therefore, IHL provided a secured and protective legal framework of action to health and relief personnel based on international recognition of medical ethics. IHL enhanced the mandatory respect of medical ethics by medical personnel against other dual security obligations imposed by States Parties to an armed conflict. To fully protect the autonomy of medical personnel and their professional ethics, IHL upholds immunity under domestic law for medical personnel acting according to medical ethics. This was necessary to secure their protection which derived from the neutrality of the medical activities they performed, and which are also in line with medical ethics.

The First Geneva Convention of 1949, for the first time, enshrined a specific IHL obligation that no one, including health personnel, shall be “molested” or “punished”³⁸ for treating the wounded and sick, including enemies, as required by medical ethics.³⁹ Subsequently, IHL in the 1977 Additional Protocols also affirmed that medical ethics is the imperative framework for medical assistance and that it is binding on all parties in situations of armed conflict and that no discrimination can be made between wounded and sick (including enemies) except if done based on medical criteria.⁴⁰

The current IHL framework protecting the medical duties, personnel and facilities is a functional one aimed at ensuring that medical care is provided without discrimination. It is rooted in the 1864 conventional agreement that medical care to wounded and sick enemy is of a neutral nature and that it encompasses the status of hospital and ambulances as well as medical and administrative personnel. Recalling this initial agreement is useful to overcome difficulties of IHL implementation in NIACs that are evolving in contexts of CT. Under IHL, civilians are entitled to the general protection under their civilian status as long as they do not make a direct participation in hostilities (DPH),⁴¹

36 Convention of 1864, above note 14, Arts 2 and 5.

37 Convention of 1864, above note 14, Art. 6.

38 It is interesting to note that GC I, at Article 18, uses the terms “*inquiété*” (worried) and “*condamné*” (convicted) in its French version while its English version uses the terms “molested” and “punished”. However, this difference of language cannot be found in the Additional Protocols. AP I, at Article 16 (1), and AP II, at Article 10(1), use the term “*puni*” in their French version and use its exact equivalent in the English version: “punished”.

39 Convention of 1864, above note 14, Arts 2 and 5; GC I, Art. 18; AP I, Art. 16; and AP II, Art. 10(1).

40 AP I, Art. 16(2); AP II, Art. 10(2); the 1864 Geneva Convention does not contain an explicit mention to medical ethics but only refers to the duty to care humanely and without discrimination.

41 See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, Geneva, 2009, available at: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>.

while wounded and sick, medical personnel, facilities and transports as well as medical duties benefit from a distinct and special protection on the basis of ensuring the performance of vital medical functions in their civilian and military components to satisfy the need for medical care.

Who are the protected wounded and sick?

In an IAC there is an obvious distinction between the military and civilian wounded and sick. The first two Geneva Conventions of 1949 developed rules for care and protection of the wounded and sick of the armed forces.⁴² The definition of armed forces was later extended by Additional Protocol I. However, it only covers individuals from a State Party to the armed conflict which encompasses their armed forces or other individuals, groups and units affiliated to it,⁴³ as long as they are under a command responsible for the conduct of its subordinates to a State Party. Although they benefit from the general protection offered by common Article 3, a confusion is created as wounded and sick fighters belonging to non-State armed groups are not explicitly included in the historical core of the protection of the wounded and sick – which used to designate solely combatants from a State armed force. The Fourth Geneva Convention of 1949 extended this protection to wounded and sick civilians, notably in situations of occupation⁴⁴ but made no explicit mention of members of non-State armed groups (or other civilians taking a DPH in the course of a NIAC) who become wounded and sick. They remain only covered by the general protection offered by common Article 3(2).

Additional Protocol I unified the definition of protected wounded and sick persons by specifying that it refers to all military or civilian persons in need of medical care and who refrain from any act of hostility.⁴⁵ It is thus clear that under IHL, impartial medical care should be provided to any wounded or sick person regardless of the label assigned to them as terrorist, or as a member of a non-State armed group – either a fighter or a civilian taking a direct part into hostilities.

The obligation to search, collect, evacuate and care for the wounded and sick without delay and without adverse distinction is a strong rule of customary IHL that clearly prohibits the abandonment of those people who are specifically at risk.⁴⁶ The rule applies to every wounded and sick person – civilian or military – as long as he is not directly participating in the hostilities when receiving the impartial medical care. This formulation allows the inclusion of wounded and sick from non-State armed groups in the protected status without

42 Prisoners of war are also entitled to hygiene and medical attention pursuant to Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Arts 29–32.

43 GC IV, Art. 4(A)(1)–(3) and (6); and AP I, Art. 43(1).

44 GC IV, Art. 16; GC I, Art. 12; GC II, Art. 12; and GC III, Art. 30.

45 AP I, Art. 8(A).

46 Customary IHL Rules 109–11.

entering into debate about their military or civilian nature. This is in line with the minimum regime established for NIACs by common Article 3. However, if the unified definition allows for the minimum protection of the wounded and sick, it has not abolished the different civilian and military special protection regimes applicable to medical duties, staff and facilities as we will see later.

Protection of medical duties under IHL contains two separate provisions: the right for the wounded to be collected and cared for on the one hand, and on the other hand, for the related protection against an attack. The prohibition of attacks protects persons *hors de combat* in particular because of their wounds and sickness.⁴⁷ Concerning the wounded and sick, while the obligation to collect and care for them is clearly stated, common Article 3 does not explicitly include specific requirements and protection for medical personnel, facilities or transports, or the military or civilian status of the personnel and the medical structures involved in such duty.⁴⁸

Additional Protocol II complemented the sobriety of common Article 3 with a set of provisions very similar to those found in Additional Protocol I for IACs.⁴⁹ The obligation to protect, collect and care covers all wounded, sick and shipwrecked persons whether or not they took part in the armed conflict.⁵⁰ This new formulation therefore imposes an absence of distinction, based on criteria other than medical ones, for the care of these persons⁵¹ as demonstrated by several international instruments⁵² and the practice of many States which included it in their military manuals applicable in NIACs.⁵³

Does it mean that belonging to either the armed forces of a State or to non-State armed groups is no longer relevant with regard to the access to and conditions of medical care? The answer is no for two main reasons, the first one being the variation in the degree of application of the precaution and proportionality duties; the second is related to the loss of protection of wounded and sick fighters.

The extension of protection to civilian wounded and sick and the unification of the terminology contained in the Additional Protocols to the Geneva Conventions have not abolished the specific rules applicable to military or civilian health personnel⁵⁴ as well as military or civilian medical facilities.⁵⁵ It

47 GC IV, Art. 3(1).

48 GC IV, Art. 3(2).

49 AP II, Arts 7–11; and AP I, Arts 10–17.

50 AP II, Art. 7(1).

51 AP II, Art. 7(2); Customary IHL Rule 110.

52 *Cairo Declaration on Human Rights in Islam*, 5 August 1990, Art. 3(a); *Hague Statement on Respect for Humanitarian Principles*, 5 November 1991, paras. 1 and 2; *Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the Socialist Federal Republic of Yugoslavia*, 27 November 1991, para. 1; *Agreement on the Application of International Humanitarian Law between the Parties to the Conflict in Bosnia and Herzegovina*, 27 November 1991, para. 2.1; *Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines*, Part IV, 16 March 1998, Arts 4(2) and (9).

53 See Customary IHL Rule 110 and the various military manuals cited in its endnote 10.

54 See AP I, Arts 13 and 15, applicable to civilian medical facilities and personnel. These articles complement GC I, Arts 21, 22 and 23–6.

55 GC I, Art. 12; GC II, Art. 12; GC IV, Arts 16 and 27; and common Article 3.

has not abolished as well the original distinction between combatant or civilian wounded and sick and its impact on the protected status of military or civilian medical facilities and personnel.

From a humanitarian point of view, the major differences between the military and civilian protection regimes for the wounded and sick, for medical personnel, facilities and transports relates to the protection against attacks and the right of capture or arrest of any wounded and sick person. The protection against indiscriminate attacks includes, of course, the prohibition to attack intentionally any wounded and sick, medical personnel, facility and transport whether or not they are considered as military or civilian.⁵⁶ The military or civilian categorization of wounded and sick and of medical unit and personnel is irrelevant for direct attacks. However, such categorization matters with regard to the duty of precaution and proportionality regarding incidental damage suffered by wounded and sick, medical personnel facilities and transports in the conduct of hostilities.⁵⁷ In such situations, the assessment of proportionality and precaution is based only or mostly on the civilian nature of the incidental damage.⁵⁸ The military or civilian characterization of such wounded and sick from non-State armed groups as well as the medical personnel and units involved in their care may lead to the exclusion of their loss and casualties from the calculation of the civilian damage. This changes the level of incidental protection that may be expected in cases of a medical facility and its personnel providing medical care without discrimination to wounded and sick from non-State armed groups.

The drafters of Additional Protocol I felt necessary to specify that the presence of the armed forces of a State or other combatant in a civilian medical facility for medical reasons shall not be considered as an act harmful to the enemy (AHTTE) and therefore shall not deprive civilian medical facilities of their IHL protection from attacks.⁵⁹ This clarification, provided only for IAC, shed

56 AP I, Art. 51(4)(a); Customary IHL Rule 12 (regarding the prohibition against indiscriminate attacks in general); GC I, Arts 12–13; GC II, Arts 12–13; GC IV, Art. 16; AP I, Art. 10(1); AP II, Art. 7(1) (regarding protection for the wounded and sick); GC I, Arts 24–6; GC II, Art. 36; GC IV, Art. 20; AP I, Art. 15(1); AP II, Art. 9(1); Customary IHL Rule 25 (regarding protection for medical personnel); GC I, Art. 19; GC IV, Art. 18; AP I, Arts 12 and 52; Customary IHL Rule 28 (regarding protection for medical facilities); GC I, Art. 35; GC IV, Art. 21; AP I, Arts 21 and 52; Customary IHL Rule 29 (regarding protection for medical transports).

57 AP I, Arts. 51(5)(b), 57 and 58; Customary IHL Rules 14, 15 and 21–4.

58 AP I, Arts. 51(5)(b); Customary IHL Rules 14 and 15. However, the position that the principles of proportionality and precaution apply differently (or not at all) to military wounded and sick, and military medical personnel and objects is not universally shared. See Robert Kolb and Fumiko Nakashima, “The Notion of ‘Acts Harmful to the Enemy’ under International Humanitarian Law”, *International Review of the Red Cross*, Vol. 101, No. 912, 2019, p. 1176 and its footnotes 35–9 where the three debated positions are discussed: (i) fully applicable to all; (ii) applicable to wounded and sick military as well as to military personnel and objects but with a more lenient equation for assessing collateral damage than for civilian collateral damage; and (iii) not applicable to military medical personnel and objects or to military wounded and sick as they remain combatants.

59 AP I, Art. 13 complements GC I, Art. 22. See also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on APs), paras. 571 and 572 on AP I, Art. 13. Para. 571: “In view of the conditions of modern warfare, military and civilian wounded and sick are often found in the same place, and

light on the risks remaining in NIAC concerning the various possible interpretations and legal impacts of the presence of wounded and sick from non-State armed groups in a medical facility either as potential non civilian “acceptable” incidental damage, or as “acceptable” targets under their potential continuous hostile activity or under other AHTTE. Navigating the various IHL criteria related to the loss of protected status for wounded and sick in NIAC requires scrutiny of the various domestic doctrines and practices.⁶⁰ AHTTE differs from acts of hostility and from DPH. Although acts of hostility do not have a clear definition under IHL, they are interpreted by analogy with the rather strict definition of “hostile act”.⁶¹ However, some countries also refer to a hostile intent rather than a hostile act in their determination of DPH, thereby creating more uncertainty as to the effective status of protection of wounded and sick.⁶² The scope of AHTTE is broader than the above-mentioned two concepts as it may encompass indirect effects, attempts, and not only acts deliberately committed to harm the military operation of the adverse party, not intended to support a specific party to the armed conflict (some acts could be committed by inattentiveness or by error). AHTTE are mainly appreciated based on the caused harm and possible contribution to military operations without having to be strictly connected to hostilities (which are defined as all the direct engagements in specific means and methods of injuring the enemy).⁶³ For example, an AHTTE could be the sheltering, inside a civilian medical facility, of fit and healthy non-State armed group fighters or the transportation, in an ambulance, of these same fighters so that they are not attacked due to the special protection afforded to the medical mission. These acts, carried inside protected medical objects, would thus confer a military advantage to one of the parties to the armed conflict as they would be performed by medical personnel outside of their humanitarian duties and outside of the function of medical objects.

Additional precaution is also required when involving the CT legal framework in the equation. Indeed, various militarized security operations taking place in CT contexts risk blurring concepts related to law enforcement and to the law of armed conflict.

consequently they may be collected by the same medical units. Thus it is not possible to complain about the presence of wounded and sick civilians in a military unit, or that of military wounded and sick in a civilian unit, as a reason to terminate the protection to which these units are entitled. The provision quoted above removes any ambiguity on this point, as do the equivalent provisions of Article 22 of the First Convention with regard to military medical units, and of Article 19 of the Fourth Convention for civilian hospitals.” Para. 572: “The expression ‘or other combatants’ was added to the expression ‘members of the armed forces’ to ensure that all combatants within the meaning of Article 43 of the Protocol (*Armed forces*) are included. This addition, which was made during the CDDH, was retained in the end, even though it had become superfluous in view of the final wording of Article 43 (*Armed forces*). As armed forces are defined in a very broad sense in paragraph 1 of that article, there are no combatants who are not members of the armed forces of a Party to the conflict within the meaning of the Protocol.”

60 R. Kolb and F. Nakashima, above note 58, pp. 1171–99.

61 AP I, Arts 41(2)(c), 42(2) and 51(3).

62 United States Department of Defense, *Law of War Manual*, June 2015 (updated December 2016), para. 5.8.3.3: “demonstrated hostile intent may also constitute taking direct part in hostilities”.

63 R. Kolb and F. Nakashima, above note 58, p. 1192. See also N. Melzer, above note 41, p. 1013.

Under IHL, the capture of an enemy, even wounded and sick, is a military operation that cannot amount to an attack on the wounded and sick or on the medical facility and personnel and it must comply with medical duties. It is not subject to formal judicial procedure.⁶⁴ Moreover, the arrest of a wounded and sick alleged criminal must respect official procedure and judicial guarantees.

Losing the wounded and sick protected status?

Under IHL the protected status of wounded and sick covers persons, whether military or civilian, who because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.⁶⁵ This definition, from the 1977 Additional Protocol I to the Geneva Conventions, complements the protected status of persons *hors de combat*.⁶⁶

The protected status of the wounded and sick and therefore the risk of losing it depends on two basic components: the person's medical condition as well as the person's conduct. However, IHL provides no clear definition of what an act of hostility is⁶⁷ or a hostile act.⁶⁸ Nor does it clarify the difference between those two terms. While good faith interpretation and implementation are expected, the case-by-case determination of wounded and sick status creates uncertainty. The loss of wounded and sick protected status may also weaken the special protection provided by IHL to medical personnel, units and transports.⁶⁹ Indeed, IHL provides that this special protection will cease if, outside its humanitarian function, the personnel commit, or the unit is used to commit AHTTE.⁷⁰ IHL officially excludes four specific situations from the scope of definition of AHTTE,⁷¹ leaving space for broad case-by-case interpretation, challenging the wounded and sick and the medical duties protected status.⁷²

64 However, a military operation only designed to capture wounded and sick from the enemy may be questioned.

65 AP I, Art. 8(a).

66 Common Article 3(1), which is applicable both to State and non-State actors, lays out that in NIACs, fighters who have laid down their arms and those placed "*hors de combat*" are to be treated humanely in all circumstances without distinction. However, common Article 3 offers no definition of the term *hors de combat*. This definition is contained in Customary IHL Rule 47 and AP I, Art. 41(2) which consider a person *hors de combat* if: (1) he is in the power of an adverse Party; (2) he clearly expresses an intention to surrender; or (3) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore incapable of defending himself; provided in any of these cases he abstains from any hostile act and does not attempt to escape.

67 AP I, Art. 8(a).

68 AP I, Art. 41(2); AP II, Art. 11(2).

69 GC I, Art. 21; GC IV, Art. 19(1); AP I, Arts 13(1) and 21; AP II, Art. 11(2); Customary IHL Rules 25 and 28. See also R. Kolb and F. Nakashima, above note 58, pp. 1171–99.

70 GC I, Art. 21; AP I, Art. 13(1); Customary IHL Rules 25 and 28.

71 AP I, Art. 13(2).

72 ICRC Commentary of 2016 to Article 3 Common to the Four Geneva Conventions, para. 1840 on GC I, Art. 21; see <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>; ICRC Commentary on APs, above note 59, para. 551 on API, Art. 13.

Without calling into question the customary character of the rules of IHL concerning the protection for the wounded and sick and medical duties in times of armed conflict, it is clear that the distinction between military and civilian wounded and sick remains a structural component of conventional IHL (reflected in numerous domestic military manuals).⁷³ It creates practical interpretation and implementation challenges in NIAC where members of non-State armed groups are considered criminals or terrorists under domestic law.

The protected status of the wounded and sick from non-State armed groups is even more problematic in a NIAC for countries that have not ratified Additional Protocol II.⁷⁴ In such contexts, common Article 3, as well as Customary IHL Rule 110, requires that the sick and wounded shall be collected and cared for without distinction, but it is silent on the actors and the means of such missions.⁷⁵ Some countries have used this silence to insist and put forward a difficult interpretation that the wounded and sick from a non-State armed group be treated only in State hospitals or State military medical units and not in other civilian or humanitarian medical facilities. This pattern was noticed in the wake of civil unrest and demonstrations during the Arab Spring, notably in Bahrain, Turkey and Syria. It has been maintained and reinforced when the situation of violence reached the

73 The United States *Law of War Manual*, for instance, treats separately military medical personnel (see Art. 4.9 and 4.10) and civilian medical personnel (Art. 7.17.4) as well as military hospitals (Art. 7.10.1.1) and civilian hospitals (Art. 7.17.2.1). Conditions related to the loss of protection are specified with regard to military hospitals (Art. 7.8.3): United States Department of Defense, above note 62.

74 For instance, the countries of Syria, Iraq and the United States.

75 Customary IHL Rule 110 states that: “The obligation to protect and care for the wounded, sick and shipwrecked is an obligation of means. Each party to the conflict must use its best efforts to provide protection and care for the wounded, sick and shipwrecked, including permitting humanitarian organizations to provide for their protection and care. Practice shows that humanitarian organizations, including the ICRC, have engaged in the protection and care of the wounded, sick and shipwrecked. It is clear that in practice these organizations need permission from the party in control of a certain area to provide protection and care, but such permission must not be denied arbitrarily (see also commentary to Rule 55). In addition, the possibility of calling on the civilian population to assist in the care of the wounded, sick and shipwrecked is recognized in practice.” See also the ICRC Commentary of 2020 to common Article 3, paras. 792, 793 and 798. See <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E160550475C4B133C12563CD0051AA66>. Para. 792: “Although it is clear that Parties to a non-international armed conflict are responsible for searching for and collecting the wounded and sick, common Article 3 does not specify who it is that has actually to carry out these activities. The typical scenario envisaged in the article involves search, collection and evacuation activities by the Party or Parties to the conflict that have been involved in the engagement that has resulted in wounded persons [...]”. Para. 793: “If the resources of a Party to the conflict are not sufficient to carry out search, collection and evacuation activities in order to meet its obligations under common Article 3, that Party may call upon civilians or humanitarian organizations to assist in these efforts [...]” (footnote citation omitted). Para. 798: “The obligation to care for the wounded and sick requires that the Parties to the conflict take active steps to ameliorate their medical condition. Like the other obligations in common Article 3, this obligation applies equally to State and non-State Parties. Some non-State armed groups have the capacity to provide sophisticated medical care, while others have more rudimentary capacities. In any case, non-State armed groups must endeavour to develop their capacities to provide treatment to the best of their abilities and should be permitted to do so. Like State Parties, they should ensure that their forces are trained in first aid. Likewise, they may have recourse, if necessary, to medical aid provided by impartial humanitarian organizations [...]”.

threshold of a NIAC.⁷⁶ It is also significant that in the context of the global war against terrorism launched by the United States in 2001, even the application of common Article 3 to non-State armed groups involved in the territories where the United States was militarily engaged has been contested.⁷⁷

The elephant in the (medical emergency) room: the “criminal” wounded and sick from non-State armed groups

As previously presented, the coherence of the international protection of the wounded and sick is historically and legally based on their combatant *versus* civilian status stirring the neutrality challenge of medical duties. Historically, the legal protection for the wounded and sick combatants of State armed forces has been obtained on the battlefield, based on a clear international definition of such combatant, and of their neutralized military status when out of combat due to wounds and sickness.⁷⁸ There is no such clarity regarding the wounded and sick members of non-State armed groups. Under IHL they are excluded from the treaty definition of a combatant. They may only be considered as civilians taking a DPH.⁷⁹ Undeniably, the concept of DPH is highly debated among States and even between States and the International Committee of the Red Cross (ICRC).⁸⁰

The affirmation of the special protected status of wounded and sick from non-State armed groups is tainted by certain ambiguities that work against them when it comes to making case-by-case determination and articulating their medical status with the conditions required for *hors de combat* (implying that they are abstaining from hostile acts) in concrete and real-time field cases. The *hors de combat* notion was designed for the special protection of wounded and sick combatants, and it must be distinguished from the later ones applicable to civilians taking a DPH and their potential continuous combat function⁸¹ and from the concept of AHTTE, which is used for the special protection of the medical mission (personnel, facilities and transports).⁸²

The principle of distinction between civilian and combatant remains the fundamental basis of IHL that cannot survive any third categorization of “unlawful” fighter or “criminal” civilian.

76 See the cases of Iraq, Nigeria, Pakistan, Syria, Turkey, Bahrain and Egypt where State regulation forbids that wounded and sick be treated by civilian or humanitarian doctors or any related medical facility. See the cases presented in Marine Buissonnières, Sarah Woznick and Leonard Rubinstein, *The Criminalization of Health Care, Safeguarding Health in Conflict*, Johns Hopkins University and University of Essex, June 2018, p. 31, available at: <https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf>.

77 United States Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al.*, 548 U.S. 557 (2006), No. 05.184, *Decision on a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*, 29 June 2006, pp. 67–8.

78 Common Article 3; AP I, Art. 41(1); Customary IHL Rule 47.

79 AP I, Arts 45(1)(3) and 51(3); and AP II, Art. 13(3).

80 See N. Melzer, above note 41, pp. 43–5.

81 N. Melzer, above note 41, pp. 34 and 35.

82 R. Kolb and F. Nakashima, above note 58, pp. 1171–99.

The explicit reference to the *hors de combat* status appears in common Article 3 in the context of a NIAC. This reference grants a protected status to wounded and sick who are affiliated to non-State armed group(s) party to the armed conflict.

It is agreed that civilians lose their protection as civilians for the duration of their DPH.⁸³ This category may efficiently cover occasional civilian participation in hostilities, but it has been expanded by doctrine and jurisprudence of some States⁸⁴ to include a continuous combat function⁸⁵ by members of non-State armed groups.⁸⁶

With regard to the continuous combat function, the interpretive guidance from the ICRC requires the element of a “lasting integration into an organized armed group” which is acting as the armed forces of a non-State party to an armed conflict and it also “involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities”.⁸⁷ The function assumed must be continuous rather than a spontaneous, sporadic or temporary role assumed for the duration of a particular operation.⁸⁸ However, under IHL and the ICRC interpretive guidance, the protected status of wounded and sick remains an individual one, triggered by the need of medical care at a given moment and the abstention of hostile act at this same time without consideration of previous continuous combat function.

The commentaries to Additional Protocols I and II demonstrate that States did not consider it necessary to define the concept of “hostile acts”.⁸⁹ This allows

83 N. Melzer, above note 41.

84 Supreme Court of Israel, *Iyad v. State of Israel*, CrimA 6659/06, 11 June 2008.

85 The concept of permanent participation in hostilities is not defined by IHL.

86 N. Melzer, above note 41, pp. 33–5 and 72; see ICRC, *Practice Relating to Rule 106. Conditions for Prisoner-of-War Status*, IHL Database, Customary IHL, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule106.

87 N. Melzer, above note 41, p. 34.

88 *Ibid.*, pp. 34 and 72.

89 See ICRC Commentary on APs, above note 59, paras. 549–53, 555 and 557 on AP I, Art. 13; AP I, Art. 13 (1); ICRC Commentary on APs, above note 59, paras. 4636–9 and 4642 on AP II, Art. 7; AP II, Art. 11(1). Para. 4636: “What is meant by the phrase ‘wounded, sick and shipwrecked’? Protection of the wounded, sick and shipwrecked responds to a fundamental humanitarian requirement and was not cast into doubt in the context of drawing up rules to govern non-international armed conflicts; this is why it is possible to use the same definition of the wounded, sick and shipwrecked as the point of departure in the two Protocols. In the light of the negotiations it can be noted that the basic terminology is uniform.” Para. 4637: “In the absence of a provision of definitions, which was finally not adopted for Protocol II, we refer to Article 8 (*Terminology*), sub-paragraph (a), of Protocol I, which defines the wounded and sick as follows: [p.1409] “‘Wounded’ and “‘sick’ mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.”” Para. 4638: “The definition of the wounded and sick protected by this Part is based on two criteria: 1) requiring medical care; 2) refraining from any act of hostility.” Para. 4639: “Any person, military or civilian, fulfilling these two conditions is included amongst the wounded or sick; maternity cases, new-born babies, the infirm and expectant mothers are examples thereof, but this is not an exhaustive list. Thus this definition differs from the usual meaning of the terms ‘wounded’ and ‘sick’. In fact, a wounded or sick person who continued to fight would not be considered as such under the terms of the Protocol, and would consequently not be entitled to protection under this article.” (footnote citation omitted). Para. 4642: “In a situation of non-international armed conflict people cannot acquire a different status to the same extent as in an international conflict, since there are not, strictly speaking, different categories of

arguing on a case-by-case basis the potential loss of protection of a given person. However, discussions around so-called continuous combat functions can trigger the loss of the special protected status for wounded and sick affiliated to non-State armed groups. Some States' doctrines have also started to challenge the *hors de combat* and non-hostile status of alleged terrorists or of "unlawful" criminal fighters when they are wounded and sick. Indeed, these States developed a broad interpretation of the continuous combat function in connection with the concept of AHTTE.⁹⁰ Rather than demonstrating the occurrence of effective hostile acts as required by IHL, they rely on hostile intent⁹¹ or on a presumed permanent hostile function or nature of such wounded and sick. These States claim a case-by-case determination of the wounded and sick remaining capacities interfering with the autonomy of medical duties. Thus, the mere ability to think ("plan") or to communicate ("command") may preclude the protective status to be afforded to those wounded and sick. Such loss of special protection is not only detrimental for the wounded and sick, it also leads to military interference with the work of medical services and suspends the military duty to protect and respect the medical mission.⁹² For "wounded and sick" fighters of a non-State armed group a "lasting disengagement from combat functions" cannot be the legal criterion imposed, as being a wounded and sick fighter does not mean that the individual needs to become a civilian in order to benefit from IHL protections. However, it can and often will be a temporary/transitory status which is triggered by *de facto* refraining from any act of hostility, for as long as the individual will be specifically protected as a wounded and sick person.

The good faith case-by-case determination of wounded and sick which provides them a protected status is a fundamental element of a correct interpretation of IHL where medical personnel should not be excluded. This is even more important because the standard regarding the nature of hostile acts and evidence required are not clear in practice, notably toward wounded and sick having a so-called continuous combat function or having remaining physical capacity to carry out hostile acts—even though they are not in fact performing hostile acts. When such determination is based on a State's military and security

protected persons: 'all persons who do not take a direct part or who have ceased to take part in hostilities' are protected. Nevertheless, after the end of the rescue operation the shipwrecked are no longer considered as such, and, depending on the circumstances, will be protected under one or other of the rules of the Protocol. As the case may be, they will be wounded or sick within the meaning of this article, if their state of health requires care; they will fall in the category of those detained or interned, if they have been captured by the adverse party, or they may simply be civilians. Protection is due to all the wounded, sick and shipwrecked, 'whether or not they have taken part in the armed conflict'. No distinction is made between members of the armed forces and civilians or according to whether they belong to the one party or the other concerned; the obligation to respect and protect is general and absolute.'" (footnote citations omitted).

90 Art. 5.8.3.3 of the *Law of War Manual* states "demonstrated hostile intent may also constitute taking direct part in hostilities": United States Department of Defense, above note 62.

91 *Ibid.*, Art. 7.10.3.6.

92 ICRC Commentary of 2016 to GC I on Article 3 Common to the Four Geneva Conventions, para. 1854 on GC I, Art. 21; and para. 2008 on GC I, Art. 24. See <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDF490736C1C1257F7D004BA0EC>.

intelligence, which is classified information, it is almost impossible for humanitarian and medical personnel to foresee at the time of the incident and to challenge it afterwards. It creates a loss of objective predictability regarding the protected status for wounded and sick as well as to medical and humanitarian personnel and facilities involved in their medical care. This unsafe legal environment is conducive at least to mistakes, if not, to intentional abuse of IHL.⁹³

Furthermore, the good faith interpretation of the various IHL concepts allowing the granting or the loss of the protected status to wounded and sick may easily be defeated and somehow substituted by the straight and self-executing domestic criminal framework. Indeed, the national criminal status of non-State armed group fighters threatens a fair determination of their international special protection when wounded and sick as well as their potential loss of protection with regard to committing hostile acts while being wounded and sick.⁹⁴

Under IHL, an injury or illness halts the targetability of a person out of combat, providing that this person abstains from committing any hostile act. This last condition is a standard one regulating the loss of the special protection of medical duties provided by IHL. Therefore, there is no justification to take away the protection from a wounded member of a non-State armed group on the basis of his alleged terrorist or criminal activities committed in the course of an armed conflict. However, under domestic criminal law, members of non-State armed groups fall under multiple criminal offences such as crimes against national security and safety as well as terrorism acts. These crimes are, by definition, hostile acts against the State. Wounds and sickness do not alter or stop their criminal status. However, the hostile component of their criminal status may be confused with the criteria leading to the loss of IHL special protection.

As previously mentioned, wounded and sick enemy fighters are not immune from arrest for their criminal acts. However, while they are wounded and sick, their capture, arrest, transfer, and detention by judicial authorities or security forces should be done in conformity with the continuity of their care and in respect of the protected status of medical personnel, facilities and transport. In numerous instances, civilian medical and humanitarian personnel have experienced special military operations to capture, arrest or kill, inside medical facilities or transports, wounded or sick enemy fighters labelled as terrorist. The military tactic was presented by the authorities as a “militarized” law enforcement operation against a patient and not as an attack on the medical facility itself.⁹⁵

93 F. Bouchet-Saulnier and J. Whittall, above note 21.

94 Conventional and customary IHL rules provide for loss of protection for the sick and wounded if they perform hostile acts. See common Article 3(1) and the ICRC 2016 Commentary to the GC I on Article 3 Common to the Four Geneva Conventions of the GC I at para. 737 and Article 12 at para. 1341. See <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>. See also AP I, Art. 8(a); ICRC Commentary on APs, above note 59, para. 306 on AP I, Art. 8; and Customary IHL Rule 109.

95 See, for instance, Reuters, “Undercover Israeli Troops Raid Hospital, Kill Palestinian”, 12 November 2015, available at: <https://www.reuters.com/article/us-israel-palestinians-violence-idUSKCN0T10JX20151112>; for the video of the operation, see Euronews, “Palestinian Killed as Israeli Forces Mount Undercover Raid Hebron Hospital”, 12 November 2015, available at: <https://www.youtube.com/watch?v=>

Such practices and argument illustrate the thin line existing in practice between the use of armed force under IHL or under law enforcement. This narrow division is made even more porous by CT special criminal law that departs from usual judicial guarantees and involves armed forces in militarized law enforcement operations.⁹⁶ State lawfulness arguments cannot silence the practical reality: the use of armed force inside medical facilities and against wounded and sick individuals labelled as terrorists is close to an abolition of the IHL protections. In such a context, the IHL special protection for medical duties associated with wounded and sick is put at odds and corrupted by the far-reaching impact of a patient's criminal status under criminal and CT legislation.

From protected medical duties to support of terrorism

The absence of an international definition of terrorism does not preclude each country from including these offences in the definition of crimes over which their courts have jurisdiction. It is therefore a matter of sovereignty for each country to determine which individuals and groups fall into this category.

Starting from 2001, terrorism has been qualified as a threat to international peace and security by many UNSC resolutions passed under chapter VII of the United Nations Charter. They requested all countries to contribute to the international fight against terrorism and to adopt domestic criminal law for the effective prosecution of terrorism activities.⁹⁷ These UNSC resolutions are also considered suitable for many countries as they represent an opportunity to provide a consensual security instrument that they might use against domestic political and armed opposition groups.⁹⁸ As CT is attached to national security,

Lj4PYh1zrvU. See also the Afghan special forces raiding an hospital in Afghanistan in 2016: Mujib Mashal, "Hospital Raid by Afghan Forces is Said to Kill at Least 3", *New York Times*, 18 February 2016, available at: <https://www.nytimes.com/2016/02/19/world/asia/hospital-raid-afghan-forces-nato-wardak-province.html>.

96 Dominique Linhardt and Cédric Moreau de Bellaing, "La doctrine du droit pénal de l'ennemi et l'idée de l'antiterrorisme. Genèse et circulation d'une entreprise de dogmatique juridique", *Droit et Société*, Vol. 97, No. 3, 2017, available at: <https://www.cairn.info/revue-droit-et-societe-2017-3-page-615.htm>; Geneviève Giudicelli-Delage, "Droit pénal de la dangerosité—Droit pénal de l'ennemi", *Revue de science criminelle et de droit pénal comparé*, Vol. 1, No. 1, 2010; Jean-François Dreuille, "Le droit pénal de l'ennemi: Éléments pour une discussion", in *Jurisprudence: Revue critique*, Université de Savoie, 2012, available at: <https://hal.archives-ouvertes.fr/hal-01479079/document>.

97 UNSC Res. 1373, 28 September 2001; UNSC Res. 1456, 20 January 2003; UNSC Res. 1535, 26 March 2004; UNSC Res. 1566, 8 October 2004; UNSC Res. 1624, 14 September 2005; UNSC Res. 1787, 10 December 2007; UNSC Res. 1805, 20 March 2008; UNSC Res. 1963, 20 December 2010; UNSC Res. 2129, 17 December 2013; UNSC Res. 2133, 27 January 2014; UNSC Res. 2170, 15 August 2014; UNSC Res. 2178, 24 September 2014; UNSC Res. 2199, 12 February 2015; UNSC Res. 2220, 22 May 2015; UNSC Res. 2242, 13 October 2015; UNSC Res. 2249, 20 November 2015; UNSC Res. 2253, 17 December 2015; UNSC Res. 2255, 21 December 2015; UNSC Res. 2309, 22 September 2016; UNSC Res. 2322, 12 December 2016; UNSC Res. 2341, 13 February 2017; UNSC Res. 2354, 24 May 2017; UNSC Res. 2368, 20 July 2017; UNSC Res. 2370, 2 August 2017; UNSC Res. 2395, 21 December 2017; UNSC Res. 2396, 12 December 2017; UNSC Res. 2427, 9 July 2018.

98 For example, in the first six months of 2021, the countries of Chad, CAR, Indonesia and Myanmar have applied the "terrorist" label to opposition groups outside the international designation process. For information, see above note 4.

international law allows restrictions to some human rights. The imperative to deter such acts and facilitate their prosecution have created at national and international level a special CT criminal framework that derogates from the usual criminal system.⁹⁹

The first specificity of CT criminal law is the broad range and many definitions of the various terrorism offences in most national criminal codes.¹⁰⁰ Historically, the international focus has been put on limiting the financing of terrorism. However, in domestic criminal law, this is more widely defined to include all forms of direct or indirect material support and assistance. Aiding and abetting terrorists as well as associating with terrorists are usual CT offences that may include almost all kind of factual interaction, contact and communication. Other offences have been added more recently to complement the legal arsenal against terrorism such as entering a territory under terrorists' control. The second specificity is that the proof of criminal intent is widely replaced by the plain knowledge of the criminal nature of certain individuals or groups involved.¹⁰¹ Such wide criminal definitions lead to wide criminal accusations impacting the legitimacy of humanitarian actors and activities during long periods of time. This specificity brings medical and humanitarian activities from impartial humanitarian organizations *de jure* into the criminal arena. This issue has raised criticism that such legislative techniques may conflict with the right to a fair trial, in particular the respect for the presumption of innocence which is a non-derogable human right.¹⁰² Due to these derogations from the usual due

99 See also Fionnuala D. Ní Aoláin, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, "Human Rights and Counterterrorism: a Sisyphean Tale", 16 June 2021, available at: https://theglobalobservatory.org/2021/06/human-rights-and-counterterrorism-a-sisyphean-tale/?utm_source=mailchimp&utm_medium=organic_email&utm_campaign=US_GO_publications_analysis&utm_content=link.

100 *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*, United States Patriot Act of 2001, Public Law 107–56, 26 October 2001, available at: <https://www.govinfo.gov/content/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf>. Until 2018, the provision contained in the Afghan CT law had the potential to encompass medical care within the ambit of punishable offences. See *Law on Combat against Terrorist Offences*, 2008, available at: http://www.vertic.org/media/National%20Legislation/Afghanistan/AF_Law_on_Combat_against_Terrorist_Offences.pdf.

101 See Criminal Code (Canada), Arts 83.03(b) and 83.19; Penal Code (Niger), Arts 200, 206, 399.1.18, 399.1.19 *nouveau (bis)* and *(ter)* and 399.1.23(c); 18 U.S. Code (United States), Arts 2339A and 2339B; see also the CT Law of Mali No. 2008-025, Art. 6, as well as the Malian Penal code, Art. 24 (broad criminal complicity). See also Chad Penal Code, Art. 118 (a broadening complicity to all those who provide without being forced to, and knowing their criminal intention, means of existence, shelter, refuge or meeting place to individuals threatening State safety and integrity), as well as Art. 109 (criminalizing all kind of material support and communication with armed and other rebel criminal groups). In 2020, Chad included a humanitarian exemption in its new CT legislation clarifying that humanitarian assistance is outside of the scope of such criminal offences. See Law No. 003/PR/2020, Arts 1(3) and (4) on the suppression of terrorist acts in the Republic of Chad of 28 April 2020 (Chad CT Law); see UNGA, above note 16, para. 33; D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 16, pp. 63 and 100.

102 UNGA Report on Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/71/384, 13 September 2016, para. 50, available at: <https://undocs.org/pdf?symbol=en/A/71/384>.

process, CT has been described as a new form of criminal law called the “criminal law of the enemy”.¹⁰³

The negative impact of CT on impartial humanitarian actors raises major legal and humanitarian concerns.¹⁰⁴ Indeed, medical and humanitarian personnel face certain recurring accusations in armed conflicts involving non-State armed groups. A non-exhaustive list of the most common accusations includes facilitating communication, facilitating the transport or escape of criminals, concealing criminal information, hiding, and providing support to criminals by various ways including by providing food, drugs, shelter and medical care. The payment of salaries to medical and humanitarian personnel in territories controlled by armed opposition groups adds to the list of potential material support or financing of terrorism.

This impact has recently been acknowledged by the UNSC resolution 2462 passed under chapter VII of the United Nations Charter which urges States, when designing and applying measures to counter the financing of terrorism, to “*take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law*”.¹⁰⁵ However, little has been done at State level to ensure compatibility of CT with IHL rules, notably by enacting proper humanitarian exemptions.¹⁰⁶ This was done under the pressure of the UNSC resolutions, which required all countries to actively contribute to the international fight against terrorism. Furthermore, these offences are defined in many countries without the requirement of a specific intent.

¹⁰³ See above note 97.

¹⁰⁴ ICRC, “The Conflation of IHL and the Legal Framework Governing Terrorism”, in *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November to 1 December 2011, pp. 48–53; United Nations Office for the Coordination of Humanitarian Affairs and Norwegian Refugee Council, *Study of the Impact of Donor Counterterrorism Measures on Principled Humanitarian Action*, July 2013, pp. 71–111. In 2016, MSF raised the issue at the CT committee of the UNSC asking them to issue State guidance regarding humanitarian exemption to ensure that IHL provisions are not undermined by CT measures. For the text of the intervention, see Françoise Bouchet-Saulnier, “IHL & Counter-Terrorism: Tensions and Challenges for Medical Humanitarian Organizations”, MSF Statement to the UN Security Council Counter-Terrorism Committee, 2 June 2016, available at: <https://msf-analysis.org/ihl-counter-terrorism-tensions-challenges-medical-humanitarian-organizations>; *Terrorism, Counter-Terrorism and International Humanitarian Law*, Proceedings of the Bruges Colloquium, 17th Bruges Colloquium, 20–21 October 2016, pp. 25 and 135–51; D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 16; Inter-Agency Standing Committee, Concept Note – IASC Counterterrorism Database: *Principled Humanitarian Action and Counter-Terror Measures: Documenting Impact Collectively Across the Humanitarian Community*; see also InterAction, *Detrimental Impacts: How Counter-Terror Measures Impede Humanitarian Action: A Review of Available Evidence*, April 2021, available at: <https://www.interaction.org/wp-content/uploads/2021/04/Detrimental-Impacts-CT-Measures-Humanitarian-Action-InterAction-April-2021.pdf>, and see at p. 2, the “Impact Catalogue” put together by InterAction.

¹⁰⁵ UNSC Res. 2462, 28 March 2019, para. 24 (emphasis added). See also UNSC Res. 2482, 19 July 2019, para. 16.

¹⁰⁶ UNSC, above note 30, paras. 83 and 84: “*Only a few States have developed a specific response to the potential impact of the counter-financing of terrorism on exclusively humanitarian activities [...]. At least three responding States have introduced humanitarian exemptions into their counter-financing of terrorism legislation [...]. However, most participating States (58 per cent) did not answer this question.*” (emphasis added).

As already mentioned, in numerous criminal codes, what is required to incur criminal responsibility in relation to a terrorist offence is a proof of a material and moral element. As for the material element, it consists of all kinds of direct or indirect material assistance, contact or association. Regarding the moral element, what is required is either the intention to commit the crime or the mere knowledge of the terrorist nature of an individual or group, and of their actions. Humanitarian and medical actors engaged in situations of armed conflict according to IHL can hardly be accused of criminal intention but their knowledge of the terrorist context, and the medical and humanitarian assistance they provide to all wounded and sick and population living in areas under the control of non-State armed groups are sufficient to incur criminal responsibility for contact and direct or indirect assistance.¹⁰⁷ The vagueness and wideness of these criteria lay grounds for criminal accusations against humanitarian and medical personnel. An exhaustive review is not available, but cases have been documented in Iraq, Nigeria, Pakistan, Syria, Colombia, Turkey, the United States and also Australia and the United Kingdom.¹⁰⁸ The negative impact of CT legislation from Western donor countries on humanitarian assistance abroad has also been established.¹⁰⁹

In Syria, the CT laws issued in July 2012 refer to a wide definition of terrorism and allow any State officials to arrest and prosecute a person for any act considered as a disturbance to public security committed by any means.¹¹⁰ According to the Independent International Commission of Enquiry on the Syrian Arab Republic, these laws have effectively made it a crime to provide medical care to anyone suspected of supporting the rebels.¹¹¹

The Iraqi law on combatting terrorism (13/2005) allows judges to bring charges against a wide range of suspects, including in practice against doctors who continued working in hospitals in Islamic State in Iraq and Syria (ISIS)-held territories.¹¹² In Nigeria, cases of doctors arrested for providing medical care to Boko Haram wounded and sick members have also been documented. Their arrest was possible due to the broad definitions of terrorism offences in Nigerian law. The ensuing release of these doctors was possible based on the fact that they did not know that the wounded they were treating were militants.¹¹³ The trend was also made clear in Pakistan where doctors have been arrested as the result of providing medical care to suspected terrorists without informing authorities.

107 See above note 102.

108 M. Buissonnières, S. Woznick and L. Rubinstein, above note 76, p. 31.

109 United Nations Office for the Coordination of Humanitarian Affairs and Norwegian Refugee Council, above note 104.

110 See the Syrian Laws No. 19, 20, 21 and 22 of 2012. See also, Violations Documentation Center in Syria, (VDC), *Special Report on Counter-Terrorism Law No. 19 and the Counter-Terrorism Court in Syria*, April 2015, available at: <http://www.vdc-sy.info/pdf/reports/1430186775-English.pdf>.

111 UNGA Report of the Independent International Committee of Inquiry on the Syria Arab Republic, UN Doc. A/HCR/25/65, 12 February 2014, para. 111 and Annex VII (Assaults on Medical Care), para. 21.

112 Human Rights Watch, *Flawed Justice: Accountability for ISIS Crimes in Iraq*, 5 December 2017, available at: <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq>.

113 See Ishaq Tanoli, "Three Doctors Held for Treating 'Militant' Released", *DAWN*, 18 November 2015, available at: <https://www.dawn.com/news/1220375/three-doctors-held-for-treating-militants-released>.

However, as previously mentioned, in many domestic criminal laws or practices, it is accepted that the simple proof of knowledge of the criminal nature of a group or an individual can be inferred from the material circumstances. Therefore, situations where medical personnel provide impartial medical care to a gunshot- or other violence-related wounded person may arguably trigger criminal charges but also heavy risks of harassment, administrative sanctions, disappearances, illegal detention and extrajudicial killings.¹¹⁴

The removal of subjective elements of criminal intent leaves little legal protection to humanitarian and medical personnel as they must have contact with such individuals and groups in order to provide humanitarian assistance to populations in disputed areas or areas under their control. With regard to medical assistance to any wounded and sick, humanitarian and medical personnel dealing with a gunshot-wounded patient are legally considered as presenting flagrant evidence of criminal activities incurring accusation of complicity and facilitation of terrorism activities if the patient is not immediately reported to the authorities.

Medical and humanitarian personnel from Médecins sans Frontières (MSF; Doctors without Borders) – exclusively engaged in medical and relief activities to populations in territories under the control of non-State armed groups – have faced official accusations and investigations in northern Nigeria, northern Syria but also in Cameroon, Turkey and in the Democratic Republic of the Congo. Accusations range from communication and facilitation of communication with terrorists, material and financial support to terrorism, association with terrorists, complicity, facilitation of transport and sheltering of terrorist individuals when wounded and sick.¹¹⁵

At field level there is a frequent overlapping between the characterization of domestic terrorism offences and that of the participation in a NIAC. Nevertheless, it remains that the simultaneous application of the two distinct *lex specialis* of IHL and criminal law leads to a deadlock for medical assistance and relief activities.

Medical activities and personnel as well as facilities and transports are caught in the domestic legal network of wide criminal offences such as association, complicity and support to terrorists and other criminals.¹¹⁶ These criminal suspicions against them have an impact on the entire medical relief chain, even though it is protected by IHL.

A humanitarian and medical actor such as MSF is witnessing an increase in accusations by the authorities, as well as military and security investigations, into its activities. Even if these investigations rarely result in trials and convictions, they may last for many years without any official decision on the closure of the case being made. During that time, they weaken or halt relief efforts by creating a dangerous

114 Such cases have been documented in Afghanistan, Bahrain, Egypt, Ethiopia, India, Iraq, Nigeria, Pakistan, Syria, Turkey and the United States. See M. Buissonnières, S. Woznick and L. Rubinstein, above note 76, p. 31.

115 These are situations that have directly affected MSF staff and activities over more than ten years, from 2010 to 2021.

116 There is a variety of criminal qualifications applicable to members of non-State armed groups such as rebels, insurgents, terrorists and it incurs criminal offences against State security and terrorism.

medium to long-term suspected status for impartial humanitarian personnel and activities stigmatizing individuals for, at times, many years.

From medical care to wounded and sick to accusations of material support to terrorists

Even if under IHL medical care to all wounded and sick without discrimination is a legal imperative, in practice, this obligation is challenged when the wounded and sick fall within the category of alleged criminals and terrorists, as this section will show.

The offence of material support to terrorism is so widely defined in its redaction that the provision of medical care as well as the provision of medical supplies become constitutive of such support to terrorism in most domestic legislation. A survey conducted on the question of criminalization of medical assistance suggested that authorities interpret support to terrorism to include the provision of health care in ten out of the sixteen countries surveyed.¹¹⁷ This tendency was made explicit in a court ruling on the grounds of “provision or attempt to provide material support to terrorists in the form of medical support to wounded jihadists”.¹¹⁸ Humanitarian organizations have since raised this concern in various fora to obtain humanitarian exemptions in international resolutions and domestic terrorism legislation.¹¹⁹

It is interesting to note that the United States court ruling mentioned above found that medical care given on an individual basis should be criminalized as material support to wounded Al-Qaeda terrorists. The judge found that the same medical care would not be criminalized if provided by an impartial humanitarian organization such as MSF since it was clear that such an organization was not

117 M. Buissonnières, S. Woznick and L. Rubinstein, above note 76, p. 31.

118 See 18 U.S. Code (United States), para. 2339B; *United States v. Shah*, above note 17, p. 499; and United States Court of Appeals, Second Circuit, *United States v. Farhane*, 634 F. 2d 127 (2d Cir. 2011), 4 February 2011, p. 134; D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 16, p. 124.

119 The ICRC has identified this as an issue as early as 2011. See the ICRC Report, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, Official Working Document of the 31st International Conference of the Red Cross and Red Crescent, Geneva, 28 November to 1 December 2011, 31IC/11/5.1.2, 31 October 2011, p. 52, available at: <https://www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>; F. Bouchet-Saulnier, above note 104; Norwegian Refugee Council, “Principles Under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action”, 12 June 2018, pp. 11, 15, 29 and 34, available at: <https://www.nrc.no/resources/reports/principles-under-pressure>; Fionnuala Ní Aoláin, “Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism”, Report of the Special Rapporteur to the Seventy-Fifth Session of the UNGA, 3 September 2020, UN Doc. A/75/337, paras. 34, 35, 45(b) and 48; Françoise Bouchet-Saulnier and Mego Terzian, “Comment les États peuvent contribuer à la protection de l’action humanitaire”, 8 September 2020, *Le Monde*, available at: https://www.lemonde.fr/idees/article/2020/09/08/comment-les-etats-peuvent-contribuer-a-la-protection-de-l-action-humanitaire_6051356_3232.html; Françoise Bouchet-Saulnier, “Where Counterterrorism Measures Impede Humanitarian Action, Domestic Law Is Key”, *IPi Global Observatory*, 17 June 2021, available at: <https://theglobalobservatory.org/2021/06/where-counterterrorism-measures-impede-humanitarian-action-domestic-law-is-key>.

acting under the control or direction of a designated foreign terrorist organization with the knowledge that the organization was engaged in terrorism activities.¹²⁰ The thin line drawn by the judge does not solve and rather exacerbates the issue of medical care by agreeing that provision of medical care to the wounded is not a mandatory duty but can amount to criminal material support. Furthermore, consolidated case law is not available in most war-affected countries where humanitarian and medical personnel remain under constant threats of accusations pursuant to national criminal law as interpreted by security and military forces before a potential court ruling.

In these contexts, the mere fact that some people have gunshot wounds is considered as an objective proof of their criminal activities. Therefore, their medical treatment by medical and humanitarian personnel is often construed by authorities as a direct support to criminal militants or terrorists.¹²¹ If it is agreed that wounded and sick enemies shall be treated, the question of where and by whom is not solved.¹²²

Under IHL, medical care to any wounded and sick, including member of non-State armed groups labelled as terrorist, is mandatory for all parties to the conflict and is part of the medical duties of impartial humanitarian and medical personnel.

Syrian authorities decided to impose that the wounded and sick from opposition groups should only be treated in governmental military hospitals. They thus criminalized any other form of medical care to wounded and sick from the armed opposition groups labelled as terrorist by the government.¹²³ They considered, along with other war-affected countries, that medical care and supplies in areas outside of government control were material support to terrorists.¹²⁴

120 *United States v. Shah*, above note 17, p. 499.

121 In Nigeria the magnitude of this problem among medical personnel has led to a necessary review of the law in 2017 supported by the ICRC. The new “gunshot law” has clarified that medical care is not *per se* a support to criminals. It clearly acknowledges that doctors are obliged to provide medical treatment to gunshot wounded. To secure that medical treatment is provided without discrimination, the law allows delaying notification to the police for up to two hours without incurring criminal charges. See the Nigerian Law: *Compulsory Treatment and Care for Victims of Gunshots Act, 2017*, available at: <https://laws.lawnigeria.com/2018/04/20/lfn-compulsory-treatment-and-care-for-victims-of-gunshots-act-2017/>.

122 The ICRC Commentary of 2016 to GC I on to Article 3 Common to the Four Geneva Conventions acknowledges at para. 768 the responsibility of parties to the conflict to treat wounded and sick. The role of impartial humanitarian organizations is only subsidiary. See <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>.

123 An official instruction from the Homs Directorate of Health from 12 April 2011 ordered the transfer of all wounded patients in relation to the events to the military hospital (copy with the author). See Amnesty International, “Health Crisis: Syrian Government Targets the Wounded and Health Workers”, 25 October 2011, available at: <https://www.amnesty.org/en/documents/MDE24/059/2011/en/>.

124 In 2021, in the North-West Region of Cameroon, MSF has had its activities suspended for over six months and has been denied the resumption of its medical and humanitarian activities following accusations that it was supporting “terrorists”. See, for example, MSF, “Cameroon: People in Northwest Seek Healthcare as MSF Denied Providing Medical Services”, Press Release, 22 June 2021, available at: <https://www.msf.org/msf-denied-providing-badly-needed-healthcare-northwest-cameroon>; La VOA, “L’aide humanitaire prise

Without going to such extremes, delineating the material support from the legitimate medical duties requires renewed IHL dialogue with all stakeholders of the State and non-State Parties to the armed conflict. Since criminal and CT specialists are not the same person as those who master the technicalities of IHL, there is a need to turn back to the very essence of the IHL message, which is: The wounded enemy is no longer a threat. The Doctor of my enemy is not my enemy.¹²⁵ This giant step of IHL remains a permanent challenge for those confronted with domestic criminal law while providing impartial humanitarian and medical assistance in situations of armed conflict.¹²⁶ The criminal status of fighters of non-State armed groups under domestic law has a spill-over effect that contaminates the protected status of medical activities carried out by impartial humanitarian and medical personnel for such wounded and sick.¹²⁷ Official accusations against humanitarian and medical impartial organizations for providing medical care to members of non-State armed groups labelled as criminal can force the closure of medical activities or initiate criminal proceedings. Accusations brought by governmental authorities may explicitly refer to the provision of medical care to fighters.¹²⁸ This creates a mindset where tacit deprivation of access to impartial medical care to the wounded belonging to non-State armed groups would appear as acceptable. This is in itself a slippery slope that may end up with recent trends of attacks on medical facilities providing medical care to non-State wounded enemies that have occurred in Syria, Yemen and Afghanistan over the last years.¹²⁹

From protected medical facilities to shelter of criminals: A legitimate military target

The fact that some of the wounded and sick are considered potential criminals puts pressure on the protective status of the medical facilities that treat them in accordance with IHL. Providing medical care to gunshot-wounded patients always goes with several legal and practical discussions at field level (see above). What is new is that terrorist crimes are defined so broadly in the criminal law of

entre deux feux au Cameroun anglophone”, 27 February 2020, available at: <https://www.voaafrrique.com/a/cameroun-l-aide-humanitaire-prise-entre-deux-feux-au-cameroun-anglophone/5306621.html>.

125 MSF, above note 23.

126 Jonathan Whittall, “Treating Terrorists”, MSF Analysis: Reflections on Humanitarian Action, 2015, available at: <https://msf-analysis.org/new-treating-terrorists>.

127 See the UNGA Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions – Saving Lives is not a Crime, UN Doc. A/73/314, 7 August 2018, paras. 10–11, 33 and 37; D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 16, pp. i–iii and 9–11 (see specifically footnotes 16 and 22 for examples); Alice S. Debarre, “Countering Terrorism and Violent Extremism: The Risks for Humanitarian Action”, in Alain Tschudin, Craig Moffat, Stephen Buchanan-Clarke, Susan Russell and Lloyd Coutts (eds), *Extremisms in Africa*, Vol. 2, Tracey McDonald Publishers, Bryanston, SA, 2019, pp. 208–9; see also the conviction entered in *United States v. Shah*, above note 17.

128 Emile Zola Ndé Tchoussi, “Cameroun: Médecins sans frontières de nouveau accusé de soutenir les séparatistes dans le Nord-Ouest”, 17 December 2020, available at: <https://www.journalducameroun.com/cameroun-medecins-sans-frontieres-de-nouveau-accuse-de-soutenir-les-separatistes-dans-le-nord-ouest-cameroun/>.

129 MSF, above note 23.

most countries that usual humanitarian and medical activities are falling within these definitions, which can lead to accusations such as concealing or providing assistance, transport, shelter or haven to terrorists. Based on these definitions, it is not necessary to prove a specific criminal intention; the simple knowledge of the criminal activities of those wounded and sick suffices to trigger complicity. In some criminal procedures this knowledge can also be derived from the facts.

In most national jurisdictions, these criminal qualifications are not mitigated by any medical exemption and immunity such as the ones drawn by IHL.¹³⁰

In such circumstances, medical activities by impartial humanitarian and medical organizations such as MSF can easily fall under such widely defined crime such as the one of complicity. The mere fact of giving medical care to patient victims and/or authors of violence becomes a factual knowledge of their criminal activities. The nature of the wounds of some patients is often considered as sufficient evidence of their criminal status which triggers criminal responsibility to those providing them with medical care according to medical ethics. This criminal responsibility is framed under different possible offences such as: assistance, complicity, and concealment of crime. In addition, the mandatory reporting of crimes, put in place under the CT regime, goes far beyond the protective provisions of IHL and medical ethics (see above).

Collecting such wounded persons and transporting them to medical facilities is mandatory under IHL and must be facilitated by all parties to the armed conflict. However, under the strict lens of CT offences, medical transports and medical transfers can as well carry criminal implications such as transportation of terrorists, facilitation of movement, concealment or complicity to escape.¹³¹ Such interpretation is obviously contrary to the essence and interpretation of IHL rules regarding protection of medical care and ethics. It reveals the difficulty of reconciling general principles agreement and concrete case implementation. The contentious interpretation of the real scope of legitimate medical care has been raised in Columbia around the prosecution of physicians because of the medical services they provided to militants. In the *Quintero* case,¹³² the Court considered that medical activities performed by the

¹³⁰ AP I, Art. 16(1); and AP II, Art. 10(1).

¹³¹ The broad definition of the various terrorist offences can lead to a severe application of the law and criminalize the action of humanitarian actors. These legal risks have been documented for major donor countries for a long time (see above note 119). They are also found in domestic criminal and CT laws of various countries affected by an armed conflict and where humanitarian action is taking place. For example, see the Penal Code of Niger, Arts 200, 206, 399.1.18, 399.1.19 *nouveau (bis)* and *(ter)* and 399.1.23(c); see also the CT Law of Mali No. 2008-025, Art. 6, as well as the Malian Penal code, Art. 24 (broad criminal complicity). See also the Chad Penal code, Art. 118 (a broadening complicity to all those who provide without being forced to, and knowing their criminal intention, means of existence, shelter, refuge or meeting place to individuals threatening State safety and integrity), as well as Art. 109 (criminalizing all kind of material support and communication with armed and other rebel criminal groups). In 2020, Chad included a humanitarian exemption in its new CT legislation clarifying that humanitarian assistance is outside of the scope of such criminal offences. See Chad CT Law, above note 101, Arts 1(3) and (4).

¹³² Ekaterina Ortiz Linares and Marisela Silva Chau, "Reflections on the Colombian Case Law on the Protection of Medical Personnel Against Punishment", *International Review of the Red Cross*, Vol. 95, No. 890, 2013; Supreme Court of Justice of Colombia, Criminal Cassation Chamber, Case No. 27227 of 21 May 2009.

accused strengthened the guerrilla group since healed members of the group would subsequently return to fight. It also considered that referral services to specialized care fell outside of the scope of medical activities protected by IHL. This is a debatable legal decision in most contexts of armed conflict where medical personnel, bound by the non-discrimination imperative, transfer wounded and sick to the medical place that is best equipped to deal with their medical condition. This customary practice—based on medical needs—is routinely carried out cross-line or cross-border. The potential criminal status requires legal predictability and compliance with the medical non-discrimination imperative.

The management of the wounded and sick under judicial investigation, arrest or detention follows well-established procedures under IHL and domestic criminal law. However, CT frameworks work under exceptional criminal rules and procedures. Operations are carried out without warrant in flagrant mode by special security agents or military forces. While not strictly falling under the legal definition of attacks on a medical facility, they are carried out in a very similar form of military commando raiding a medical facility to arrest or kill a presumed terrorist patient present inside medical facilities. Several documented incidents¹³³ have shown that medical personnel have no room to argue about IHL rules and the medical condition of the person targeted by such operations which often result in deaths instead of the plain arrest of a patient, due to the use of violence inside the medical facility.

After the 2015 attack on MSF's hospital in Kunduz, Afghanistan, discussions between the military authorities of the United States and MSF highlighted concrete legal ambiguities. Indeed, the military authorities disputed the protected status of the MSF trauma centre as well as its civilian nature, due to the presence of large numbers of wounded and sick Taliban fighters in it.¹³⁴

The United States military authorities challenged the fact that those wounded and sick members of armed opposition groups could be all considered as *hors de combat*. They claimed that the medical state of those wounded fighters would still permit some of them to run some kind of command or combat functions. It also appears that these legal arguments would have made incidental harm on the hospital and medical personnel acceptable as they are supposed to accept the risk due to their presence among or in proximity to combatants or combat operation. Under the same United States *Law of War Manual*, such proximity gives no cause for complaint in cases of incidental harm. Therefore, the death of medical personnel would not be counted in a proportionality analysis nor would the death among the wounded and sick as, according to their

133 See above note 114.

134 The United States are not a party to AP I. Article 13 of AP I is thus not part of their military doctrine. This article states that the protection to which civilian units are entitled to shall not cease if members of armed forces or other combatants are present inside the medical unit for health-related reasons. Such presence should not be considered as an AHTTE. See also F. Bouchet-Saulnier and J. Whittall, above note 21.

interpretation, the precaution and proportionality principles apply to civilian losses only while those wounded enemy fighters are not “innocent” civilians.¹³⁵

These types of incidents are a clear indicator of the dangerous blending between the law applicable to the use of armed forces in armed conflict situations (IHL) and the use of armed force in a CT criminal context for militarized law enforcement operations—human rights.¹³⁶ In this last case, law enforcement “attacks” are becoming a practical substitute for the judicial sanction. The protections afforded by IHL to the wounded and sick are undermined because they remain considered as criminal enemies. At the same time, due process and judicial guarantees, such as fair trial rights, are also being pushed aside under the prism of the global war against terror and new derogative criminal law.¹³⁷

From protected neutral medical personnel to criminal accomplices

Medical personnel engaged pursuant to IHL in the care of all wounded and sick persons without discrimination are also *de facto* involved in the care of those who may be considered criminals or terrorists by the concerned State. This *de facto* assistance may have *de jure* adverse consequences. Criminal association in relation to terrorist undertaking is the legal gateway to most terrorism charges against individuals¹³⁸ including medical and humanitarian personnel. It also comes easily through the channel of material support and complicity that broaden the possibility of criminal charges against medical personnel having attended wounded and sick suspected of any terrorist offences. These specific criminal offences of complicity or association also encompass humanitarian dialogue with alleged criminal groups or individuals in view of providing medical and humanitarian assistance to populations in areas under their control. Here again, the knowledge of the terrorist context can replace the requirement of a criminal intent in supporting accusations of material assistance to terrorism against medical and humanitarian actors to incur criminal responsibility.¹³⁹ In

135 See the United States *Law of War Manual* at Art. 5.12.3.2 (harm to certain individuals who may be employed in or on military objectives), Arts 7.8.2.1 and 7.10.1.1 (incidental harm not prohibited), Arts 4.10.1, 7.10.1.1 and 7.12.3.2 (acceptance or the risk from proximity to combat operations): United States Department of Defense, above note 62. See also Oona Hathaway, “The Law of War Manual’s Threat to the Principle of Proportionality”, *Just Security*, 23 June 2016, available at: <https://www.justsecurity.org/31631/lowm-threat-principle-proportionality>.

136 International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, para. 216; Gloria Gaggioli, *Expert Meeting: The Use of Force in Armed Conflicts. Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, ICRC, November 2013, pp. 14, 19 and 76, available at: <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4171.pdf>.

137 See above note 131.

138 Human Rights Watch, *Preempting Justice: Counterterrorism Laws and Procedures in France*, 1 July 2008, available at: <https://www.hrw.org/report/2008/07/01/preempting-justice/counterterrorism-laws-and-procedures-france>.

139 See above note 132.

most countries where humanitarian and medical assistance and relief have not been explicitly excluded from the material support to terrorists, the humanitarian and medical personnel present in areas of armed conflict remain vulnerable to such charges due to their activities performed pursuant to IHL in relation to members of non-State armed groups, considered to be terrorist – and criminal. It must be noted that some countries affected by armed conflict have recently amended their domestic law to remedy the negative impact on impartial medical care.¹⁴⁰ In 2019, Afghanistan included an explicit medical exemption in its domestic criminal law to regain coherence with the protected status of medical care under IHL.¹⁴¹ Trying to mitigate the same concern, Colombia adopted in 2013 an explicit immunity for medical personnel that mirrors the ones provided by IHL. However, this immunity was not embodied in Columbia criminal law (that would give it its full force) but in a Medical Service Manual adopted by the Ministry of Health and Social Protection.¹⁴²

From medical confidentiality and ethics to criminal concealment

Accusations against medical and humanitarian personnel face yet another specific difficulty concerning the respect of medical confidentiality under IHL and the obligation to denounce crimes which are imposed and reinforced by criminal law and CT measures. The framework of the medical mission in situations of armed conflict as defined by IHL and, in particular, the two Additional Protocols to the Geneva Conventions upholds the importance of respecting medical ethics.¹⁴³ This is particularly crucial in situations where medical personnel are confronted with patients who are victims of intentional violence in situations of armed conflict and other situations of violence where the respect for the rule of law is no longer guaranteed.

140 Exemptions and good practices are noted in M. Buissonnières, S. Woznick and L. Rubinstein, above note 76, p. 31.

141 Art. 119 of the Afghan Penal Code from 2019 stipulates that no necessary medical procedures are to be considered crimes if they are carried out within the technical principles of the medical profession and the patient's family, or legal representative, has given consent. Surgical procedures performed in emergencies according to medical principles are also not to be labelled as crimes.

142 Ministry of Health and Social Protection, Office of Territorial Management, Emergencies and Disasters, Colombia, *Manual de Misión Médica*, 2013, available at: <https://repositorio.gestiondelriesgo.gov.co/bitstream/handle/20.500.11762/20719/Manual%20de%20Mision%20Medica.pdf?sequence=1&isAllowed=y>.

143 See ICRC Commentary on APs, above note 59, paras. 4692 and 4693 on AP II, Art. 10, which may be of use. Para. 4692: "Paragraph 2 establishes the principle of the free exercise of medical activities, i.e., medical personnel should be able to work without compulsion, guided only by professional ethics. Thus it is specifically prohibited to compel those carrying out medical activities to commit any act or to refrain from acting in a way which would be contrary to 'the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol'." Para. 4693: "It should be noted that in addition to the mention of medical ethics reference is made to 'other rules'. This is, in particular, because of the fact that in some countries medical ethics prohibit doctors from co-operating in medical procedures undertaken by personnel which are not officially qualified. This would apply for example to a medical student. The article refers to the rules of medical ethics which protect the wounded and sick, as opposed to those which are concerned only with the interests of the medical profession; it also refers to other rules designed for the same purpose, and applicable in specific cases." (footnote citation omitted).

IHL clearly states that in all type of armed conflict no distinction can be made among the wounded and the sick on any grounds except medical ones.¹⁴⁴ However, one should notice the sensitive character of medical treatment for the wounded and sick in NIAC by the fact that intentional deprivation of medical care is explicitly enunciated as being a grave breach of IHL in the context of an IAC¹⁴⁵ while in a NIAC, the same conduct is not as explicit but may amount to inhumane treatment as a serious violation of common Article 3.

The duty to report some type of disease and injuries to national authorities is a common pattern in domestic law applicable in times of peace. It is based on legitimate concerns of public health or public security, and it is always combined with other provisions allowing medical personnel to refer to medical ethics in making their own decision. In situations of armed conflict, this reporting procedure may be instrumentalized in the course of the conduct of hostilities to restrict access to wounded and sick enemies to medical facilities. It may also create additional pressure or threats on medical personnel that will *de facto* deprive access to impartial medical care for some wounded and sick including victims of sexual and other organized forms of violence. A recent survey has concluded that mandatory reporting is potentially incompatible with international law and medical ethics as it can obstruct access to health care for victims of armed conflict and other emergencies and may expose victims and health-care personnel to further harm.¹⁴⁶

As a body of law that anticipates the complex context of armed conflict, IHL has provided a set of important provisions to allow for medical ethics to prevail over formal compliance with mandatory reporting systems provided by domestic law.

The Additional Protocols to the Geneva Conventions have adopted two specific provisions protecting the legitimate and ethical concerns of confidential medical information.¹⁴⁷

The first provision applies to the protection of medical ethics against mandatory reporting. Its drafting differs slightly in IAC and NIAC but carries the same logic.

In situations of IACs, IHL sets, as an absolute principle, the confidentiality of medical information *vis-a-vis* the opposing Party to the conflict. It also sets a

144 Customary IHL Rule 110; GC I, Arts 12(2) and 15(1); GC II, Arts 12(2) and 18(1); GC IV, Art. 16(1); AP I, Art. 10; common Article 3; and AP II, Arts 7–8.

145 AP I, Art. 11(4).

146 This issue will not be treated in this article as it is not within its scope. However, most public health considerations are compatible with general aggregated data respecting the confidentiality or requiring obtaining the formal consent of the patient. Regarding reporting crimes to authorities, these provisions rarely entail sanction for medical personnel when they have acted in conformity with medical ethics. They instead allow, in limited circumstances, the reporting of cases when it is in the patient's best interest. These practices cannot contradict fundamental principles of medical ethics: access to medical care must not be jeopardized or delayed by such obligation. Patient consent and patient's best interest are the only valid criteria to take into consideration when making a medical decision. See also Swiss Institute of Comparative Law, *Legal Opinion on the Obligation of Health Care Professionals to Report Gunshot Wounds*, 30 June 2019, available at: <https://www.isdc.ch/media/1834/17-120-final-nov19.pdf>.

147 AP I, Art. 16(1)–(3); and AP II, Art. 10(1)–(4).

medical ethic criterion to support the medical personnel's autonomy of decision. "No person carrying out medical activities can be compelled to give out any information concerning the wounded and sick who are, or have been, under his or her care, as long as the medical person considers that such information might prove harmful to the patients concerned or to their families." This applies whether the person requesting the information belongs to the adverse Party to the conflict or to the medical person's own Party, except in cases foreseen by the person's domestic laws. However, even in this limited scenario, only one exception is carved by IHL for such compulsory reporting: regulations concerning the compulsory notification of communicable diseases must be respected.¹⁴⁸

In situations of NIACs, the non-State Party to the armed conflict is not entitled to the same rights as the State. IHL recalls that restriction to confidential medical information can only be carved out by the law in opposition to any other type of executive order or security practices. Additional Protocol II¹⁴⁹ specifies that: "[t]he professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected".¹⁵⁰

The second IHL specific provision aims at shielding medical personnel from the sanction of failure to comply with a domestic mandatory reporting system, notably in NIAC.

In such a context, IHL affirms that: "[s]ubject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care".¹⁵¹ These detailed provisions and their cross-reference to domestic law create an enormous pressure when it comes to their effective and ethical articulation with domestic law provisions regarding mandatory reporting. However, this reference to national law is not a full licence left for compliance when domestic mandatory reporting may contradict the principles of medical ethics and prove harmful to the patients concerned or to their families.

A last provision applicable in both IAC and NIAC provides clear criminal immunity for persons engaged in impartial and ethical medical activities. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefitting therefrom.¹⁵² The wording of this immunity is carefully chosen to cover all persons who have carried out a medical activity in accordance with professional ethics, regardless of the circumstances or the beneficiaries.¹⁵³ This immunity therefore applies to all persons engaged in these medical assistance and care activities and not only to

148 AP I, Art. 16(3).

149 See ICRC Commentary on APs, above note 59, on AP II, Art. 10(1)–(4).

150 AP II, Art. 10(3).

151 AP II, Art. 10(4).

152 AP I, Art. 16(1); and AP II, Art. 10(1).

153 *Ibid*; Customary IHL Rule 26 uses similar wording: "punishing a person for performing medical duties compatible with medical ethics [...] is prohibited".

the military or civilian assigned medical personnel¹⁵⁴ to this mission by the Parties to the armed conflict nor only to those exclusively engaged in these medical activities.¹⁵⁵ This is confirmed by customary IHL Rule 26 which states that: “[p]unishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited”. Medical ethics must therefore be remembered as the only mandatory legal framework under which sanction towards the medical personnel could be taken.

However, despite its importance, this immunity clause does not appear in a systematic and consistent way in military manuals or domestic criminal law. Considering the differences in legal systems between monist and dualist countries, the implementation of international treaties may not always require a direct incorporation into domestic legislation. However criminal matters and immunity benefit from solid domestic anchoring. This is even more worrying that in addition to legal concerns raised by mandatory reporting and potential sanction related to the breach of such obligations, CT has created a new layer of obligations and criminal offences challenging medical confidentiality. Where breach of mandatory reporting can lead to limited sanctions, concealment of terrorist information is a fully fledged crime¹⁵⁶ that may be applied to medical and humanitarian personnel in the absence of any explicit exemption and in the context of existing public accusation in some sensitive areas.

Conclusion

The review of the legal context of medical care in mixed situations of CT and armed conflict involving non-State armed groups shows that we are back to pre-Solferino times. CT criminal legal framework is *de facto* denying wounded and sick from non-State armed groups an impartial access to medical care. Like in Solferino, impartial medical and humanitarian personnel and facilities are experiencing this reality on the front line.

Deprivation of impartial medical care to non-State armed group fighters is a tacit component of a State deterring power over armed opposition groups labelled as criminal or terrorist. In situations of armed conflict, it is weaponizing medical care in a way that destroys the neutrality and respect of medical duties built by IHL over the long history of conflict.

It is agreed that human rights (including the right to security) and IHL apply simultaneously in situations of armed conflict. However, this simultaneous application has always acknowledged the primacy of IHL as *lex specialis* in situations of conflict.¹⁵⁷ This primacy has been put in danger by CT criminal law emerging as another competing *lex specialis* in those situations.

154 AP I, Art. 8(c).

155 Customary IHL Rule 25; and GC I, Arts 24–7.

156 See, for instance, Mali, Law No. 2008-025, Art. 7.

157 International Court of Justice, above note 136, para. 216; Gloria Gaggioli, above note 136, pp. 14, 19 and 76.

In this context, the undefined status of members of non-State armed groups under IHL is wiped off by their criminal and terrorist status under national law. The criminal status that authorities assigned them has a contagious effect and turns into accomplices all those who enter in contact with members of non-State armed groups considered as terrorists including through the provision of medical assistance and relief. This article could not touch on other problematics linked to the contagious impact of the CT framework on IHL. Among them, the global right to humanitarian assistance and protection provided by IHL to population victims of armed conflict, living in areas disputed or controlled by non-State armed groups labelled as criminal or terrorist, should never be forgotten.

The relative downgrading of IHL in favour of general criminal law also stems from the fact that CT criminal law is autonomously incorporated into the national law of the different countries and without any reference to the special rights to humanitarian and medical assistance granted by IHL in situations of armed conflict. CT constitutes the strongest body of positive law directly applicable by all States' bodies in a mix of law enforcement and security–military defence order. In situations of armed conflict, CT terminology is undermining the fundamental right of assistance and protection provided by IHL categories of protection and assistance. Where the IHL framework protects “victims” of armed conflict,¹⁵⁸ the newly introduced reference to “innocent civilians”¹⁵⁹ is a soft language that is in fact hiding the tacit agreement to exclude the “suspected” individuals and populations from their right of survival in the contemporary situation of armed conflict tainted by the fight against terrorism.

What matters today is to get States' answer as to whether or not this legal and practical reality is an intended or unintended result of their CT agenda. As the context of CT and armed conflict continues to spread around the world, the historical challenges and dilemmas of IHL must be spoken loudly to the deaf ears of our generation regarding the global struggle against terrorism. The body and essence of IHL can still guide us through the pitfalls of the dehumanization of the enemy in armed violence.

The protection of the medical mission against current trends of attacks and abuses depends on the concrete steps taken by States in restoring the safe and fair coexistence of IHL and CT legislation. In the absence of such clarification, the temptation to weaken the non-State enemy by deprivation of medical care will become an acceptable trend. This requires restoring the primacy of IHL over CT domestic legislation to effectively protect the humanitarian and medical mission for the victims of contemporary armed conflicts.

The multiple ramifications and legal complexities embedded in national and international law leaves only one viable option open to reconcile CT legal framework with IHL duties.

158 AP I and AP II refer to the protection of victims of armed conflict to harmonize the different categories of protection provided in the four Geneva Conventions from 1949.

159 UN Office of the Coordination of Humanitarian Affairs, “Scores of Innocent Civilians Wounded and Killed in Attacks in Hajjah Governorate”, News and Press Release, 11 March 2019, available at: <https://reliefweb.int/report/yemen/scores-innocent-civilians-wounded-and-killed-attacks-hajjah-governorate-enar>.

Carving in the definition of CT offences an exemption¹⁶⁰ for medical and humanitarian activities carried out by impartial humanitarian organizations in accordance with IHL is the safest and easiest way to exclude activities authorized by IHL from the scope of criminal law. It is also a reliable option to go beyond usual lip service and demonstrates States' good faith in their commitment to respect IHL. Unfortunately, in the vast majority of countries, the medical mission as described in IHL remains threatened by CT laws and practices. Official discourse downplays this situation as a non-intentional consequence of the most needed fight against terrorism that must show no weakness. However, acknowledging incidental damage of CT on IHL cannot end with its acceptance.

Aside from international debate on humanitarian exemption, a handful of States have already included such provisions in their CT laws to ensure the non-criminalization and respect for humanitarian and medical activities in accordance with IHL.¹⁶¹ Their decision draws viable solutions to face the legal conundrum of safeguarding the integrity of both IHL and CT. They also show that it is not legitimate to maintain national legal insecurity around activities authorized by IHL. Among them, Chad CT law adopted in 2020¹⁶² dares to give legal strength to nice words. It made clear that activities that are exclusively humanitarian and impartial carried out by humanitarian and neutral organizations are excluded from CT offences. This demonstrates that it is not only necessary but also possible to preserve the principle of humanity in all situations even when confronted with a global phenomenon as tragic as the one of terrorism.

160 An exemption means that the exclusion, non-application of the measure is automatic (like an immunity) and permanent. It does not require any procedure or request for authorization to benefit from it. See also Rebecca Brubaker and Sophie Huvé, *UN Sanctions and Humanitarian Action: Review of Past Research and Proposals for Future Investigation*, United Nations University, New York, 2021, p. 12 and endnote 29, available at: http://collections.unu.edu/eserv/UNU:7895/UNSHA_ScopingPaper_FINAL_WEB.pdf.

161 ICRC, "Counter-Terrorism Measures Must Not Restrict Impartial Humanitarian Organizations From Delivering Aid", ICRC Statement to UNSC Debate, 12 January 2021, available at: <https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations>; UNSC, above note 30, para. 84.

162 Chad CT Law, above note 101, Arts 1(3) and (4).

Screening of final beneficiaries – a red line in humanitarian operations. An emerging concern in development work

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Abstract

Funding agreements for humanitarian action frequently include restrictions and requirements in their grants that aim to ensure that recipients of the funding comply with counterterrorism measures and sanctions adopted by the donor. These measures can be problematic if they prevent humanitarian actors from operating in accordance with humanitarian principles or are incompatible with international humanitarian law. While attention has focused primarily on requirements in grants for humanitarian action, increasingly donors to development work have also started including sanctions- and counterterrorism-related restrictions in their

grants. The present article focuses on one such measure that is currently a live concern: requirements to screen and, thus, potentially exclude final beneficiaries. It explains why these requirements go over and above what sanctions and counterterrorism measures require, and why they are inconsistent with humanitarian principles and international humanitarian law. The article also explores the position in relation to development interventions.

Keywords: counterterrorism, sanctions, screening of final beneficiaries, humanitarian operations, development work.

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Introduction

Humanitarian organizations must comply with counterterrorism measures and sanctions¹ that are directly binding on them: those adopted by the States where the organizations are registered – and these may be more than one – and by the States where they operate. Their staff is bound by the measures adopted by their State of nationality, although this does not render these rules applicable to the organizations. The measures adopted by other States may also become applicable. For example, transactions conducted in United States (US) dollars through formal banking channels must comply with US sanctions. The most significant way in which counterterrorism measures and country-specific sanctions that are not directly applicable to a particular humanitarian organization can become so “indirectly” is by means of contractual obligations assumed in funding agreements.²

Institutional donors to humanitarian action – States and inter-governmental organizations such as the European Union (EU) – frequently include restrictions and requirements in their grants that aim to ensure that recipients of the funding comply with counterterrorism measures and sanctions adopted by the donor. This is a way for the donor to comply with its own obligations, sometimes referred to as “downward re-risking”. A particular focus of the restrictions is ensuring that funded activities do not benefit persons or entities designated under sanctions or counterterrorism measures.³

1 This article uses the term “counterterrorism measures” to cover laws and other measures whose objective is preventing and suppressing acts of terrorism. They can include measures criminalizing certain acts of violence or support to persons or groups designated as terrorist as well as sanctions that prohibit making funds or other assets available directly or indirectly to such persons or groups. It uses the term “sanctions” to refer to sanctions imposed for other objectives, either in relation to specific contexts, or “horizontally” to achieve specific policy objectives such as, for example, the promotion of human rights.

2 This article uses the terms “funding agreements” and “grants” interchangeably.

3 The restrictions may have other objectives too, like promoting the donor’s political agenda in a particular context. For example, the restrictions on contact with Hamas in the United States Agency for International Development’s (USAID’s) funding agreements for Gaza are aimed at not giving Hamas any political legitimacy or visibility. USAID/WEST BANK/GAZA, April 26, 2006, Notice No. 2006-WBG-17, and USAID/WEST BANK/GAZA, June 21, 2007, Notice No. 2007-WBG-18.

Requirements are by no means uniform. They vary from donor to donor, context to context and, frequently, also with the recipient of the funding, depending on their status – i.e. whether they are United Nations (UN) agencies, other international organizations or non-governmental organizations – and also because donors may impose more restrictive obligations on actors that they are less familiar with, or because a particular recipient has successfully negotiated less restrictive measures. The nature of the funded activities is also a consideration, with programmes that entail the provision of cash being more tightly regulated.

This is a challenging area to analyse, as donors and recipients are reluctant to share information on the arrangements that they have concluded. Donors may not want to grant all recipients the less onerous terms that they have agreed to with some organizations.⁴ On their side, recipients may be “embarrassed” by what they have agreed to as it may undermine their capacity to operate in accordance with humanitarian principles; or they may be concerned that shining a light on the agreements may reveal that they have not been fully compliant with contractual obligations. While understandable, this wariness makes it difficult for humanitarian organizations to develop common bargaining positions, and to identify and replicate good practices that meet donors’ concerns but do not impede principled action.

Despite this, it is possible to identify a number of particularly problematic requirements and restrictions compliance with which could prevent humanitarian actors from operating in accordance with humanitarian principles, and that, in some cases, are incompatible with international humanitarian law (IHL). The present article focuses on one such requirement that is currently a live concern: requirements to screen and, thus, potentially exclude, final beneficiaries.⁵

To date, attention has focused primarily on requirements in grants for humanitarian action. However, increasingly donors to development work have also started including sanctions- and counterterrorism-related restrictions in their grants. This raises numerous new challenges: both because of the limited familiarity with the issues among development stakeholders, and also because the substantive bases of arguments for pushing back against problematic restrictions and requirements are different.

The bigger “multi-mandate” or “double-hatted” organizations that implement humanitarian and development activities frequently operate in

4 For a thorough and still relevant analysis, see Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts”, Research and Policy Paper, May 2014, available at: http://blogs.harvard.edu/cheproject/files/2013/10/CHE_Project_-_Counterterrorism-related_Humanitarian_Grant_Clauses_May_2014.pdf (all internet references were accessed in September 2021).

5 For the sake of clarity, the present article uses the term “beneficiaries” as this is the expression that is used in the discussions on requirements in funding agreements. It is important to note that this term has been criticized because of its connotation of passivity and failure to recognize people’s agency, and that humanitarian organizations are increasingly using other expressions such as “crisis-affected people”, “clients”, or “participants”, and, in development work, “target group” or “change agents”. See, for example, Dayna Brown and Antonio Donini, “Rhetoric or Reality? Putting Affected People at the Centre of Humanitarian Action”, ALNAP/ODI, London, 2014, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/alnap-rhetoric-or-reality-study.pdf>.

situations of armed conflict and so have been tackling the tensions raised by sanctions and counterterrorism measures for many years. Organizations whose work is exclusively development-focused appear to be less familiar with the issues.

The same holds true for donors. While donors to humanitarian action are now well aware of concerns and positions, this is not the case for donors to development work. Although these are frequently the same States or inter-governmental organizations, and despite the World Humanitarian Summit-prompted elaboration of the “New Way of Working”, and related endeavours to achieve “collective outcomes”,⁶ institutional arrangements and silos within governments are such that staff working on development are not necessarily aware of the issues and positions adopted by their own colleagues in relation to humanitarian funding, and the reasons underlying these.

Equally challenging is the normative framework. As will be elaborated, organizations operating in situations of armed conflict and other complex emergencies have been successful in resisting requirements to screen final beneficiaries by relying on arguments based on humanitarian principles and IHL. When activities funded under development grants are conducted in contexts where IHL is applicable, or humanitarian principles relevant, these can be invoked. However, as contexts where the funded activities are undertaken shift along the humanitarian/development continuum, these bases become progressively less relevant, and arguments must be based on development principles and human rights law. Precisely how these interact with sanctions and counterterrorism measures is an issue that is currently unexplored.

Without detracting from the importance of striving to achieve “collective outcomes”, the differences in the regulatory framework governing humanitarian and development work must be acknowledged. The laws and principles that regulate these activities (IHL and humanitarian principles, and human rights law and development principles, respectively) are different, although there may be moments of transition when the two frameworks overlap. An additional challenge is the fact that many donors have different institutional structures and arrangements for funding the two types of action. The approaches that they have adopted for funding in humanitarian settings are often different from those for development settings.

The first section of this article briefly presents provisions in funding agreements that may require or lead to the screening, and thus potentially the exclusion, of final beneficiaries. It also clarifies the difference between screening and vetting. The second section focuses on screening and exclusion of final beneficiaries of grants for humanitarian action. It explains why this goes over and above what sanctions and counterterrorism measures require, and why it is inconsistent with humanitarian principles and IHL. It concludes by presenting current practice by certain key donors and humanitarian actors. The third section turns to development activities. It starts off by outlining the development sector’s

6 UN Joint Steering Committee to Advance Humanitarian and Development Collaboration, “The New Way of Working”, available at: <https://www.un.org/jsc/content/new-way-working>.

criteria for selection of contexts where to operate. It then turns to the regulatory framework that underpins development work. The section ends with some recent examples of how restrictions in funding agreements have undermined the effectiveness of development interventions. The article concludes with some reflections on next steps.

Funding agreements and screening: some general considerations

One of the most common requirements in funding agreements is a duty to avoid funds or other assets provided under the agreements being made available directly or indirectly to persons or entities designated under sanctions or counterterrorism measures that are binding on the donor.

Nature of obligation to avoid making funds or assets available to designated persons or entities

While this is a shared objective, States formulate the precise nature of this duty in different ways. Some donors impose what has been described as an “obligation of result”: recipients must ensure that assistance does not reach designated persons or entities. This is a high standard—probably unrealistically so—that many humanitarian actors are uncomfortable committing to. A preferable approach is that of donors which frame this as an “obligation of means” that requires recipients to take “reasonable measures” or “use their best endeavours”, in this regard.⁷ The standard of effort that must be undertaken to avoid assets reaching designated persons or entities is one of the first issues to consider when reviewing the sanctions- and counterterrorism-related sections of grants.

Some grants specify which measures must be taken to comply with this requirement, for example, by expressly requiring recipients to screen certain categories of people involved in the funded activities. Others leave it to recipients to choose the modalities for doing so. Most frequently, this is done by screening a range of actors involved in the implementation of the programmes to ensure that they are not included in lists of individuals or entities designated under relevant international or domestic sanctions or counterterrorism measures.

What is “screening”? And what is “vetting”?

Although the terms are frequently used interchangeably, screening must be distinguished from vetting. Screening is carried out by humanitarian

7 See examples in Counterterrorism and Humanitarian Engagement Project, above note 4, p. 24; and Kate Mackintosh and Patrick Duplat, “Study on the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action”, 2013, pp. 47–71, available at: <https://www.nrc.no/globalassets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf>. While dated, these give examples of the different approaches.

organizations themselves. They check that a range of persons and entities involved in the implementation of funded programmes are not designated under UN, EU and other relevant sanctions and counterterrorism measures. Various commercial programmes exist for doing this.

Vetting requires humanitarian actors to provide the identity information of certain persons and entities to the donor, which will carry out the checks itself. Only a small minority of donors require vetting, and even those only in grants for certain contexts. Applications for certain US government funding for operations in certain contexts require partner vetting – i.e. the provision of personal information of certain “key individuals” in the organization applying for funds, including principal officers of its governing board, directors, officers and other staff members with significant responsibilities for the management of the funded programme. In some contexts, this has also included the vetting of final beneficiaries who receive more than a proscribed amount of assistance in cash or in kind, or who participate in training activities.⁸

Vetting raises additional concerns to screening, including in terms of data protection and privacy in relation to the personal information provided to the donor.⁹ Vetting can also undermine perceptions of the independence of humanitarian actors providing such information from the state donors requiring it. If the donor is a party to an armed conflict, the provision of information can also affect the perceived neutrality of humanitarian actors, with potentially serious consequences for access and staff safety.

To add to the confusion, the term “vetting” is sometimes also used in a more general way to refer to due diligence measures that may be undertaken for a variety of reasons.

In view of this, it is important to use terminology as accurately as possible, to determine precisely what donors require. The rest of this article will focus on screening, as explained above.

8 USAID, “ADS Chapter 319 – Partner Vetting”, revised January 2021, available at: <https://www.usaid.gov/sites/default/files/documents/319.pdf>. In March 2021 USAID Partner Vetting is required for USAID contracts and assistance agreements for Afghanistan, Iraq, Lebanon, Pakistan, Syria, Yemen and the West Bank and Gaza. USAID, op. cit., Chapter 319.1. USAID can impose additional vetting requirements. For example, in relation to Gaza it requires recipients of funds to also provide information on beneficiaries who received more than a specified amount of assistance or participated in training.

9 Neal Cohen, Robert Hasty and Ashley Winton, Counterterrorism and Humanitarian Engagement Project, “Implications of the USAID Partner Vetting System and State Department Risk Analysis and Management System under European Union and United Kingdom Data Protection and Privacy Law”, Research and Policy Paper, March 2014, available at: <http://blogs.harvard.edu/cheproject/files/2013/10/CHE-Project-US-Partner-Vetting-under-EU-and-UK-Data-Protection-and-Privacy-Law.pdf>. While the precise details of the vetting programmes may have changed since this paper was published, the data protection concerns outlined endure, and have probably become more acute following the adoption of the EU Global Data Protection Regulation.

How is the requirement to screen and/or exclude final beneficiaries formulated?

Although the discussion – including in the present article – is often framed in terms of the problems raised by screening of final beneficiaries, it is not screening *per se* that is problematic, but rather its objective: the exclusion of certain people from programmes.

Requirements to screen and/or exclude final beneficiaries from funded programmes can either be implied or express. Most frequently, they are implicit in provisions that prohibit recipients from making available funds or assets to entities, individuals or groups of individuals designated under counterterrorism measures or sanctions. If these provisions do not expressly indicate that this requirement does not cover final beneficiaries, there is a real risk that the expression could be interpreted by the donor as including them. At other times, clauses leave no room for doubt that final beneficiaries must also be excluded from funded activities, as they are expressly mentioned.

Screening and exclusion of final beneficiaries of humanitarian programmes

Screening is not problematic *per se*. It is simply a tool for determining whether a person or entity has been designated under counterterrorism measures or country-specific sanctions. Screening of a range of persons and companies involved in the delivery of humanitarian programmes, including sub-grantees, contractors and vendors, is an acceptable way of ensuring that funds or other assets are not provided to designated persons or entities in the course of operations.

Screening becomes problematic if it leads to people's exclusion from the humanitarian assistance that they have been determined as requiring. It is for this reason that humanitarian organizations have drawn a "red line" at provisions in grants that expressly or implicitly entail screening of final beneficiaries of humanitarian programmes.

Once someone has been determined as requiring humanitarian assistance on the basis of the eligibility criteria developed by a humanitarian organization – which are frequently shared with the donor – depriving that person of this assistance is more restrictive than what is required by the underlying sanctions, and is incompatible with IHL and humanitarian principles. These different grounds will be considered in turn.

Exceeding underlying restrictions

The purpose of screening requirements in funding agreements is to ensure compliance with sanctions and counterterrorism measures. However, these very measures include exemptions allowing designated persons to access basic services,

such as medical care, food and accommodation.¹⁰ This is a clear indication that they are not intended to deprive designated persons of essential services and goods.

The same holds true when rather than designated persons acquiring these basic goods and services directly, they are provided in the form of humanitarian relief. In a Guidance Note of 2020, the European Commission expressly restated its well-established and consistent position that EU sanctions do not prohibit the provision of humanitarian assistance. It did so both in general terms, reasserting that “the provision of humanitarian aid should not be prevented by EU restrictive measures”,¹¹ and also in a reply to a specific question on screening of final beneficiaries:

Should the Humanitarian Operators vet [sic] the final beneficiaries of ... humanitarian aid?

No. According to International Humanitarian Law, Article 214(2) of the Treaty on the Functioning of the European Union and the humanitarian principles of humanity, impartiality, independence and neutrality, humanitarian aid must be provided without discrimination. The identification as an individual in need must be made by the Humanitarian Operators on the basis of these principles. Once this identification has been made, no vetting [sic] of the final beneficiaries is required.¹²

It is thus undisputed that sanctions do not prohibit designated persons from acquiring basic goods and services—food, medical care and shelter—either directly using their own funds, or indirectly, when these are provided by humanitarian assistance. Despite this, a disconnect has developed between the restrictions in sanctions and the measures in funding agreements purportedly giving effect to them. When grants for humanitarian action expressly or

10 The UN Security Council Islamic State of Iraq and the Levant (ISIL)/Al-Qaeda sanctions, for example, include an exemption to the financial sanctions for funds and other financial assets or economic resources “necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services”: UN Security Council Resolution 2368 (2017), UN Doc. S/RES/2368 (2017), 20 July 2017, section 81(a). The exemption covers both aspects of financial sanctions. It allows frozen assets to be used for these purposes, and also the relevant goods or services to be provided.

The EU’s autonomous counterterrorism sanctions include a similar exemption “for essential human needs of a natural person included in the list referred to in Article 2(3) or a member of his family, including in particular payments for foodstuffs, medicines, the rent or mortgage for the family residence and fees and charges concerning medical treatment of members of that family”: 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, Art. 5(2)(a).

Although reference is made here just to sanctions imposed for counterterrorism objectives, similar exemptions for the benefit of designated persons are systematically included in financial sanctions in UN and EU country-specific sanctions.

11 European Commission, *Commission Notice, Commission Guidance Note on the Provision of Humanitarian Aid to Fight the COVID-19 Pandemic in Certain Environments Subject to EU Restrictive Measures*, C(2021) 5944 final, 13 August 2021, pp. 7, 9, 13, 17, 19, 31, 41, 47–8 and 51.

12 *Ibid.*, pp. 13, 24, 33, 45 and 51.

implicitly exclude final beneficiaries that might be designated, they are going over and above the underlying sanctions.

Moreover, sanctions and most counterterrorism measures prohibit making funds or assets available to designated persons. They do not cover training.¹³ Requirements to screen and thus potentially exclude participants in training programmes also go beyond the underlying measures.

Incompatibility with international humanitarian law and humanitarian principles

The precise entitlement to assistance under IHL varies with the type of assistance, the situation in which people find themselves (e.g. in situations of occupation, deprived of their liberty, otherwise *hors de combat*), and their status: civilian or fighter.¹⁴

Everyone who is wounded and sick – civilian and fighter – is entitled to the medical care required by their condition, with no discrimination other than on medical grounds.¹⁵ Everyone who is deprived of their liberty – civilian and fighter – is entitled to food, water and clothing.¹⁶ Even when not deprived of their liberty, civilians are entitled to objects indispensable to their survival including food, water, medical items, clothing and bedding. If the party to the conflict depriving people of their liberty or otherwise in control of civilians is unable or unwilling to provide these, they may be provided by means of humanitarian relief operations.¹⁷ Children are entitled to education, including if they are deprived of their liberty.¹⁸

13 Training falls within the scope of prohibited support as a matter of criminal law under the US Material Support Statute, U.S.C. § 2339A.

14 The term “fighter”, while not found in IHL treaties, is used colloquially to refer to members of States’ armed forces and of organized armed groups. The definition of “wounded and sick” for the purposes of IHL requires fighters to be refraining from acts of hostility: ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016 (hereafter *ICRC Commentary*), para. 1345.

15 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 12; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 12; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 10; and Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 7.

16 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Arts 15 and 25–30; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 89–92; and AP II, Art. 5.

17 GC IV, Arts 55, 56 and 59; common Arts 3 and 9/9/9/10 of the GCs, AP I, Arts 69–71; and AP II, Art. 18 (2). See generally, Dapo Akande and Emanuela-Chiara Gillard, “Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict”, 2016, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/Oxford%20Guidance%20pdf.pdf>.

18 GC IV, Arts 50 and 94; and AP II, Art. 4(3).

Once a person has been determined as being in need of the requisite type of assistance, the humanitarian principle of impartiality requires such assistance to be provided with no discrimination, other than prioritization on the basis of greatest need. Depriving people of the assistance to which they are entitled because they are designated under sanctions or counterterrorism measures would be inconsistent with IHL and humanitarian principles.

The position is different for fighters who are not *hors de combat* by sickness, wounds, detention or any other cause, to use the words of Article 3(2) common to the four Geneva Conventions. They do not have the same entitlement as civilians to other objects indispensable to their survival, such as food. However, this does not mean that screening and excluding designated persons from programmes providing these other forms of assistance is acceptable.

From a legal perspective, domestic law determines who is member of a State's armed forces, and criteria have been elaborated to identify "targetable" members of an organized armed group for the purpose of the rules of IHL on the conduct of hostilities. The same cannot be said for designations. Sanctions set out the grounds on which a person can be designated, but these are framed in terms of the threat they pose to broad policy objectives such as international peace and security, respect for IHL and human rights law, undermining peace processes and counterterrorism. Most frequently, the designations are based on the provision of types of support – political and financial, for example – that would not affect a person's status as civilian under IHL. The narrative summaries setting out the grounds for designation of particular people indicate that this is rarely the type of behaviour that would render them "fighters" for the purposes of IHL.

There is thus simply no equivalence between being a "fighter", and thus not entitled to certain forms of humanitarian assistance, and being designated. Screening risks depriving people of the humanitarian relief to which they are entitled under IHL.

In addition, and more operationally, the eligibility criteria that humanitarian organizations develop for their programmes, and oversight of their implementation in practice go a long way in ensuring that assistance is not provided to groups of fighters. Although framed in terms of good humanitarian programming and oversight rather than in order to avoid the provision of assets to designated persons and entities, these measures have played an important role in providing reassurance to some donors.

The positions adopted by humanitarian organizations and key donor States to date

For these reasons, while humanitarian organizations have been willing to comply with requirements to screen key members of staff, sub-grantees, contractors and vendors, they have drawn a "red line" at screening final beneficiaries. On the whole, this red line has been accepted by key donors to humanitarian action.

Some States' funding agreements, like those of Ireland,¹⁹ Norway and Switzerland, for example, do not include provisions that could exclude final

beneficiaries. Grants from humanitarian aid by SIDA, the Swedish International Development Cooperation Agency, expressly exclude the provisions on compliance with sanctions found in its General Conditions.²⁰

As far as the EU is concerned, the November 2020 version of ECHO's Humanitarian Aid General Model Grant Agreement requires recipients to ensure that the EU grant does not "benefit any affiliated entities, associated partners, subcontractors or recipients of financial support to third parties" subject to EU sanctions. Importantly, it expressly adds that "[t]he need to ensure the respect for EU restrictive measures must not however impede the effective delivery of humanitarian assistance to persons in need in accordance with the humanitarian principles and international humanitarian law. Persons in need must therefore not be vetted."²¹ (Here the term "vetted" is used to refer to screening by the humanitarian organization.)

In a similar vein, in 2019 the EU issued a letter clarifying that the provisions in the 2018 Financial and Administrative Framework Agreement between the EU and the UN do not prohibit or preclude the provision of humanitarian assistance using EU funds to persons who are in need, including where these persons have been designated under EU sanctions.²²

The position of the United States Agency for International Development (USAID) is more complex. Its stated position is that it does not require screening of final beneficiaries of in-kind assistance of the humanitarian programmes it funds. In practice, however, its approach is not quite so clear cut. The precise sanctions and counterterrorism requirements in funding agreements vary recipient-by-recipient and context-by-context. At their most onerous, they come into play in three different ways in the contractual relationship.

First, when applying for USAID funding, non-governmental organizations (NGOs)²³ must sign a counterterrorism certification stating that, to the best of their knowledge they have not, in the previous three years, knowingly engaged in transactions with, or provided material support or resources to, any individual or entity who was, at the time, subject to US counterterrorism sanctions or UN sanctions. This requirement expressly does not cover

19 Irish Aid, "Irish Aid Programme Grant II (2017–2021) and HPP (2019–2021) Programme Cycle Management Guidelines 2019", para. 41, available at: <https://www.irishaid.ie/media/irishaid/whatwedo/respondingtoemergencies/Programme-Grant-II-and-Humanitarian-Programme-Plan-2019-PCM-Guidelines.pdf>.

20 SIDA, *Grant Agreement for Humanitarian Action*, September 2019, section 13.6. On file with authors.

21 European Commission, Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO), "Humanitarian Aid (HA) General Model Grant Agreement", November 2020, Annex 5, pp. 76 and 77, available at: <https://www.dgecho-partners-helpdesk.eu/download/referencedocumentfile/162>.

22 European Commission Service for Foreign Policy instrument letter of 6 February 2019 to Deputy Controller, UN and Deputy Director of the UN Development Programme. On file with authors.

23 Anti-terrorism certifications are not required for *inter alia* public international organizations: US Government Accountability Office, *Report to Congressional Committees, West Bank and Gaza Aid*, GAO-21-332, March 2021, p. 11.

[t]he furnishing of USAID funds, or USAID-financed commodities or other assistance, to the ultimate beneficiaries of USAID-funded humanitarian or development assistance, such as the recipients of food, non-food items, medical care, micro-enterprise loans or shelter, *unless* the applicant knew or had reason to believe that one or more of these beneficiaries was subject to U.S. or U.N. terrorism-related sanctions.²⁴

This exception suggests that providing assistance to a final beneficiary is only problematic for the purpose of the certification if the NGO knew or had reason to believe that the person was designated.

The second moment the issue can arise is in contexts where USAID imposes partner vetting requirements. As discussed above, some recipients of USAID funding in such contexts are required to vet final recipients of cash or in-kind assistance of more than a specified amount, and participants in training programmes of a certain duration.²⁵

This is a vetting requirement, rather than an automatic exclusion of these final beneficiaries from the programmes in question. Nonetheless, it can be presumed that the donor would not authorize their participation if it were to be established that they were on a list of designated persons. This said, the requirement only applies to certain activities: participation in training programmes and transactions above a certain sum. Implicit in this appears to be acceptance that no one must be excluded from humanitarian activities to meet essential needs.

Finally, funding agreements themselves include express provisions on the provision of resources to designated persons or entities. The precise requirements vary significantly according to the status of the recipient of USAID funds: public international organization or NGO.²⁶ The latter must comply with more onerous requirements. The relevant clauses are revised periodically, and the most recent iteration, adopted in May 2020, prohibits NGOs from engaging in transactions with, or providing resources or support to, any individual or entity that is subject

24 USAID, “Certifications, Assurances, Representations, and Other Statements of the Recipient: A Mandatory Reference for ADS Chapter 303”, partially revised 18 May 2020, Part I.4, available at: <https://www.usaid.gov/sites/default/files/documents/1868/303mav.pdf> (emphasis added).

25 See, for example, USAID Mission Order 21 in relation to the West Bank and Gaza. The precise vetting requirements are set out in US Government Accountability Office, *Report to Congressional Committees, West Bank and Gaza Aid*, GAO-21-332, March 2021, p. 8. Similar requirements also apply in relation to operations in Syria: USAID, “Syria Vetting Standard Operating Procedures”, 25 May 2016, available at: https://www.usaid.gov/sites/default/files/documents/1866/USAID_Syria_Vetting_Procedures_04-25-2016.pdf.

26 USAID, *Standard Provisions for Cost-Type Agreements with Public International Organizations (PIOs) – A Mandatory Reference for ADS Chapter 308*, partially revised 4 December 2020, pp. 15–16; USAID, *Standard Provisions for U.S. Nongovernmental Organizations – A Mandatory Reference for ADS Chapter 303*, partially revised 18 May 2020, section M12; and USAID, *Standard Provisions for Non-U.S. Nongovernmental Organizations – A Mandatory Reference for ADS Chapter 303*, partially revised 31 March 2021, pp. 24–5. While the obligations imposed on NGOs are significantly more onerous, there are also significant variations in the nature of the obligation imposed on various types of public international organizations.

to UN or US sanctions. This language does not appear to exclude final beneficiaries from this prohibition.

Recent challenges

Despite the ambiguity in USAID's position, the humanitarian community – UN agencies, International Committee of the Red Cross (ICRC) and NGOs alike – have been successful in refraining from screening final beneficiaries of humanitarian programmes. In the past couple of years, however, this red line has been put to the test by some donors.

On the US front, USAID funding agreements concluded with certain humanitarian actors in contexts where certain groups designated as terrorist by the US are operative, including Boko Haram and the Islamic State of West Africa Province (ISWAP) in Nigeria, and Islamic State of Iraq and the Levant (ISIL) in Syria and Iraq, have included clauses requiring recipients to seek prior authorization from USAID before providing assistance to individuals whom the recipient “affirmatively knows” to have been “formerly affiliated” with these groups “as combatants or non-combatants”.²⁷

Sometimes referred to as the “Lake Chad Basin clause”, as it was funding agreements for activities in this context that brought the issue to the fore, this requirement raises numerous concerns.²⁸ USAID has not provided definitions or guidance of what amounts to having been “formerly affiliated” with a designated group. However, this is likely to be a larger group than those who are designated, so people who are not even designated could potentially be excluded from humanitarian programmes. USAID has also not provided guidance on what constitutes “affirmative knowledge” of a person's former affiliation.

This pre-authorization requirement means that recipients of funding must identify – by whatever means they choose – and thus potentially exclude from humanitarian action, an even broader category of people than those who are designated. This exacerbates the problems underlying screening.

Admittedly, the requirement neither requires recipients of funding to provide the names and other personal data of the persons in question, nor does it automatically preclude assistance from being provided. It is for USAID to decide what the consequences of any notification are. Nonetheless, there is a very real risk that this requirement may exclude people from life-saving assistance, including measures to treat and reduce the spread of COVID-19. Not providing medical assistance – even just pending authorization – would violate IHL and be contrary to medical ethics.

27 The precise requirements vary from context to context. Some of the clauses in funding for operations in Iraq/Syria exclude “civilian populations who only resided in areas that were at some point in time controlled by the groups” from the pre-authorization requirements. Personal interviews, November 2020.

28 Obi Anyadichke, “Aid Workers Question USAID Counter-terror Clause in Nigeria”, *The New Humanitarian*, 5 November 2019, available at: <https://www.thenewhumanitarian.org/news-feature/2019/11/05/USAID-counter-terror-Nigeria-Boko-Haram>. See also, Norwegian Refugee Council (NRC), Private Briefing Note, *Lake Chad Basin Clause*, May 2019.

Even more alarming, in view of the potential number of contexts in relation to which it could apply, is recent EU practice. As of 2018, funding agreements concluded by European Commission divisions other than ECHO,²⁹ including the Directorate-General for International Cooperation and Development (DEVCO) and under the EU Instrument Contributing to Peace and Stability (IcSP),³⁰ have included a clause providing that recipients “must ensure that there is no detection of sub-contractors, natural persons, including participants to workshops and/or trainings and recipients of financial support to third parties” in EU sanctions.³¹ This clause has been included in grants relating to Iran, Iraq, Syria and Sudan, and is expected to be rolled out more generally in European Commission funding agreements for international cooperation and development work, other than those by ECHO.³²

There is no reason why the EU’s stated position that the provision of humanitarian aid must not be prevented by EU sanctions, and that once a person has been determined as an individual in need no screening of final beneficiaries is required, should not also apply to these funding agreements.

The “funding stream” or division within an inter-governmental organization or State that provides the funding is irrelevant. What is determinative is the context in which the funded activities are being conducted. Is it one where IHL applies, or to which humanitarian principles are otherwise relevant, such as during and in the aftermath of man-made or natural disasters?³³ And the nature of the funded activities: are they humanitarian in nature? Do they aim to prevent and alleviate human suffering in order to preserve people’s lives, security, dignity and physical and mental well-being?³⁴ Both questions must be answered on the basis of the facts on the ground, and not the institutional identity of the donor.

In view of this there has—rightly—been significant pushback to the inclusion of this requirement, most particularly in relation to activities that are being conducted in conflict settings, such as Syria. Some NGOs have terminated the grants that included it, returning the funds. Others have successfully argued that the requirement should only apply to the parts of the grant relating to cash-

29 ECHO is responsible for overseas humanitarian aid and civil protection.

30 In January 2021 DEVCO became the Directorate-General for International Partnerships (INTPA). It formulates the EU’s development policy abroad. Other parts of the European Commission that use the same General Conditions include the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR), the Service for Foreign Policy Instruments (FPI) and the Directorate-General for Structural Reform Support (DG REFORM).

31 “Annex I: General Conditions Applicable to European Union-Financed Grant Contracts for External Actions Financed by the European Union or by the European Development Fund”, July 2019, Art. 7.4, available at: <https://www.eucap-som.eu/wp-content/uploads/2020/01/B2-Annex-I-General-Conditions.pdf>.

32 The clause is included in the 2020 version of the “PRAG”, the Practical Guide on Contract Procedures, applicable to European Commission funding for international cooperation and development work other than civil protection and humanitarian aid operations by ECHO: Basic Rule 2.4, available at: <https://ec.europa.eu/europeaid/prag/document.do?nodeNumber=1>.

33 Good Humanitarian Donorship Initiative, *24 Principles and Good Practice of Humanitarian Donorship*, Principle 1.

34 ICRC Commentary, above note 14, para. 811.

based activities, as only these are covered by EU sanctions, returned that element of the grant, and carried out the other activities without screening final beneficiaries.

Adopting these principled positions is essential to maintaining the red line. It is nonetheless regrettable that it was necessary to return the funds as this left people without the assistance they had been determined to need.

These are troubling developments. They are relatively new, and because of the siloed nature of inter-governmental organizations it is possible that they were introduced without appreciating the problems that they pose to principled humanitarian action. There may still be a window of opportunity to push back against them. Doing so requires the adoption of concerted positions by the entire humanitarian community affected by the measures in particular context, coupled with calls for changes of approach at EU-headquarters level by humanitarian actors and supportive Member States.

Screening and exclusion of final beneficiaries of development programmes

The humanitarian actors' red line against screening of final beneficiaries has a firm foundation in IHL and humanitarian principles in situations of armed conflict or other contexts where humanitarian action is being conducted. To what extent and on what basis can arguments be made to oppose screening and potential exclusion of final beneficiaries' requirements in grants for development programmes?

Restrictions in counterterrorism measures and sanctions can also apply in development contexts and, over the years, the funding agreements of Organisation for Economic Co-operation and Development's Development Assistance Committee (OECD-DAC) States and inter-governmental organizations such as the EU via DEVCO have started including provisions to promote compliance therewith. Some States have also included such restrictions in their bilateral funding agreements. For example, the Agence Française de Développement has started including requirements to screen final beneficiaries of programmes it funds, many of which are implemented in contexts that are not humanitarian.

As highlighted by the ongoing debates on the humanitarian–development continuum or nexus, it is frequently impossible in practice, in addition to undesirable as a matter of policy, to draw a sharp distinction between the two types of response. Inevitably there will be times, particularly in the aftermath of conflicts or natural disasters,³⁵ when humanitarian and development activities will be conducted in the same context, and thus when humanitarian and development principles apply in tandem. In such circumstances, as just discussed

35 Caution should be exercised when using the expression “natural disasters”. See, for example, Ksenia Chmutina, Jason von Meding, J. C. Gaillard and Lee Bosher, “Why Natural Disasters Aren’t All That Natural”, *openDemocracy*, 14 September 2017, available at: <https://www.opendemocracy.net/en/why-natural-disasters-arent-all-that-natural/>.

above in relation to DEVCO requirements for Syria, IHL and humanitarian principles remain relevant. This said, and while the institutional source of the funds is not relevant *per se*, as activities are conducted in situations that are progressively more along the development side of the continuum, humanitarian principles will diminish in relevance and arguments will have to be based on development principles.

Drawing a sharp distinction between “humanitarian” and “development” actors and contexts is artificial and frequently inaccurate. There are many “hybrid” organizations that conduct both types of activities, as frequently do Red Cross/Red Crescent National Societies. Similarly, as evidenced by ongoing triple nexus discussions, it is equally artificial to refer to situations as being either “humanitarian” or “development” contexts. The reality is much more nuanced and fluid. In fact, one of the challenges is determining precisely when IHL and humanitarian principles can no longer be relied upon to oppose requirements to screen final beneficiaries.

Nonetheless, for the sake of simplicity, this section of the article refers to “development” actors, contexts and interventions, to contrast them with their exclusively humanitarian counterparts discussed in the previous sections.

The impact of counterterrorism measures, sanctions and restrictions in funding agreements for development work has received less attention than in relation to humanitarian work. One reason for this is that development actors have a greater degree of choice as to where they work.

Latecomers to the discussions

Unlike humanitarian work, the majority of development projects are generally not implemented in countries in relation to which sanctions have been imposed, or where groups designated under counterterrorism measures have a significant presence or, indeed, in areas of acute humanitarian need.

In taking strategic decisions on the areas and scope of their interventions, development actors take various factors into account. These include poverty, marginalization, vulnerability and exclusion indicators, as well as the expected outcomes. Aid effectiveness is also a strong imperative: the development sector can decide to stay out of areas that are too heavily impacted by violence and recurring disasters, on the basis of low- or no-impact assessments. Finally, political will at the national level is also a factor, as well as the possibility of operating in coordination with large development actors such as the UN Development Programme, USAID, EU DEVCO, the World Bank and the regional development banks.

This means that development actors have more strategic freedom to decide where to operate than humanitarian actors. There is no overarching imperative that dictates where and how development actors should operate. This flexibility has given development actors the choice of strategically avoiding areas where designated people and groups are active, to reduce potential legal liabilities and restrictive requirements in funding agreements.

This has also meant that the development sector has not yet elaborated a coherent approach and collective understanding of the implications of counterterrorism measures and sanctions.

Since the impact of counterterrorism measures and sanctions are increasingly also being felt in the development domain, opting out no longer seems to be a viable option. However, at present, there appears to be a lack of strategic coherence within the multi-mandated organizations on this issue. It tends to be dealt with at an operational level and programme staff tries to find ways to deal with the issues on a country-by-country basis. This can lead to the adoption of less than ideal and sometimes inconsistent positions even among the same organization. Organization positions and policies must be adopted at headquarters level and implemented consistently. Equally, importantly agencies should elaborate common positions.

The development sector, therefore, needs to urgently review how development principles can guide it to elaborate a collective position on counterterrorism measures and sanctions, that will allow it to implement its objectives of supporting poverty alleviation and socio-economic development.

A less clearly articulated and well-established underlying regulatory framework

In pushing back against problematic restrictions in funding agreements humanitarian actors can rely on a well-established and clearly articulated regulatory framework: IHL and humanitarian principles. In contexts where development activities are being conducted these are not applicable; consequently, it is necessary to rely upon arguments based on human rights law and development principles – and neither offers as firm a basis.

As a matter of law, it is the framework of social and economic rights that is most relevant to development work, and States' obligations in this regard. At present there is little analysis of how restrictions in sanctions, counterterrorism measures or funding agreements that aim to give effect to them could impair these rights, as well as the right to development, as articulated by the General Assembly in 1986.³⁶

Some General Comments by the UN Committee on Economic, Social and Cultural Rights have touched upon the potential impact of sanctions on protected rights, but the issue has not been considered in detail. In 1997 the Committee adopted General Comment 8 on the relationship between economic sanctions and respect for economic, social and cultural rights. Here the Committee noted that these rights “must be taken fully into account when designing sanctions”, and that a State that imposes sanctions has an obligation “to take steps, individually and through international assistance and cooperation, especially

³⁶ Declaration on the Right to Development, adopted by General Assembly Resolution 41/128 of 4 December 1986.

economic and technical” to respond to any “disproportionate suffering experienced by vulnerable groups within the targeted country”.³⁷

More recently, in General Comment 14 on the right to health, the Committee stated that States party to the International Covenant on Social, Economic and Cultural Rights should “refrain at all times from imposing embargoes or similar measures restricting the supply of another state with adequate medicines and medical equipment”.³⁸

The interplay between sanctions and protected rights needs to be revisited in greater detail by the Committee on Economic, Social and Cultural Rights, which does not appear to have considered the impact of counterterrorism measures yet. The Expert Mechanism on the Right to Development established by the Human Rights Council in 2019 could also play a useful role in analysing the regulatory framework.

In addition to the legal framework, the principles underlying development work are also not as clearly articulated and as well established as humanitarian principles. There are simply no clear and unifying principles. Instead, there is a patchwork of criteria, guidelines and beliefs. More analysis is necessary also in this area to distil key elements that can be relied upon to oppose measures that adversely affect development interventions.

The first criteria for development work were elaborated in 1961 by the OECD-DAC, to establish a set of criteria for identifying countries and territories eligible to receive official development assistance from the OECD-DAC. These criteria have evolved over the years and it is the 2005 Paris Declaration on Aid Effectiveness that has shaped the current thinking around development aid. As a practical, action-oriented roadmap to improve the quality of aid and its impact on development, the Declaration sets out a series of specific implementation measures and establishes a monitoring system to assess progress and ensure that donors and recipients hold each other accountable to their commitments. The Paris Declaration sets out five “partnership commitments” for making aid more effective, that emphasize that local ownership and local partnership are fundamental for achieving development results.³⁹ Counterterrorism measures and

37 UN Committee on Economic, Social and Cultural Rights, General Comment 8 on the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. E/C.12/1997/8, 12 December 1997, paras 12 and 14.

38 UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4, 11 August 2000, para. 41.

39 The Paris Declaration is based on the following five partnership commitments:

- Ownership: Developing countries set their own strategies for poverty reduction, improve their institutions and tackle corruption.
- Alignment – Donor countries align behind these objectives and use local systems.
- Harmonisation: Donor countries coordinate, simplify procedures and share information to avoid duplication.
- Results: Developing countries and donors shift focus to development results and results get measured.
- Mutual accountability: Donors and partners are accountable for development results.

Available at: <https://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm#:~:text=The%20Paris%20Declaration%20on%20Aid%20Effectiveness&text=It%20gives%20a%20series%20of,other%20accountable%20for%20their%20commitments>

sanctions can negatively affect local ownership and partnership, because they can disempower local partnership and local agency.

The Sustainable Development Goals (SDGs) are the leading global framework for sustainable development up to 2030. The outcome statement of the June 2012 UN Summit on Sustainable Development (Rio+20) proposed the Global SDGs.⁴⁰ At the SDG summit on 25 September 2015, UN Member States adopted the 2030 Agenda for Sustainable Development, in which they committed to achieving the seventeen SDGs.

SDG 16 is particularly relevant to the interplay of development work with sanctions and counterterrorism measures. States commit to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. Counterterrorism measures and sanctions can impair achieving this goal if they lead to the exclusion of certain people and groups from society in social, political and economic terms.

Examples of the adverse impact of counterterrorism measures on development objectives

Current examples can provide insights into how screening requirements in funding agreements can undermine development objectives, by excluding beneficiaries from the funded programmes, and also from political processes and dialogue.

Local ownership

The Paris Declaration emphasizes that local ownership is fundamental for achieving development results. The SDGs are objectives, underlined by the principle that the development agenda must be locally owned and driven by local and civic-driven change actors. Screening and exclusion can disempower certain groups and undermine local ownership through top-down exclusion mechanisms.

A case in point is a project in Burkina Faso. Religious leaders in the northern Sahel region of Burkina Faso started a network on intra-religious dialogue to deal with extremist religious messaging and to discuss how to understand Sufi and Salafi teaching from a Burkinabé perspective to support non-violent co-existence. Fundraising for this network became complicated when some of the religious leaders were screened and excluded on the basis of their relation to Jihadi groups in the Sahel. Only some of the religious leaders were allowed to participate, which made the network and the effort less diverse, less legitimate in the eyes of communities and, therefore, less effective.

⁴⁰ UN, “Future We Want—Outcome Document”, available at: <https://sustainabledevelopment.un.org/futurewewant.html>.

Aid effectiveness

Exclusion of groups that have a support base in local communities on the basis of screening requirements imposed by donors has proved counter-productive to achieving the programme goals, and at times also in terms of attaining the broader development and peace-building objectives.

A more recent example occurred in Cabo Delgado, in Mozambique. In March 2021 the U.S. Department of State added Islamic State in Iraq and Syria (ISIS) affiliate Ansar al-Sunna Mozambique to its list of terrorist entities.⁴¹ This designation has caused problems for many development projects funded by the international community. One of these is conducted by AIAS, the governmental water and sanitation agency that implements clean drinking water projects in Cabo Delgado. When AIAS implements these projects, it engages youths by training them on technical skills required in the water project. The youths become part of AIAS's temporary staff and earn some income. Due to the listing, AIAS has had to pause the project and screen some groups that were involved in its implementation. In some communities AIAS has even had to stop the projects because of the presence and indirect influence of members of the listed group. The Ansar al-Sunna Mozambique group used this situation as an example of the absence of local services and good governance for local communities as part of its compelling narrative to gain a support base. This is an instance of the listing of a group becoming counter-productive and possibly undermining its counterterrorism objectives.

Do no harm and conflict sensitivity

In the 1990s the principle of “do no harm” was adopted by the development sector. It sets out a minimum obligation for any development action or intervention in and on conflict: to do no harm. It requires development interventions to actively look for and seek to avoid or mitigate negative impacts. These could include worsening divisions between conflicting groups; increasing danger for participants in development activities; reinforcing structural or overt violence; or disempowering local people.

Conflict transformation (peacebuilding) has been part of the development portfolio since the beginning of this century when the UN and the World Bank started to report that development impact cannot be sustained without peace and respect for human rights. The nexus between security and development has become stronger and more evident. Development is an essential precondition to sustaining peace. Sustainable and inclusive development interventions are

41 U.S. Department of State, “State Department Terrorist Designations of ISIS Affiliates and Leaders in the Democratic Republic of the Congo and Mozambique”, 10 March 2021, available at: <https://www.state.gov/state-department-terrorist-designations-of-isis-affiliates-and-leaders-in-the-democratic-republic-of-the-congo-and-mozambique/>.

necessary to address the root causes of conflicts and facilitate long-term conflict transformation processes.

Requirements in funding agreements to screen and potentially exclude certain stakeholders on the basis of supposed membership or alignment with designated entities, should be assessed against the do no harm principle.

By way of example, in important peacebuilding processes, harm has been done by the exclusion of certain groups from formal dialogues. Recently in Mali the international community drew a distinction between those armed groups that were allowed to sign the 2015 Accords and the non-signatory groups associated with Al-Qaeda and ISIS. The latter were excluded from the negotiations and turned into spoilers for future implementation of the peace agreement.

More generally, when development interventions become or are perceived as instrumental to a Western security agenda, they do harm in terms of being perceived as not legitimate and potentially fuelling existing conflicts, putting project staff and implementing communities at risk.

Concluding reflections

States are not under a legal obligation to fund humanitarian programmes, but if they do, they must not include provisions that are incompatible with IHL, or that put recipient humanitarian organizations in a situation where they cannot operate in accordance with humanitarian principles or medical ethics.

It is clear that requirements that could lead to the exclusion of people from the assistance that they have been determined as requiring would do so. Humanitarian actors have a strong basis for opposing such requirements, and there have been positive instances of donors removing problematic clauses in response to common positions by humanitarian actors. These are extremely valuable precedents.

Although progress still needs to be made in elaborating the analytical framework for addressing the tensions between sanctions, counterterrorism measures and development interventions, the adverse impact of exclusion on effectiveness of development activities and peacebuilding is being increasingly highlighted. This should be taken into account in triple nexus discussions. The good practices that are being elaborated in respect of work in humanitarian settings should be carried through to development and peacebuilding activities.

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

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Abstract

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

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

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

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

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Introduction

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

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

Restriction of humanitarian access in times of counterterrorism

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

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

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

1 Article 3 common to the four Geneva Conventions.

2 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 10; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 7; and rule 110 of customary international humanitarian law (IHL) (“Rule 110. Treatment and Care of the Wounded, Sick and Shipwrecked”). In situations of occupation, Art. 59 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV) states that “all Contracting Parties shall permit the free passage”, in particular “of the provision of consignments of foodstuffs, medical supplies and clothing”. Art. 69 of AP I also says that the Occupying Power shall ensure the provision of supplies essential to the survival of the civilian population of the occupied territory. The impeded passage of relief consignments, equipment and personnel are also stated in Art. 70(1) of AP I, Art. 18(2) of AP II and customary IHL rule 55 of customary IHL (“Rule 55. Access for Humanitarian Relief to Civilians in Need”).

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

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

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

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

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

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

Examples of restricting access

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 *Ibid.*

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

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

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

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

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

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

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

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

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

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

20 MSF internal report, May 2018.

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

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

23 *Ibid.*

24 *Ibid.*

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

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

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

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

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

27 For instance, Australia’s counterterrorism legislation is seen as undermining humanitarian principles. See Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, “Legislating Against Humanitarian Principles: A Case Study on the Humanitarian Implications of Australian Counterterrorism Legislation”, *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016, pp. 235–261.

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

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

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

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

Associating civilians to designated terrorist groups

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 Confidential interview with a source close to the case, 20 December 2019, on file with the authors. In February 2018, David Abrams of The Zionist Advocacy Center filed a lawsuit against Oxfam (*United States of America ex rel. TZAC, Inc. v. Oxfam a/k/a Oxfam GB*). In order to be eligible for funding, Oxfam had to execute certifications indicating that it had not provided material support or resources to designated terrorist persons or entities in the last 10 years. According to Abrams, Oxfam had received over \$53 million in USAID grant funds in recent years, but from 2013 to 2017, Oxfam sponsored a project in the Gaza Strip to promote agriculture in urban and suburban areas. He claimed that this project provided support and assistance to the Ministry of Agriculture and the Ministry of National Economy in Gaza. In those years Hamas governed the Gaza Strip, and Hamas was a designated Foreign Terrorist Organization as defined by the U.S. State Department. The lawsuit is available at: <https://www.docketbird.com/court-documents/ABC-v-DEF/COMPLAINT-against-OXFAM-a-k-a-OXFAM-GB-Document-filed-by-UNITED-STATE-OF-AMERICA-ex-rel-TZAC-Inc-Document-previously-filed-under-seal-in-envelope-1-and-unsealed-by-document-3/nysd-1:2018-cv-01500-00006>.

41 Sam Olukoya, "Nigeria Suspends UNICEF Work, Alleges 'Clandestine' Activity", *AP*, 14 December 2018, <https://apnews.com/c7b5ccc3e14b4f80a90bf10877b2c189>.

42 Abby Stoddard, Monica Czwarno and Lindsay Hamsik, *NGOS & Risk: Managing Uncertainty in Local-International Partnerships (Global Report)*, USAID, Interaction and Humanitarian Outcomes, March 2019, available at: <https://www.humanitarianoutcomes.org/publications/ngos-risk2-partnerships>, p. 10. In May 2020, USAID reviewed some of those restrictions as a response of pressure by some international non-governmental organizations, and amended two documents related to USAID's contract and certification process, the Anti-Terrorism Certification and the Standard Provision on Preventing Transactions with, or the Provision of Resources or Support to Sanctioned Groups and Individuals (Standard Provision). While problems associated with the clause persisted, "these changes will provide improved clarity and reasonable standards regarding grantees' obligations in all grant agreements going forward". Charity & Security Network, *USAID Revises Grantee Documents Relating to Anti-Terrorism Requirements*, 21 May 2020, available at: <https://charityandsecurity.org/false-claims-act-lawsuits/usa-id-revises-grantee-documents-relating-to-anti-terrorism-requirements/>.

43 U.S. Department of Defense, U.S. Department of State and USAID, above note 39, p. 49.

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

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

Detention, political screening and dispossession of the right of assistance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

57 R. Fisk, above note 53.

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

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

Conclusion

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

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

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

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

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

Detention in the context of counterterrorism and armed conflict: Continuities and new challenges

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Abstract

This article explores recent practices of States in relation to counterterrorism and armed conflict detention. Recent cases in the courts of the UK and US are drawn on to demonstrate the continued defence by those States of their administrative detention practices. Furthermore, the practice of other States in adopting new administrative detention laws as part of their counterterrorism strategies is explored. Finally, two examples of contemporary controversies are then considered to show where much of the debate is likely to be focused in the coming years, namely the use of other administrative measures short of detention, particularly assigned residence, and detentions carried out by armed groups that are supported by foreign States.

Keywords: counterterrorism, administrative detention, international humanitarian law.

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Introduction

In the wake of 9/11, counterterrorism and armed conflict came to be seen as inseparable, both operationally, in the sense that the US's and others' operations against al-Qaeda were part of the broader invasion and occupation of Afghanistan, and legally, in the sense that States sought to justify their counterterrorism policies on the basis that they fell within an armed conflict and were subject to international humanitarian law (IHL). This phenomenon, of course, played out particularly publicly in the context of administrative detention or internment,¹ where debates raged over the appropriate regulatory framework. Whilst some saw this in terms of a stark "criminal law *versus* military detention" binary,² others emphasized the possibility of adhering to a human rights framework whilst engaging in administrative detention.³ Still others raised concerns with the emerging idea of entrenching permanent, formalized models of administrative counterterrorism detention.⁴

The US and UK, amongst others, were particular advocates of an administrative detention regime in the context of counterterrorism.⁵ Soon after 9/11, the UK derogated in part from Article 5 of the European Convention on Human Rights (ECHR) and adopted its infamous 2001 Anti-Terrorism, Crime and Security Act.⁶ Part 4 of the 2001 Act introduced a domestic system of indefinite administrative detention for those certified as "international terrorists" by the Home Secretary, with appeal to, and six-monthly periodic reviews by, the Special Immigration Appeals Commission (in place of ordinary judicial review). In many ways, this system of administrative detention looked a great deal like that provided for under the Fourth Geneva Convention in respect of civilians

- 1 That is, detention ordered by the executive, usually for the purposes of preventing an alleged security threat from materializing, outside of any criminal justice framework and often without traditional judicial oversight.
- 2 Avril McDonald, "Terrorism, Counter-Terrorism and the *Jus in Bello*", in Michael N. Schmitt and Gian Luca Beruto (eds), *Terrorism and International Law: Challenges and Responses*, International Institute of Humanitarian Law, San Remo, 2002; Robert Chesney and Jack Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models", *Stanford Law Review*, Vol. 60, No. 4, 2008, p. 1079.
- 3 See, e.g., albeit with different consequences, Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, Oxford, 2011, Chapter 9; Diane Webber, *Preventive Detention of Terror Suspects: A New Legal Framework*, Routledge, Abingdon, 2016; Monica Hakimi, "International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict–Criminal Divide", *Yale Journal of International Law*, Vol. 33, No. 2, 2008, p. 369.
- 4 Deborah Pearlstein, "We're All Experts Now: A Security Case Against Security Detention", *Case Western Reserve Journal of International Law*, Vol. 40, 2009, p. 577.
- 5 Whilst UK and US practice exemplifies this approach, that practice took place in a global context of emerging counterterrorism policy (including under the auspices of the UN Security Council) that was conspicuously silent on the need for compliance with human rights law: Manfred Nowak and Anne Charbord, "Key Trends in the Fight Against Terrorism and Key Aspects of International Human Rights Law", in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism*, Edward Elgar, Cheltenham, 2018.
- 6 In the preceding few years, the new Blair Government had already introduced some of the most far-reaching counterterrorism legislation in Europe, particularly in the field of police powers and the criminal law: see Adam Tomkins, "Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001", *Public Law*, Summer, 2002, p. 205.

during an international armed conflict.⁷ The derogation, and Part 4 of the 2001 Act, were held to be incompatible with the ECHR by the UK House of Lords and European Court of Human Rights (ECtHR), resulting in the replacement of the administrative detention regime with a new system of control orders under the 2005 Prevention of Terrorism Act.⁸

Regarding its detention operations in Afghanistan and Iraq, during the international and non-international armed conflicts in both States, the UK adopted internment regimes that, unsurprisingly, were again clearly grounded in those applicable under international humanitarian law in international armed conflicts. Over the intervening two decades, challenges have been brought before UK domestic courts (and the ECtHR) by detainees that had been captured and detained in those conflicts through various causes of action, including judicial review,⁹ human rights claims,¹⁰ *habeas corpus*¹¹ and actions in tort.¹² The UK has sought to rebut these claims, with varying degrees of success, by invoking a range of different arguments depending on the nature of the claims, from procedural arguments concerning crown act of State,¹³ foreign act of State, and State immunity,¹⁴ to substantive arguments concerning the relationship between the ECHR and IHL.¹⁵

The conflation between counterterrorism and armed conflict was especially evident in the practice of the US. As is well known, Congress adopted the Authorization for the Use of Military Force (AUMF) after 9/11, which authorized the president

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁶

7 For a detailed consideration of the content of the IHL internment regimes applicable in international armed conflicts, see Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, Oxford, 2016, Chapter 2.

8 *United Kingdom, A and Others v. Secretary of State for the Home Department; X and Another v. Secretary of State for the Home Department*, Judgment, [2004] UKHL 56; ECtHR, *A and Others v. UK*, Judgment (Grand Chamber), Appl. No. 3455/05, 19 February 2009. Control orders themselves were subsequently replaced with “terrorism prevention and investigation measures” in 2012. On this UK practice, see D. Webber, above note 3, pp. 97–109.

9 *R (on the Application of Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

10 *R (on the Application of Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58.

11 *Rahmatullah v. Secretary of State for Foreign and Commonwealth Affairs* [2012] UKSC 48.

12 *Belhaj v. Straw* [2017] UKSC 3.

13 *Rahmatullah v. Ministry of Defence* [2017] UKSC 1.

14 *Belhaj v. Straw* [2017] UKSC 3.

15 *Hassan v. UK*, Judgment (Grand Chamber), Appl. No. 29750/09, 16 September 2014; *Al-Waheed v. Ministry of Defence; Mohammed v. Ministry of Defence* [2017] UKSC 2.

16 Public Law 107–40, 115 Stat. 224, section 2(a).

The AUMF has been invoked by the US government as the basis for military operations in multiple jurisdictions.¹⁷ Curtis Bradley and Jack Goldsmith have commented that the AUMF has been transformed “from an authorization to use force against the 9/11 perpetrators who planned an attack from Afghanistan into a protean foundation for indefinite war against an assortment of terrorist organizations in numerous countries”.¹⁸

The US Supreme Court confirmed that the “necessary and appropriate force” authorized by the AUMF provided domestic legal authority to detain,¹⁹ with Congress largely codifying the Obama Administration’s definition of the scope of this authority as covering persons who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks” as well as persons who were

part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.²⁰

This standard is seen as grounded in “longstanding law-of-war principles”, premised on a right to detain until the relevant hostilities have ended.²¹ Whereas the Supreme Court extended the right of *habeas corpus* under the Suspension Clause of the US Constitution to Guantanamo detainees,²² the extent of such judicial review and the evidential and procedural standards applied by the District of Columbia (DC) Circuit Court make it very difficult for detainees effectively to challenge their detention.²³ In addition, the DC Circuit has upheld the government’s refusal to extend the right of *habeas* review to those detained in Afghanistan (“an active theatre of war”), even if they were captured elsewhere and transferred there.²⁴

This post-9/11 detention practice of the US and UK was marked by a desire to limit or exclude counterterrorism and armed conflict detention from ordinary law and ordinary legal processes. The last decade has seen a general winding down of detention operations in practice by these two States in the context of transnational terrorism. However, the next two sections below will demonstrate that the general approach of isolating counterterrorism detention from ordinary legal processes has continued to be pursued by both the UK and US in their

17 Tess Bridgeman, Ryan Goodman, Stephen Pomper and Steve Vladeck, “Principles for a 2021 Authorization for Use of Military Force”, *Just Security*, 5 March 2021, available at: <https://www.justsecurity.org/74273/principles-for-a-2021-authorization-for-use-of-military-force/> (all internet references were accessed in August 2021).

18 Curtis A. Bradley and Jack L. Goldsmith, “Obama’s AUMF Legacy”, *American Journal of International Law*, Vol. 110, No. 4, 2016, p. 628.

19 *Hamdi et al. v. Rumsfeld*, *Secretary of Defense et al.*, 542 U.S. 507 (2004).

20 National Defense Authorization Act (NDAA) 2012, Public Law 112–81, 125 Stat. 1298, section 1021.

21 *Hamdi*, above note 19, p. 521.

22 *Boumediene v. Rumsfeld*, 553 U.S. 723 (2008).

23 Stephen I. Vladeck, “The D.C. Circuit After *Boumediene*”, *Seton Hall Law Review*, Vol. 41, No. 4, 2011, p. 1451.

24 *Maqaleh v. Gates*, 605 F.3d 84 (2010).

ongoing defence of their practices. The consequence has been the further entrenching of a counterterrorism detention policy that follows closely the kind of detention associated with international armed conflict, excluding normal procedural standards and typical judicial control.²⁵

This ongoing practice of the UK and US is not only important as a precedent for those States, should they rely again on detention as a counterterrorism tool in the future, but also as a precedent for other States, which may view these positions of the UK and US as giving legitimacy to their own practices. Indeed, the fourth section of this article will demonstrate that a number of other States do still rely on existing and newly adopted administrative detention regimes as part of their counterterrorism strategy. Together, the next three sections of the article will seek to show that, despite suggestions to the contrary,²⁶ States still advocate and rely on administrative detention in the context of counterterrorism that mirrors that applicable under IHL in international armed conflicts. Thus, the post-9/11 practice of relying on extraordinary wartime detention powers as an analogy for counterterrorism detention, instead of the criminal justice system, has become normalized. Alongside this continuity in practice, the last section of this article then concludes by suggesting some of the new detention-related issues in the context of counterterrorism that are likely to dominate debates in this area in the coming years.

Recent US practice on Guantanamo and the Due Process Clause

A series of recent Guantanamo cases going through the DC Circuit Court demonstrates the continued defence by the US of their IHL-inspired model of counterterrorism detention. These cases have been brought by petitioners seeking the application of the Due Process Clause of the Fifth Amendment to the US Constitution in their *habeas corpus* claims. The Supreme Court in *Boumediene* required detainees to be given a “meaningful”²⁷ review. This led the DC Circuit

25 And this particular practice around detention forms part of and contributes to a broader context of increasingly aggressive counterterrorism strategy: M. Nowak and A. Charbord, above note 5, p. 25 (“... enhanced interrogation, secret detention and extraordinary rendition have given way to bulk surveillance and increased use of armed drones; and the moment that governments start criminalizing preparatory acts of terrorism has moved forward in time, with recent measures that target ‘extremism’ in the absence of any link to violence”).

26 See, e.g., Karen J. Greenberg, “Drones Strikes and the Law: From Bush-Era Detention to Obama-Era Targeted Killing”, in David Cortright, Rachel Fairhurst and Kristen Wall (eds), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications*, University of Chicago Press, Chicago, IL, 2015, pp. 74–75 (viewing the rise of armed drones as, in some respects, replacing detention in the context of US counterterrorism); John R. Crook, “President Obama Outlines Shifts in U.S. Counterterrorism Policy”, *American Journal of International Law*, Vol. 107, No. 3, 2013, pp. 674 and 678 (on the Obama Administration’s plan to bring “law of war detention to an end”, to be replaced with “prosecuting terrorists”).

27 *Boumediene*, above note 22, p. 783 (“[h]abeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.”).

to develop specific evidential and procedural principles to apply in the Guantanamo *habeas* litigation (though with inconsistencies and frequent disagreements between judges).²⁸ However, application of the Due Process Clause would bring those processes more in line with those well-established rules applicable, *inter alia*, to pre-trial criminal detention.²⁹ Importantly, the Due Process Clause is also invoked by a number of the petitioners to support their challenge of the long duration of their detention under the AUMF, which, as indefinite detention for the duration of hostilities, reflects the analogy drawn by the US to the internment regime applicable to prisoners of war under the Third Geneva Convention.³⁰

Three recent and ongoing cases raise this constitutional question. In the first, *Qassim v. Trump*, the DC Circuit Court in 2019 overturned the District Court's finding that earlier Circuit Court jurisprudence in *Kiyemba v. Obama*³¹ categorically barred the application of the Due Process Clause to Guantanamo detainees, holding instead that the only issue before the Court in *Kiyemba* concerned the substantive question of whether detainees unlawfully held had a substantive right to release in the US.³² The question over the application of the procedural rights under the Due Process Clause to the *habeas* hearings remained unresolved and was remanded back to the District Court.³³ The particular claim by the petitioner in *Qassim* was that the Due Process Clause required that he and his counsel be given access to the classified material informing the government's decision to detain, including exculpatory evidence.³⁴

In the second case, *Al-Hela v. Trump*, a different panel of the DC Circuit held in 2020 that previous Supreme Court and Circuit Court precedent *did* establish that the Due Process Clause, including the procedural rights therein, does not extend "to aliens without property or presence in the sovereign territory of the United States".³⁵ In taking this categorical approach, the Court rejected the

28 Benjamin Wittes, Robert Chesney and Rabia Benhamin, *The Emerging Law of Detention: the Guantanamo Habeas Cases as Lawmaking*, Brookings Institute, Washington, DC, 2010, available at: <https://www.brookings.edu/wp-content/uploads/2016/06/Chesney-Full-Text-Update32913.pdf>, p. 3.

29 Joshua Alexander Geltzer, "Of Suspension, Due Process and Guantanamo: The Reach of the Fifth Amendment After *Boumediene* and the Relationship between *Habeas Corpus* and Due Process", *Journal of Constitutional Law*, Vol. 14, 2012, p. 719 and pp. 725–734 (citing admissibility of evidence obtained through coercion, standard of proof, right to exclude and present certain evidence, and right of cross-examination of witnesses as potential questions for which the applicability of the Due Process Clause might be dispositive).

30 Jonathan Hafetz, "Upcoming Cases Provide Opportunities to Reassess the Application of the Due Process Clause at Guantanamo", *Just Security*, 3 March 2021, available at: <https://www.justsecurity.org/75106/due-process-at-guantanamo/> ("[m]ost important, application of the Due Process Clause to Guantanamo would provide judges with the opportunity to address the question they have not yet answered and which, after two decades of detention, is plainly the most appropriate and salient one: whether a detainee poses such a grave threat to U.S. security that he must continue to be imprisoned").

31 *Kiyemba v. Obama*, 555 F.3d 1022 (2009).

32 *Qassim v. Trump*, 927 F.3d 522 (2019).

33 *Ibid.*, pp. 528–529.

34 *Ibid.*, p. 530. The Circuit Court wanted the established disclosure procedures to be tested first before asking whether any withholding of evidence engaged constitutional requirements.

35 *Al-Hela v. Trump*, 972 F.3d 120 (2020), p. 148. This judgement has recently been vacated and the petition for rehearing *en banc* granted by the DC Circuit Court: United States Court of Appeals for the District of Columbia Circuit, *Al-Hela v. Biden*, No. 19-5079, Order, 23 April 2021.

petitioner's argument for applying to the Due Process Clause the functional test that was established in *Boumediene* for the purposes of determining the reach of constitutional provisions.³⁶ The petitioner's particular procedural claims in this case again concerned the withholding of evidence from himself and his counsel, as well as the reliance by the government on hearsay, which he claimed violated both the Suspension Clause and the Due Process Clause. In addition to rejecting the application of the Due Process Clause entirely, the Circuit Court held that the use of hearsay, as well as the withholding of evidence from detainees and their counsel (and the hearing of it by the court *ex parte*), were not, as such, incompatible with the Supreme Court's requirement of a "meaningful" *habeas* review.³⁷

Importantly, *Al-Hela*'s substantive challenges regarding the basis and duration of his detention were also rejected by the Court. First, in accordance with previous case law, the Court confirmed that the petitioner's detention was authorized by the AUMF on the basis of a "preponderance of the evidence" standard.³⁸ Second, it rejected the claim that the long duration of his detention (since 2004) and the US's apparently unending war on terror meant that Justice O'Connor's prescient point in *Hamdi* regarding the possibility of an unravelling of the argument that the AUMF authorizes detention for the duration of the hostilities was now being realized.³⁹ The Circuit Court held that the AUMF imposes no

time limit on the President's authority to detain enemy combatants ... The government maintains that the War on Terror is an ongoing conflict involving combat operations by the United States and its allies abroad. Courts lack the authority or the competence to decide when hostilities have come to an end. "The 'termination' of hostilities is 'a political act.'"⁴⁰

The petitioner had also attempted to challenge his indefinite detention as incompatible with the substantive rights under the Due Process Clause, but this failed as a result of the Court's findings regarding the scope of the Clause.⁴¹

In the third case, *Ali v. Trump/Biden*, a petition for *certiorari* was refused in May 2021 by the Supreme Court following the DC Circuit Court's denial of the

36 *Al-Hela v Trump*, *ibid.*, p. 142. *Boumediene* had established "at least" three factors for determining the extra-territorial reach of the Suspension Clause: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ": *Boumediene*, above note 22, p. 766.

37 *Al-Hela*, above note 35, pp. 135–138.

38 *Ibid.*, pp. 130–135.

39 *Hamdi*, above note 19, p. 521 ("[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [that the AUMF authorizes detention for the duration of hostilities based on 'longstanding law-of-war principles'] may unravel").

40 *Al-Hela*, above note 35, p. 135 ("[s]o long as the record establishes the United States military is involved in combat against Al Qaeda, the Taliban, or associated forces, we have no warrant to second guess fundamental war and peace decisions by the political branches").

41 *Ibid.*, p. 140 ("[w]e need not assess whether Al Hela has articulated a cognizable due process right because longstanding precedent forecloses any argument that 'substantive' due process extends to Guantanamo Bay").

petitioner's *habeas* application in 2020.⁴² As in *Al-Hela*, the petitioner in *Ali* invoked both the substantive and procedural aspects of the Due Process Clause to challenge his detention. Although the Circuit Court, following *Qassim* and in contrast to *Al-Hela*, considered the District Court's categorical rejection of the application of the Due Process Clause to Guantanamo to be "misplaced"⁴³ given the Supreme Court's more nuanced references in *Boumediene* to the different elements that might feed into a "meaningful" review,⁴⁴ for the same reasons it also did not accept what it saw as the petitioner's "wholesale" application of the Due Process Clause to Guantanamo.⁴⁵ Holding that it need not resolve the constitutional question,⁴⁶ the Court assessed each of the petitioner's substantive and procedural challenges and took the view that the Due Process Clause, even if it did apply, would be of no help to him.

Of particular interest here is what the Court said about the length of Ali's detention. First, the Court held that substantive due process does not as such prohibit the very lengthy detention that he has faced, particularly in light of the Periodic Review Board's findings that he continues to pose a threat.⁴⁷ Second, the Court dismissed Ali's procedural due process claim that his extended detention meant that the government now needed to show by clear and convincing evidence that he continues to pose specific threats.⁴⁸ Ali invoked the Supreme Court's *Rasul* case to argue that the government should now be held by a stricter standard in light of the long duration of his detention.⁴⁹ The Court held, however, that previous case law had acknowledged the possibility of very lengthy detention under the AUMF without considering that this affected the standard to be applied in review.⁵⁰ It went on to note:

42 *Ali v. Biden*, __ S Ct __ (17 May 2021); *Ali v. Trump*, 959 F.3d 364 (2020).

43 *Ali*, above note 42, p. 368.

44 *Boumediene*, above note 22, p. 783.

45 *Ali*, above note 42, pp. 368–369 (“[i]n sum, *Boumediene* and *Qassim* teach that the determination of what constitutional procedural protections govern the adjudication of habeas corpus petitions from Guantanamo detainees should be analyzed on an issue-by-issue basis, applying *Boumediene*'s functional approach. The type of sweeping and global application asserted by *Ali* fails to account for the unique context and balancing of interests that *Boumediene* requires when reviewing the detention of foreign nationals captured during ongoing hostilities.”).

46 Though see *Ali*, above note 42, Concurring Opinion of Randolph J (arguing that the Court should have confirmed that the Due Process Clause does not extend to Guantanamo, on the basis of his survey of Supreme Court and DC Circuit precedent).

47 *Ali*, above note 42, pp. 369–371. It should be noted that the unclassified summary of the most recent full Periodic Review Board review (totalling 111 words) simply reiterated *Ali*'s prior roles, stating that the detainee had not submitted any evidence to suggest he no longer posed a security threat: Periodic Review Board, *Unclassified Summary of Final Determination for Detainee ISN 685*, 28 February 2019, available at: https://www.prs.mil/Portals/60/Documents/ISN685/SubsequentReview1/20190228_U_ISN_685_FINAL_DETERMINATION_PUBLIC.pdf. The government's unclassified submissions in his most recent file review similarly reiterated his prior roles: Periodic Review Board, *Government's Unclassified Summary for Detainee ISN AG-685*, 14 November 2020, available at: https://www.prs.mil/Portals/60/Documents/ISN685/FileReview8/201214_U_FOUO_ISN685_FR8_Detainee%20Summary_UPR.pdf.

48 *Ali*, above note 42, p. 372.

49 *Rasul v. Bush*, 542 U.S. 466, 488 (2004) (“as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker”).

50 *Ali*, above note 42, pp. 372–373.

Indeed, Ali agrees that, if the hostilities covered by the AUMF were a more traditional type of war that continued for this same length of time, there would be no substantive due process objection to continued detention ... Yet, Ali cites no authority suggesting that the form of hostilities that enemy combatants undertake changes the law of war's authorization of their continued detention, especially when, as here, the government has found that the threat Ali poses continues.⁵¹

Thus, in both *Al-Hela* and *Ali*, the Circuit Court rejected the claims that the long duration and indefinite nature of the petitioners' detention as such rendered it unconstitutional (whether under the Suspension Clause or the Due Process Clause). In *Al-Hela*, the Court focused on domestic constitutional considerations around separation of powers, viewing the termination of hostilities as a "political" act, to be determined unilaterally by the executive. In *Ali*, on the other hand, it is clear from the above quote that the Court considers such lengthy detention to be consistent with international humanitarian law, suggesting that IHL indicates no difference here based on the nature of the conflict. In its recent brief opposing Ali's petition for *certiorari* to the Supreme Court, the Biden Administration reiterates this argument:

Neither precedent nor common sense suggests that the government's detention authority should dissipate simply because hostilities are protracted ... The risk that a combatant will return to the battlefield lasts as long as active hostilities remain ongoing—and petitioner has not disputed that they remain ongoing here ... An individualized determination of dangerousness has never been a prerequisite to the detention of enemy combatants.⁵²

Yet the position under IHL does, in fact, differ in this regard depending on the nature of the conflict. Whilst it is true that in international armed conflicts there is a presumption of internment of combatants for the duration of hostilities,⁵³ there is no such presumption applicable in non-international armed conflicts.⁵⁴ And this is for good reasons. As I have shown elsewhere, the principles that inform this presumption *vis-à-vis* members of State armed forces in international armed conflicts do not apply to non-State armed groups, such that analogies to the internment regime for combatants/prisoners of war are inappropriate.⁵⁵ Indeed, given that the precise contours of armed groups and their membership are often undefined,⁵⁶ with States relying on functional criteria for determining whether

51 *Ibid.*, p. 373.

52 *Ali v. Biden*, Supreme Court of the United States, No. 20-888, Brief for the Respondents in Opposition, April 2021, pp. 21–22. Similarly, see *Awad v. Obama*, 608 F.3d 1 (2010), p. 11.

53 Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Arts 21 and 118.

54 L. Hill-Cawthorne, above note 7, pp. 95–98 (demonstrating that the prohibition of arbitrary deprivation of liberty that is based in Article 3 common to the four Geneva Conventions necessarily requires release where the (individualized) security reasons justifying internment cease to exist).

55 *Ibid.*, pp. 230–234.

56 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross (ICRC), Geneva, 2009, p. 33.

someone is a member of an armed group,⁵⁷ presuming that detention of those with this “status” is necessary for the duration of hostilities is insufficiently nuanced.⁵⁸ Just as membership of an armed group will often be based on functional, as opposed to formal, criteria, so leaving that armed group also will be.⁵⁹ In the context of the US’s ongoing war on terror, the need to assess the necessity of continued detention on the basis of an individualized threat determination, as opposed to presuming necessity on the basis of “status” for the duration of hostilities, is all the more pressing given the extremely vague contours of the relevant conflict and the parties thereto, a point long recognized.⁶⁰ It is this limitation that continues to be the core problem with *habeas* reviews of Guantanamo detainees, as it conditions the court’s power to order release on the executive’s determination of whether the conflict has ended. The Periodic Review Board process, though it does in theory assess whether detention continues to be necessary for security, results in only a recommendation to the Secretary of Defense,⁶¹ with Congress in recent years heavily limiting the ability to transfer detainees out of Guantanamo.⁶²

These recent cases suggest that, notwithstanding the passage of nearly twenty years since the opening of the detention facility at Guantanamo Bay to house detainees captured in the US’s war on terror, there remain fundamental continuities in the legal approach taken by the courts and by the government regarding detainees. First, the infamous and heavily criticized notion of a “war on terror” continues to inform the legal framework governing Guantanamo detainees and was invoked explicitly by the DC Circuit in *Al-Hela*.⁶³ Second, the presumption of indefinite administrative detention for the duration of hostilities remains the core part of the US’s detention policy, even as the idea of ongoing hostilities against a defined enemy has long dissipated. Third, attempts to bring the *habeas* proceedings closer in evidentiary and procedural standards to more ordinary judicial proceedings through extension of the Due Process Clause continue to be rebuffed. Indeed, the Biden Administration’s brief on this point in *Ali* opposing the petition for *certiorari* to the Supreme Court takes an almost identical position to the Trump Administration in earlier iterations of the case.⁶⁴

57 In the context of detentions under the AUMF, see *Gherebi v. Obama*, 609 F. Supp. 2d 43 (2009), pp. 68–70. In the context of targeting, see the ICRC’s functional approach in N. Melzer, *ibid.*, pp. 32–34.

58 For a good outline of some of the issues with both individualized and status-based approaches to detention in conflicts with non-State groups, see John B. Bellinger III and Vijay M. Padmanabhan, “Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law”, *American Journal of International Law*, Vol. 105, No. 2, 2011, p. 201 and pp. 220–221.

59 See, e.g., *Basardh v. Obama*, 612 F. Supp. 2d 30 (2009).

60 J. B. Bellinger and V. M. Padmanabhan, above note 58, pp. 228–233.

61 NDAA 2012, above note 20, section 1023(b). See some points of criticism of the Periodic Review Board process in Dru Brenner-Beck, “Eighteen Years of Detention at Guantánamo Bay: Compliance with International Law or the Specter of Tyranny”, *American University International Law Review*, Vol. 35, No. 4, 2020, p. 671 and pp. 724–726.

62 Benjamin R. Farley, “A Path for Renewing Guantanamo Closure”, *Just Security*, 17 November 2020, available at: <https://www.justsecurity.org/73311/a-path-for-renewing-guantanamo-closure/>.

63 *Al-Hela*, above note 35, p. 135.

64 *Ali v. Biden*, Brief for the Respondents in Opposition, above note 52; also see *Ali v. Trump*, Court of Appeals for the District of Columbia Circuit, No. 18-5297, Brief for Respondents, July 2019. The

This is not to suggest that there has been no progress. On the contrary, the Supreme Court ensured at least some process for Guantanamo detainees in the first decade, and the vast majority of detainees have now been transferred out of Guantanamo.⁶⁵ In addition, there has been some push to bring those captured in more recent years as part of the US's war on terror before ordinary criminal courts.⁶⁶ Yet the continued refusal to bring Guantanamo detainees within a more ordinary legal framework, and the continued use of inappropriate analogies to the IHL internment regime applicable to combatants in international armed conflicts, shows the extent to which this precedent is now firmly entrenched in US counterterrorism policy. In addition, whilst the US's own counterterrorism detention practices have wound down, this precedent risks serving a legitimizing function for similar practices that continue in other States, as will be seen later in the article.

Recent UK practice in litigation concerning overseas detention operations

In UK practice too we can see core continuities with the past in the approach taken in recent cases, again creating certain worrying precedents for other States. Whereas much of the litigation in the US has concerned *habeas* petitions by Guantanamo detainees, the litigation in the UK has largely come from detainees held in Iraq and Afghanistan in the form of public law (principally Human Rights Act) and private law actions. The purpose of this section is not to review these cases, which have received significant coverage elsewhere. Instead, two points will be made. First, the UK government, like the US government in its "war on terror", has continued to argue that its detentions in the context of Iraq and Afghanistan are to be judged not against any ordinary law regime but against international humanitarian law. Second, the jurisprudence of the UK Supreme Court in this area has created a real risk that the internment regimes applicable in international armed conflicts could be applied in situations outside armed conflict (international or non-international), which stricter human rights standards should regulate.

On the first point, the UK government has sought to exclude both its domestic law on *habeas corpus* and its obligations under the ECHR from detainees held in Afghanistan and Iraq. With respect to *habeas corpus*, the UK government, like the US government, has argued that UK courts do not have

Trump Administration's filings before the Circuit Court argued that, should the Court feel it necessary to rule on the constitutional question, it should find against the petitioner: *ibid.*, pp. 29–39.

65 As of November 2020, forty people remain detained at Guantanamo: B. R. Farley, above note 62.

66 See, e.g., Luke Hartig, "Prosecuting the ISIS 'Beatles': A Testament to Dedicated US Government Professionalism", *Just Security*, 9 October 2020, available at: <https://www.justsecurity.org/72764/prosecuting-the-isis-beatles-a-testament-to-dedicated-us-government-professionalism/>; Bruce K. Miller, "No Virtue in Passivity: The Supreme Court and Ali Al-Marri", *Western New England Law Review*, Vol. 33, 2011, p. 697 (on the Obama Administration's desire to prosecute both the so-called Christmas Day 2009 bomber and Khalid Sheikh Mohammad before civilian courts).

jurisdiction to hear *habeas* petitions from military detainees in Iraq and Afghanistan.⁶⁷ Unlike the US courts, however, which have rejected *habeas* petitions from those held in conflict zones,⁶⁸ the UK Supreme Court has held that there is nothing preventing the extension of *habeas corpus* to detainees overseas that are within the control of the UK.⁶⁹ The UK Supreme Court approaches this question differently to the US Supreme Court, asking not whether there is sufficient territorial control by the State to justify the extension of the writ, but rather whether the individual is within the (actual or potential) control of the State.⁷⁰ This is important for those detained abroad by the UK in any situation, whether or not there is an armed conflict.

With respect to the ECHR, as is well known, the UK in *Hassan v. UK* successfully argued for the first time before the ECtHR that Article 5 of the ECHR was modified in an international armed conflict by IHL.⁷¹ The UK then sought to extend this argument to non-international armed conflicts in its domestic litigation in relation to detention operations in Afghanistan.⁷² This was rejected by the High Court and Court of Appeal.⁷³ A majority of the UK Supreme Court agreed with the government that the grounds and procedures (taken from the Fourth Geneva Convention) acceptable to the Strasbourg Court in *Hassan* for the purposes of complying with Article 5 of the ECHR in international armed conflicts would also be acceptable in the case of the non-international armed conflict in Afghanistan. However, they did so, not on the basis of IHL, but rather relevant Security Council resolutions, which they viewed as providing a sufficient legal basis for detention.⁷⁴

The UK Ministry of Defence has subsequently amended its detention policy in light of Lord Sumption's judgement in *Al-Waheed/Mohammed*, in which he held on the facts that the detention review procedures in Afghanistan did not comply with Article 5(4) of the ECHR even after reading down what that provision required.⁷⁵ Thus, in 2020 the Ministry of Defence's detention policy was revised so as to create a new Detention Review Authority, which is separate from and outside the chain of command of the authority ordering detention and which has the power to order release following initial and periodic (six-monthly) reviews.⁷⁶ Though certainly helping to address some of the concerns with the previous

67 *Al-Waheed*, above note 15, para. 100 (Lord Sumption).

68 *Maqaleh*, above note 24.

69 *Al-Waheed*, above note 15, paras 99–103 (Lord Sumption); *Rahmatullah*, above note 11.

70 Tatyana Eatwell, "Selling the Pass: Habeas Corpus, Diplomatic Relations and the Protection of Liberty and Security of Persons Detained Abroad", *International & Comparative Law Quarterly*, Vol. 62, No. 3, 2013, p. 727 and pp. 737–738.

71 *Hassan*, above note 15.

72 *Al-Waheed*, above note 15, para. 241 (Lord Reed).

73 *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB); *Serdar Mohammed et al. v. Secretary of State for Defence* [2015] EWCA Civ 843.

74 *Al-Waheed*, above note 15, para. 30 (Lord Sumption).

75 *Ibid.*, paras 104–109 (Lord Sumption) (holding that the procedures applied by the UK failed to meet the requirements of impartiality and fair procedure set out by the ECtHR in *Hassan*).

76 Ministry of Defence, *Joint Doctrine Publication 1–10: Captured Persons*, 4th ed., Development, Concept, and Doctrines Centre, 2020, paras 1B.9–1B.40.

process, the new policy states that the Detention Review Authority may consist of a single person, which is not compatible with IHL.⁷⁷

The revised policy applies to all those detained by the UK on preventive, security grounds (other than prisoners of war) in any armed conflict, whether international or non-international. However, the reasoning of Lord Sumption in *Al-Waheed* appears not to be limited to armed conflicts. Instead, in order to overcome the very different context of the *Hassan* and *Al-Waheed* cases (namely, that in the former the Court was able to draw on the rules under the Fourth Geneva Convention on civilian internment in international armed conflicts, which was not possible in the latter given the dearth of rules for non-international armed conflicts), Lord Sumption appeared to read the *Hassan* judgement as setting out a general minimum content for Article 5 of the ECHR, for which derogation is not necessary:

It is in my opinion clear that [the Grand Chamber] regarded the duty of review imposed by articles 43 and 78 of the Fourth Convention as representing a model minimum standard of review required to prevent the detention from being treated as arbitrary. They were adopting that standard not just for cases to which those articles directly applied, but generally.⁷⁸

This is a long way from the Grand Chamber's clear statement that:

[i]t can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.⁷⁹

Lord Sumption's approach creates a real risk that the limited procedural protections for civilian internees under the Fourth Geneva Convention will be viewed as the generally applicable standards that are sufficient to meet Article 5(4) of the ECHR in any circumstance, including outside armed conflict. The analogy to the approach of the US government and federal courts in interpreting the US's detention authority under the AUMF by reference to what is permitted under the law of international armed conflict is clear. I have argued elsewhere that the philosophy of IHL, with its presumption of necessity, should make us very cautious about any attempt to extend it (whether in respect of non-international armed conflicts or situations outside armed conflicts altogether) in a way that might be seen as automatically modifying international human rights law.⁸⁰ The preference should instead be to require States to derogate from the latter and thereby demonstrate an actual necessity to depart from ordinarily applicable legal standards. Once again, this risks creating a precedent that may influence other States in extending the

77 On the need for a review body to consist of more than one person in the context of civilian internment review under the Fourth Geneva Convention, see L. Hill-Cawthorne, above note 7, p. 53.

78 *Al-Waheed*, above note 15, para. 66 (Lord Sumption).

79 *Hassan*, above note 15, para. 104.

80 Lawrence Hill-Cawthorne, "The Role of Necessity in International Humanitarian and Human Rights Law", *Israel Law Review*, Vol. 47, No. 2, 2014, p. 225.

detention regimes under IHL to, *inter alia*, counterterrorism detention outside armed conflict. It is to those other States, which continue to use administrative detention for counterterrorism purposes, that we now turn in the next section.

Recent examples of administrative detention laws

Whereas the US and UK have wound down their post-9/11 detention operations in recent years, administrative detention remains a key part of many other States' counterterrorism tools. In particular, in the context of counterterrorism, we have recently seen a number of States adopt new domestic laws permitting administrative detention, other States applying or expanding existing domestic laws permitting administrative detention, and others relying on extended forms of pre-trial detention in terrorism cases that in practice are sometimes indistinguishable from administrative detention. This section briefly explores examples of each in order to demonstrate the continuing reliance of many States on administrative detention regimes in counterterrorism. Together with the previous sections, which showed the continued defence of administrative detention for counterterrorism purposes by the US and UK, these examples confirm that such forms of detention remain a prominent part of counterterrorism policy around the world.

As an example of a State recently adopting a new domestic statute permitting administrative detention, we can look to Malaysia, which has a long history of domestic preventive detention laws.⁸¹ In particular, its controversial Internal Security Act 1960 (ISA) provided for indefinite administrative detention and remained in force until its repeal in 2012. However, shortly after the repeal of the ISA, Malaysia adopted its new Prevention of Terrorism Act in 2015 (POTA),⁸² which reintroduced the power of (effectively indefinite) administrative detention outside the criminal justice system,⁸³ and which in some respects is more draconian than that under the ISA.⁸⁴ Under the POTA, introduced in response to the threat posed by Islamic State and returning Malaysian fighters, a person suspected of engaging in or supporting terrorist acts involving listed terrorist organizations abroad can be detained for up to sixty days initially.⁸⁵ An Inquiry Officer (appointed by the Minister) then advises a Prevention of Terrorism Board (POTB), which comprises members with legal experience

81 M. Ehteshamul Bari and Safia Naz, *The Use of Preventive Detention Laws in Malaysia: A Case for Reform*, Springer, Singapore, 2020.

82 Prevention of Terrorism Act – Act 769 (2015) (POTA).

83 Malaysia also has various criminal law powers that are frequently used to detain persons before charge who are suspected of terrorism. For example, under the Security Offences (Special Measures) Act – Act 747 (2012) (SOSMA), those suspected of specific “security offences” can be detained before charge for an extended twenty-eight-day period (as opposed to the usual fourteen days): SOSMA, *ibid.*, section 4.

84 Safia Naz and M. Ehteshamul Bari, “The Enactment of the Prevention of Terrorism Act, 2015 in Pursuance of the Constitution of Malaysia: Reincarnation of the Notorious Internal Security Act, 1960?”, *Suffolk Transnational Law Review*, Vol. 41, No. 1, 2018, p. 1.

85 POTA, above note 82, section 4.

appointed by the King.⁸⁶ The POTB may make a detention order of up to two years where it is satisfied that the individual “has been or is engaged in the commission or support of terrorist acts involving listed terrorist organizations in a foreign country or any part of a foreign country” and where “it is satisfied that it is necessary in the interest of the security of Malaysia”.⁸⁷ Detention orders can then be extended by the POTB for further periods of up to two years at a time with no limit on the number of renewals.⁸⁸ There are no stipulated procedures or due process standards governing the POTB’s decision-making and no right of access to a lawyer. The detainee can make representations to an Advisory Board, provided for under the Malaysian Constitution, but members are again appointed by the King and its recommendations are not binding.⁸⁹ The 2015 Act also contains an ouster clause excluding the jurisdiction of any court to review on the decisions of the POTB.⁹⁰

The POTA, as well as other domestic laws providing for extended detention in terrorism cases, continue to be relied upon by the government, and in August 2020 it was reported that 1032 individuals were detained without trial in Malaysia under national security laws.⁹¹ Human rights non-governmental organizations have been highly critical of Malaysia’s counterterrorism statutes, given the stark departure from ordinarily-applicable human rights standards on the right to liberty and judicial review of detention.⁹² The POTA reflects an administrative detention regime in the strictest of senses, permitting indefinite detention on the basis of security threat, outside the criminal justice system, ordered and fully overseen by the executive with no recourse to substantive judicial review. It is very similar to the internment regime provided under the Fourth Geneva Convention for international armed conflicts, though the lack of independent review capable of ordering release means it would not comply even with that regime were it applicable.⁹³

Sri Lanka is an example of a State that continues to rely upon (and has extended) long-established domestic administrative detentions laws as part of its ongoing counterterrorism strategy. The Prevention of Terrorism Act of 1979 (PTA), adopted in the context of the government’s conflict with separatist insurgencies including the Liberation Tigers of Tamil Eelam (LTTE), provides a

86 *Ibid.*, section 8.

87 *Ibid.*, section 13(1)(b).

88 *Ibid.*, section 17.

89 *Ibid.*, section 13(9). On the inadequacies of the Advisory Board, see S. Naz and M. E. Bari, above note 84, pp. 13–14.

90 *Ibid.*, section 19.

91 U.S. Department of State, *2020 Country Reports on Human Rights Practices: Malaysia*, 30 March 2021, available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/malaysia/>, section 1.D.

92 Human Rights Watch (HRW), *Malaysia: Repeal Abusive Security Law: SOSMA Denies Right to Fair Trial*, 31 October 2019, available at: <https://www.hrw.org/news/2019/10/31/malaysia-repeal-abusive-security-law>; Amnesty International, *Malaysia: New Anti-Terrorism Law a Shocking Onslaught Against Human Rights*, 7 April 2015, available at: <https://www.amnesty.org/en/latest/news/2015/04/malaysia-new-anti-terrorism-law-a-shocking-onslaught-against-human-rights/>.

93 L. Hill-Cawthorne, above note 7, pp. 54–55.

very similar administrative detention regime to that under the POTA in Malaysia. Under the PTA, detention is permitted for up to eighteen months, “[w]here the Minister has reason to believe or suspect that [the individual] is connected with or concerned in any unlawful activity”, with administrative, as opposed to judicial, review.⁹⁴ Notwithstanding the end of the conflict with the LTTE in 2009, successive governments have continued to detain persons under the PTA. For example, “[a]ccording to police, authorities arrested 2,299 individuals, primarily under the PTA, in the aftermath of the April 2019 Easter Sunday attacks. As of December [2020], 135 suspects remained in custody, but no charges were filed against them.”⁹⁵

The same administrative detention regime applicable during Sri Lanka’s long civil war thus continues to be applied as part of its post-conflict counterterrorism policy. Moreover, notwithstanding assurances from the government, including to the European Union and United Nations (UN) Human Rights Committee, that it would repeal the PTA,⁹⁶ in March and April 2021, respectively, the Sri Lankan government adopted two sets of Regulations under the PTA expanding extraordinary powers of detention.⁹⁷ Whilst the second regulation proscribes eleven Islamist organizations, with extended criminal penalties for individuals associated with them,⁹⁸ under the first, any person “who causes or intends to cause commission of acts of violence or religious, racial or communal disharmony” may be referred by a Magistrate to a “rehabilitation programme” in a “reintegration centre” for up to two years, with the power of release resting with the Minister of Defence.⁹⁹ The International Commission of Jurists has criticized these regulations as likely being used to (further) target minority religious and ethnic communities with administrative detention.¹⁰⁰ In June 2021, the European Parliament adopted a resolution condemning Sri Lanka’s continued reliance on the PTA and its adoption of these new regulations

94 Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, section 9; L. Hill-Cawthorne, above note 7, pp. 167–168.

95 U.S. Department of State, *2020 Country Reports on Human Rights Practices: Sri Lanka*, 30 March 2021, available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/sri-lanka/>, section I.D.

96 UN Human Rights Committee, Sixth Periodic Report Submitted by Sri Lanka under Article 40 of the Covenant, due in 2017, CCPR/C/LKA/6, 25 April 2019, paras 49–52.

97 Prevention of Terrorism (Deradicalization from Holding Violent Extremist Religious Ideology) Regulation No. 01 of 2021; Prevention of Terrorism (Proscription of Extremist Organizations) Regulation No. 02 of 2021.

98 The offences listed under the regulations have been criticized as “ill-defined” and open to abuse: International Commission of Jurists, *Sri Lanka: New Anti-Terror Regulations Aimed at Organizations Further Undermine the Rule of Law*, 15 April 2021, available at: <https://www.icj.org/sri-lanka-new-anti-terror-regulations-aimed-at-organizations-further-undermine-the-rule-of-law/>.

99 Regulations No. 01 of 2021, *ibid.*, sections 2, 3 and 4.

100 International Commission of Jurists, *Sri Lanka: “De-Radicalization” Regulations Should be Immediately Withdrawn*, 18 March 2021, available at: <https://www.icj.org/sri-lank-de-radicalization-regulations-should-be-immediately-withdrawn/>; HRW, *Sri Lanka: “Religious Disharmony” Order Threatens Minorities*, 16 March 2021, available at: <https://www.hrw.org/news/2021/03/16/sri-lanka-religious-disharmony-order-threatens-minorities>.

as incompatible with the right to liberty and the due process guarantees in Article 9 of the International Covenant on Civil and Political Rights (ICCPR).¹⁰¹

Israel also continues to rely on established administrative detention laws as part of its counterterrorism strategy. Separate, though similar, laws exist for Israel and the Occupied Palestinian Territories (OPT). In respect of the OPT, a military order grants commanders the power to order detention initially for up to six months (renewable indefinitely) where they reasonably believe such detention to be necessary “for reasons to do with regional security or public security”.¹⁰² In respect of Israel, the Emergency Powers (Detention) Law of 1979 similarly permits the Minister of Defence to order detention for up to six months (again renewable indefinitely) where they reasonably believe such detention to be necessary for “reasons of state security or public security”.¹⁰³ Under the 2002 Incarceration of Unlawful Combatants Law, which has been used as the basis for administratively detaining residents of Gaza, the Chief of the General Staff of the Israel Defence Forces may order the detention of a person where they reasonably believe them to be an “unlawful combatant” whose detention is necessary for State security.¹⁰⁴ The law creates a rebuttable presumption that a person who is a member of or participated in acts of a group engaging in hostile acts against Israel is someone whose release would harm State security so long as hostilities with that group are ongoing.¹⁰⁵ Moreover, the Minister of Defence is given the power to identify groups engaging in “hostile acts” against Israel for these purposes.¹⁰⁶ There is a clear analogy here to the shortcomings in the Guantanamo *habeas* reviews, discussed above, which treat as dispositive the government’s position that hostilities are ongoing in its “war on terror”. Unlike in the case of Malaysia and Sri Lanka, under each of these administrative detention regimes, though with some differences, initial and periodic review is by a court as opposed to administrative body.¹⁰⁷ Nevertheless, these judicial reviews have been criticized as showing deference to the military and applying draconian procedures.¹⁰⁸

101 European Parliament Resolution of 10 June 2021 on the situation in Sri Lanka, in particular the arrests under the Prevention of Terrorism Act, 2021/2748(RSP). Sri Lanka informed the Human Rights Council in 2015 that all of its previous derogations from the ICCPR had ceased: Sri Lanka, Notification of 19 November 2015, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en.

102 Order Regarding Security Provisions (No. 1651), 5770-2009, section 285(A).

103 Emergency Powers (Detention) Law (EPDL), 5739-1979, section 2(A).

104 Incarceration of Unlawful Combatants Law, 5762-2002, section 3(A). Section 2 defines an “unlawful combatant” as: “a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him”.

105 *Ibid.*, section 7.

106 *Ibid.*, section 8.

107 See Order, above note 102, section 287; EPDL, above note 103, section 4; 2002 Law, above note 104, section 5.

108 B’Tselem, *Administrative Detention*, 11 November 2017, available at: https://www.btselem.org/administrative_detention; Shiri Krebs, “Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court”, *Vanderbilt Journal of Transnational Law*, Vol. 45, No. 3, 2012, p. 639; HRW, *Gaza: “Unlawful Combatants Law” Violates Rights*, 1 March 2017, available at: <https://www.hrw.org/news/2017/03/01/gaza-unlawful-combatants-law-violates-rights>.

Israel continues to rely on these various administrative detention laws as a tool in counterterrorism,¹⁰⁹ and its “serial derogation” from Article 9 of the ICCPR (introduced on ratification in 1991) remains in effect.¹¹⁰ Administrative detention by Palestinian authorities on the basis of vague laws also continues to be emphasized as cause for concern by monitoring bodies.¹¹¹ Furthermore, in addition to its existing administrative detention laws, Israel recently consolidated and expanded its counterterrorism legislation in a 2016 statute that, *inter alia*, creates harsher sentences for those convicted of terrorism-related offences and normalizes the powers of the government previously exercised under long-standing emergency legislation to designate groups as terrorist organizations.¹¹²

France historically has adopted a very different approach to counterterrorism detention than Israel and the other States discussed above, relying principally on ordinary criminal law.¹¹³ However, over the last decade especially, it has adopted a number of specialized laws that enhance counterterrorism powers and, to an extent, represent a shift towards preventive, administrative measures (albeit stopping short of administrative detention).¹¹⁴ In response to the 2015 Paris attacks, the government declared a state of emergency that lasted for two years, during which it formally derogated from the ICCPR and ECHR, including Articles 9 and 5, respectively.¹¹⁵ Following the 2016 Bastille Day attack in Nice, France adopted a broad new counterterrorism law that, *inter alia*, expanded police powers and extended the right of house arrest from one month to three; a proposal to introduce preventive detention of terrorism suspects without judicial oversight was, however, rejected.¹¹⁶ This law, and a second adopted in 2017, made permanent a number of the emergency powers, including

109 According to B’Tselem, a total of 376 Palestinians were held by the Israeli Prison Service in administrative detention in September 2020: B’Tselem, *Statistics on Administrative Detention*, 28 April 2021, available at: https://www.btselem.org/administrative_detention/statistics.

110 See derogation of Israel, 3 October 1991, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en. On “serial derogations”, see Laurence R. Helfer, “Rethinking Derogation from Human Rights Treaties”, *American Journal of International Law*, Vol. 115, No. 1, 2021, p. 20.

111 UN Human Rights Council, Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem: Report of the High Commissioner for Human Rights, 21 February 2018, UN Doc. A/HRC/37/42, p. 7.

112 The Counter-Terrorism Law, 5776-2016; Elena Chachko, “Israel’s New Counterterrorism Law”, *Lawfare*, 13 July 2016, available at: <https://www.lawfareblog.com/israels-new-counterterrorism-law>.

113 Nadav Morag, “International Counterterrorism Laws and Practices: Israel and France in Comparison”, *International Criminal Justice Review*, Vol. 28, No. 2, 2018, p. 162.

114 UN Human Rights Council, Visit to France: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/40/52/Add.4, 8 May 2019, paras 19–22.

115 See French derogation dated 23 November 2015, withdrawn 20 July 2018, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en; see French derogation dated 24 November 2015, withdrawn on 6 November 2017, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>.

116 HRW, *France: Prolonged Emergency State Threatens Rights*, 22 July 2016, available at: <https://www.hrw.org/news/2016/07/22/france-prolonged-emergency-state-threatens-rights>.

enhanced police powers and powers of assigned residence, introduced following the 2015 Paris attacks.¹¹⁷

Moreover, the long-standing concept of *détention provisoire* continues to be relied upon, whereby persons under investigation for serious crimes, including terrorism-related offences, can be detained initially for up to one year (with the possibility of extension up to a total of four years for the most serious crimes), on the order of a *juge des libertés et de la détention*.¹¹⁸ This system of pre-trial detention has been criticized on many grounds.¹¹⁹ It has been observed that the 2015 Paris attacks contributed to an increased reliance on lengthier pre-trial detention, including for suspected foreign terrorist fighters, for whom detention pending investigation is now the norm.¹²⁰ It is important to note in this context that France has one of the highest populations of pre-trial detainees in Europe,¹²¹ as well as one of the highest populations of detainees held for terrorism-related offences.¹²² Criticisms against other States have also been made for the use of lengthy pre-trial detention in terrorism- and security-related cases.¹²³

The above examples of Malaysia, Sri Lanka and Israel demonstrate the continued reliance on administrative detention regimes in the context of counterterrorism. Like the post-9/11 detention practices of the UK and US, which were shown in earlier sections to still be defended by those States, these regimes

117 Mirja Gutheil *et al.*, “EU and Member States’ Policies and Laws on Persons Suspected of Terrorism-Related Crimes”, Study for European Parliament, Directorate General for Internal Policies (Policy Department C: Citizens’ Rights and Constitutional Affairs), PE 596.832, December 2017, pp. 78 and 81. The UN Special Rapporteur on the promotion and protection of fundamental rights while countering terrorism stated that the 2017 law, “situated within the broad array of counter-terrorism powers already available to the state, constitutes a de facto state of qualified emergency in ordinary French law”: Human Rights Council, above note 114, para. 23.

118 D. Webber, above note 3, pp. 163–164.

119 Particular cases of *détention provisoire* have been criticized as incompatible with the ECHR: *Tomasi v. France*, Appl. No. 12850/87, 27 August 1992. See also Sharon Weill, “French Foreign Fighters: The Engagement of Administrative and Criminal Justice in France”, *International Review of the Red Cross*, Vol. 100, 2018, pp. 211 and 229 (“[i]n practice, the decision on pre-trial detention is taken by the liberty and detention judge, in the nearby office of the investigative judge, behind closed doors, with the presence of defence lawyers. No public access to these procedures or to the decisions is available. In practice it is very rare for the detention and liberty judge not to follow the request of the investigative judge.”).

120 Sharon Weill, *Terror in Courts, French Counter-Terrorism: Administrative and Penal Avenues*, Report for the Official Visit of the UN Special Rapporteur on Counter-Terrorism and Human Rights, May 2018, p. 30.

121 Marcelo F. Aebi and Mélanie M. Tiago, *SPACE I - 2020 – Council of Europe Annual Penal Statistics: Prison Populations*, Council of Europe, Strasbourg, 2021, p. 49.

122 Rajan Basra and Peter R. Neumann, *Prisons and Terrorism: Extremist Offender Management in 10 European Countries*, International Centre for the Study of Radicalisation, Department of War Studies, King’s College London, London, 2020, p. 7.

123 See, e.g., U.S. Department of State, *2020 Country Reports on Human Rights Practices: India*, 30 March 2021, available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/india/>, section 1.D (on India’s Unlawful Activities Prevention Act 1967, which permits pre-charge detention for up to 180 days); *Alpay v. Turkey*, Application No. 16538/17, Judgment, 20 March 2018, paras 96 and 97 (noting criticism of Turkey’s reliance on lengthy pre-trial detention during its state of emergency following the 2016 coup attempt by the Council of Europe Commissioner for Human Rights and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression).

are very similar to the extraordinary internment regimes applicable in international armed conflicts under IHL. Importantly, the adoption and use of these administrative detention powers are in a context where States are expanding their counterterrorism powers more generally, including through their criminal law, as demonstrated by the recent legislation in Sri Lanka, Israel and France. It has been remarked that there has also been a recent trend of extended derogations from the ECHR in the context of emergency measures that include intrusions into liberty (in the form of both lengthy pre-charge detention and house arrest) and reduced judicial oversight.¹²⁴

Going forward

The previous sections have shown that administrative detention remains a key part of many States' counterterrorism policies, and that even the UK and US, which have wound down their post-9/11 detention practices, continue to defend administrative detention regimes that sit outside the ordinary legal framework. This aspect of the contemporary practice reflects a fundamental continuity over the past two decades in counterterrorism policy. However, there are other aspects of contemporary detention-related practices in the context of counterterrorism that, though not novel, raise new challenges. It is here that much of the debate will no doubt be located over the next few years. It is on two such examples of recent practices that this section focuses. First, the growing phenomenon of other administrative, liberty-restricting measures will be explored, in particular house arrest or "assigned residence". Second, the legal controversies posed by detentions by non-State armed groups supported by States will be considered.

Assigned residence

The use of administrative measures short of detention that make an impact on the right to liberty and freedom of movement has become especially prominent in light of the recent phenomenon of foreign terrorist fighters.¹²⁵ Thus, a recent feature of counterterrorism laws across Europe is the inclusion of administrative measures, often termed "control orders", that restrict a person's movement to different degrees, measures that have long been in use in the UK.¹²⁶ This trend has been

124 Triestino Mariniello, "Prolonged Emergency and Derogation of Human Rights: Why the European Court should Raise its Immunity System", *German Law Journal*, Vol. 20, No. 1, 2019, p. 46 (using the examples of France's derogation following the 2015 Paris attack, Ukraine's derogation in 2015 in response to Russian intervention in the East, and Turkey's derogation following the attempted 2016 coup).

125 Domestic approaches to the phenomenon of foreign terrorist fighters have been impacted by UN Security Council Resolution 2178 (2014): see Sandra Krähenmann, "Foreign Fighters, Terrorism and Counter-Terrorism", in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2020, pp. 239–255.

126 See generally Bérénice Boutin, "Administrative Measures in Counter-Terrorism and the Protection of Human Rights", *Security and Human Rights*, Vol. 27, Nos 1–2, 2016, p. 128.

noted with concern given the tendency for such measures to apply at increasingly pre-emptive points in time and to fall outside ordinary criminal justice processes and safeguards.¹²⁷

Of particular interest here is the use of assigned residence as an administrative measure in the context of counterterrorism, given the very fine line between this measure and detention in the strict sense. Indeed, assigned residence, like administrative detention, is provided for under IHL in international armed conflicts for civilians that pose a security threat, and it is viewed and regulated by IHL as equivalent to internment.¹²⁸ It is therefore especially noteworthy that, alongside the continuing reliance on administrative detention by certain States, assigned residence is also growing in prominence in counterterrorism practices. In September 2020, for example, Switzerland adopted its new Federal Law on Police Measures to Combat Terrorism,¹²⁹ which was approved by a national referendum in June 2021.¹³⁰ Amongst the new administrative measures provided for under the law is assigned residence where an existing control order (e.g. one imposing a curfew or banning contact with specific individuals) is breached and where “there are concrete and current indications” that the person poses “a considerable threat to the life or bodily integrity of third parties” which cannot be prevented by other means.¹³¹ Assigned residence can be ordered initially for three months and can be renewed for two further periods of three months each.¹³² Whilst this should normally be in the home of the individual concerned, exceptionally they can be assigned to a different location or institution.¹³³ Authorization for initial assigned residence orders and their renewal is by a court (the Tribunal cantonal des mesures de contrainte in Bern).¹³⁴

The law makes it possible to obtain certain exemptions from assigned residence, and it permits limiting of contact with the outside world only to the extent necessary.¹³⁵ However, it is possible for “assigned residence” under the new law to look identical to administrative detention in a detention facility.

127 Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, EUR 01/5342/2017, 2017, p. 48. Note, however, the importance also of not unreflectively relying on the criminal law in such cases, as this has led to States adopting new and expansive criminal laws to try to get around some of the evidential problems faced in prosecuting these kinds of cases: Jonathan Horowitz, “The Challenge of Foreign Assistance for Anti-ISIS Detention Operations”, *Just Security*, 23 July 2018, available at: <https://www.justsecurity.org/59644/challenge-foreign-assistance-anti-isis-detention-operations/>.

128 See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Arts 42, 43 and 78.

129 *Loi fédérale sur les mesures policières de lutte contre le terrorisme (MPT)*, FF 2020 7499, 25 September 2020.

130 The Federal Council, *Federal Act on Police Measures to Combat Terrorism (PMCT)*, 13 June 2021, available at: <https://www.admin.ch/gov/en/start/documentation/votes/20210613/federal-act-on-police-measures-to-combat-terrorism.html>.

131 *Loi fédérale*, above note 129, section 23o(1).

132 *Ibid.*, section 23o(5).

133 *Ibid.*, section 23o(2).

134 *Ibid.*, section 23p(1).

135 *Ibid.*, sections 23o(3) and (4).

Indeed, the provision for assigned residence has been heavily criticized as being incompatible with Articles 5 and 6 of the ECHR.¹³⁶

Other States too have recently adopted new counterterrorism statutes that provide for assigned residence (albeit to different degrees). In France, for example, where the return of foreign terrorist fighters is equally a concern,¹³⁷ the 2017 Law on Strengthening Internal Security and the Fight Against Terrorism (SILT) introduced a number of administrative control measures into French law following the end of the state of emergency.¹³⁸ This includes a power of the Minister of the Interior to order anyone whose behaviour is considered to pose a serious security threat, and who is in regular contact with those supporting or participating in terrorism, not to go beyond the perimeters of a specified geographical area, which cannot be smaller than their town or city.¹³⁹ Any such order is initially for up to three months, renewable up to a total of twelve months. Though less restrictive of liberty than the new assigned residence orders under Swiss law, these orders under SILT have been criticized on the basis of the vague language regarding to whom they apply and the barriers to effectively challenging such orders before the Conseil d'État.¹⁴⁰

Other States continue to rely on existing assigned residence powers as a counterterrorism tool. This is the case, for example, with Tunisia in its ongoing state of emergency that was declared following the November 2015 attack (claimed by Islamic State) on the Presidential Guard in Tunis. Those placed in assigned residence (which in some cases appears in practice to be house arrest) include returning foreign terrorist fighters and members of domestic terrorist groups.¹⁴¹

These laws and practices regarding assigned residence share the same idea as that underpinning the use of administrative detention, i.e. that special laws restricting liberty and freedom of movement, sitting outside ordinary legal processes and instead mirroring similar measures available under IHL, are necessary counterterrorism tools. The recent laws in Switzerland and France provide another example of such extraordinary powers being incorporated into permanent domestic legislation. Assigned residence, and other administrative

136 Gloria Gaggioli and Ilya Sobol, "Counter-Terrorism Control Orders Come to Switzerland: Is Assigned Residence for 'Potential Terrorists' Compatible with Art. 5?", *EJIL:Talk! – Blog of the European Journal of International Law*, 6 June 2020, available at: <https://www.ejiltalk.org/counter-terrorism-control-orders-come-to-switzerland-is-assigned-residence-for-potential-terrorists-compatible-with-art-5-echr/>; *Mandats de la Rapporteuse spécial sur la promotion et la protection des droits de l'homme et des libertés fondamentales dans la lutte antiterroriste; de la Rapporteuse spéciale sur les exécutions extrajudiciaires, sommaires ou arbitraires; du Rapporteur spécial sur la promotion et la protection du droit à la liberté d'opinion et d'expression; du Rapporteur spécial sur la liberté de religion ou de conviction; et du Rapporteur spécial sur la torture et autres peines ou traitements cruels, inhumains ou dégradants*, OL CHE 1/2020, 26 May 2020.

137 Human Rights Council, above note 114, para. 12.

138 *Loi No 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme*, JORF No. 0255, 31 October 2017.

139 *Ibid.*, Art. 3.

140 Amnesty International, *Punished Without Trial: The Use of Administrative Control Measures in the Context of Counter-Terrorism in France*, EUR 21/9349/2018, pp. 9–17.

141 UN Human Rights Council, Visit to Tunisia: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms whilst countering terrorism, 12 December 2018, UN Doc. A/HRC/40/52/Add.1, paras 41–43; Amnesty International, "We Want an End to the Fear": *Abuses Under Tunisia's State of Emergency*, MDE 30/4911/2017, pp. 38–40.

measures short of traditional detention, will probably continue to play a prominent role in the future, and their compatibility particularly with human rights law will be an ongoing controversy.

Detainees held by armed groups

A second significant issue now confronting many States involved in overseas counterterrorism operations and armed conflict concerns the disposition of detainees held by partner armed groups. This question has, of course, arisen particularly in the context of detainees held by the Syrian Democratic Forces (SDF) in the North East, which have received support from and worked with many of the States in the Global Coalition to Defeat ISIS.¹⁴² Particularly since the fall of Baghouz in March 2019, the SDF has detained tens of thousands of suspected Islamic State fighters and their families, with the total figure in March 2021 standing at over 63,000.¹⁴³ The question of how now to deal with these detainees has arisen, particularly in light of the reluctance of many States to accept the repatriation of their nationals that are being held by the SDF, creating a real risk of indefinite administrative detention or flawed trials by Syrian Democratic Council and Iraqi courts.¹⁴⁴

In addition to questions concerning the legality of detentions by armed groups and the legitimacy of refusals by national States to accept the return of foreign terrorist fighters,¹⁴⁵ the context of support for and partnering with armed groups by States raises legal questions regarding the responsibility of such States for those detentions (including treatment of detainees) by armed groups. Rules from multiple sources of international law create obligations on States in relation to the conduct of others.¹⁴⁶ Under international humanitarian law, a widely shared reading of Article 1 common to the four Geneva Conventions places obligations on all States not to aid or assist in violations of IHL by others and to

142 Rights & Security International, *Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria*, Susak Press, 2020, reprinted 2021, available at: https://www.rightsandsecurity.org/assets/downloads/Europes-guantanamo-THE_REPORT.pdf, para. 82 (“[m]embers of the Global Coalition have provided, and some continue to provide, military support to the SDF, including through the provision of fighter aircraft. Some members are also providing ongoing training to Iraqi and Kurdish security personnel, though it is unclear whether this is also provided to the SDF.”).

143 HRW, *Thousands of Foreigners Unlawfully Held in NE Syria*, 23 March 2021, available at: <https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria> (“[r]oughly 20,000 are from Syria, 31,000 from neighboring Iraq, and nearly 12,000 others—8,000 children and 4,000 women—are from almost 60 other countries.”).

144 Roger Lu Phillips, “A Tribunal for ISIS Fighters—A National Security and Human Rights Emergency”, *Just Security*, 30 March 2021, available at: <https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/>.

145 See, e.g., Dan E. Stigall, “The Syrian Detention Conundrum: International and Comparative Legal Complexities”, *Harvard National Security Journal*, Vol. 11, No. 1, 2020, p. 54; Andrew Clapham, “Detention by Armed Groups under International Law”, *International Law Studies*, Vol. 93, 2017, p. 1; Maria Gavrilova, “Administrative Detention by Non-State Armed Groups: Legal Basis and Procedural Safeguards”, *Israel Law Review*, Vol. 53, No. 1, 2020, p. 35.

146 For a good overview of relevant rules in respect of military operations, see Bérénice Boutin, “Responsibility in Connection with the Conduct of Military Partners”, *Military Law and Law of War Review*, Vol. 56, 2017–2018, p. 57.

do all that they can to bring such violations to an end.¹⁴⁷ Under the law on State responsibility, States must not knowingly aid or assist other States in the commission of internationally wrongful acts,¹⁴⁸ and some have argued in favour of extending this rule to include assistance to non-State actors.¹⁴⁹ In addition, where there is a serious breach of a peremptory norm of international law,¹⁵⁰ States must do all that they can to bring that violation to an end.¹⁵¹ Also, under international human rights law, States' positive obligations require that they protect individuals within their jurisdiction from rights violations by non-State actors,¹⁵² with some treaty bodies taking a very expansive approach as to when an individual falls within a State's jurisdiction.¹⁵³

In light of this background normative context, States cannot expect to outsource parts of their overseas counterterrorism operations with impunity to non-State groups operating in the region.¹⁵⁴ Where those non-State groups engage in detention, the States supporting them may well be in a strong position to promote compliance with international law, which is particularly important for those rules above that contain due diligence obligations. Indeed, it has been reported that a number of States involved in the Coalition have a presence of some kind in the detention camps run by the SDF.¹⁵⁵ In addition to the risks of indefinite detention without due process for detainees held by the SDF, there is also clear evidence of very poor conditions of detention, abuse of detainees, and disappearances.¹⁵⁶ This is no doubt, in part, a consequence of the total lack of planning for detention operations; given the need to avoid such humanitarian crises and given that the international responsibility of supporting States could be engaged by such breaches committed by their non-State partners, advance

147 See, e.g., ICRC, *Commentary to the First Geneva Convention*, Cambridge University Press, Cambridge, 2016, para. 154; Oona A. Hathaway *et al.*, "Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors", *Texas Law Review*, Vol. 95, 2017, p. 539.

148 See International Law Commission (ILC), Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Report of the ILC on the Work of its Fifty-Third Session, UN GAOR 56th Session Suppl. No. 10, A/56/10, Art. 16; Helmut Philipp Aust, *Complicity and the Law on State Responsibility*, Cambridge University Press, Cambridge, 2011.

149 See, e.g., Miles Jackson, *Complicity in International Law*, Oxford University Press, Oxford, 2015, p. 214.

150 A number of core rules of IHL would probably qualify for this status: ILC, above note 148, Commentary to Art. 40, para. 5.

151 ILC, above note 148, Art. 41.

152 See, e.g., Laurens Lavrysen, *Human Rights in a Positive State*, Intersentia, Cambridge, 2016.

153 Of particular relevance, see UN Committee on the Rights of the Child, *L.H. et al. v. France*, Communications Nos. 79/2019 and 109/2019, CRC/C/85/D/79/2019–CRC/C/85/D/109/2019 (finding that France exercises jurisdiction over children with French nationality held by the SDF in North East Syria). See also African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, Pretoria University Law Press, Pretoria, 2015, para. 14 (stating that extra-territorial jurisdiction under the African Charter can arise in cases of "effective authority, power, or control over ... the perpetrator" and where "the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life").

154 See this point being made in the recent report by the International Commission of Inquiry into arbitrary detentions and other abuses committed by the parties to the conflicts in Syria: UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/46/55, 11 March 2021, para. 83.

155 Rights & Security International, above note 142, paras 84–85.

156 *Ibid.*, paras 39–81.

planning is essential.¹⁵⁷ In light of the increasingly prominent role once again of foreign State support for armed groups in conflicts around the world, as seen across the Middle East, Africa and Ukraine, these same issues are likely to continue to arise in future conflicts and overseas counterterrorism operations.¹⁵⁸

Concluding remarks

This article has demonstrated the continued prominence of administrative detention as a counterterrorism tool. In the years following 9/11, administrative detention constituted a key part of the “war paradigm” that informed many States’ counterterrorism practices. For some, this has continued, and for the US and UK, which in recent years have moved away from counterterrorism detention, the IHL-inspired model of administrative detention, sitting outside ordinary legal processes, continues to be defended and constitutes a precedent for other States. However, the continued conflation between IHL and counterterrorism does not stop there. As the previous section showed, many States have recently relied upon and even expanded their administrative measures short of detention for counterterrorism purposes, including assigned residence, a measure provided for under IHL as equivalent to administrative detention. These other administrative measures, along with the controversies arising from detentions by armed groups (often with the support of States) will probably dominate much of the work in this area in the coming years.

To end, two final points are worth emphasizing. First, as has been shown above, the recent practice explored in this article sits in a context of new domestic statutes that render permanent many powers, including those having an impact on the right to liberty, previously exercised under emergency counterterrorism legislation.¹⁵⁹ This facilitates the gradual incursion of extraordinary powers, such as those provided for under IHL of administrative detention and assigned residence, into everyday counterterrorism practices. Second, we should remember that this relationship between IHL and counterterrorism runs in both directions. Whereas the focus here has been on the use of IHL powers in counterterrorism, post-9/11 counterterrorism practices also served as testing grounds for readings of IHL (and international human rights law) that create even more freedom for States, putting pressure on these legal regimes and their capacity effectively to regulate future conflicts.¹⁶⁰

157 Dan E. Stigall, “Battlefield Detention, Counterterrorism, and Future Conflicts”, *Articles of War*, 24 March 2021, available at: <https://lieber.westpoint.edu/battlefield-detention-counterterrorism-future-conflicts/>.

158 James Kenneth Wither, “Outsourcing Warfare: Proxy Forces in Contemporary Armed Conflicts”, *Security & Defence Quarterly*, Vol. 31, No. 4, 2020, p. 17.

159 Myriam Feinberg, “States of Emergency in France and Israel – Terrorism, ‘Permanent Emergencies’, and Democracy”, *Zeitschrift für Politikwissenschaft*, Vol. 28, 2018, pp. 495–506.

160 Lisa Hajjar, “The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US ‘War on Terror’”, *Law & Social Inquiry*, Vol. 44, No. 4, 2019, p. 922; Rebecca Sanders, *Plausible Legality: Legal Culture and the Political Imperative in the Global War on Terror*, Oxford University Press, Oxford, 2018.

Foreign fighters and the tension between counterterrorism and international humanitarian law: A case for cumulative prosecution where possible

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Abstract

Contemporary foreign fighters (FFs) often join so-called dual-nature groups, i.e. groups that can at the same time be qualified as a non-State armed group involved in a non-international armed conflict and a terrorist organization. Both international humanitarian law and counterterrorism (CT) legislation may hence be of relevance when assessing the legality of FF conduct. The CT perspective tends to remain predominant, however. This paper argues that, especially in terms of prosecution, due regard must be paid to both legal frameworks where possible. It also argues that national prosecution in the country of origin seems to offer the best prospects for realizing such cumulative prosecution.

Keywords: foreign fighters, counterterrorism, international humanitarian law, cumulative prosecution.

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Introduction: The multidimensional nature of the foreign fighter phenomenon

In 2014, an estimated 12,000 people from more than 80 countries had travelled to Syria in order to join groups, such as Jabhat Al-Nusra and Islamic State of Iraq and Syria (ISIS), and engaged in the civil conflict there.¹ At the height of the conflict, in 2015, that number is thought to have gone up to almost 30,000 from more than 100 countries.² The total number of men, women and children that have travelled from Western Europe to Syria and Iraq has been estimated at around 5000.³ Around 30 percent of the European foreign fighters (FFs) are believed to have returned to their home country in the meantime.⁴ Since the defeat of Islamic State (IS), those who have not returned are either believed to be dead or imprisoned in Syria or Iraq.⁵ The latter are still considered an important security threat and States seem to be doing everything possible to prevent these so-called FFs as well as their families from returning to their country of origin.⁶ Aside from the question whether such a position is actually the most efficient in terms of national security,⁷ the consequence of such an approach is that many of these FFs, especially in the camps in Syria, are just left there and no action is taken in their regard.⁸ It is the position of the present author, however, that it is of utmost importance for these FFs to be brought to justice, preferably in their State of origin.⁹ The question of the prosecution of (returning) FFs is, however,

- 1 Richard Barrett, "Foreign Fighters in Syria", Soufan Group, June 2014, available at: www.jstor.org/stable/resrep10783, p. 9 (all internet references were accessed in August 2021).
- 2 Soufan Group, "Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq", Report, December 2015, available at: <http://www.jstor.org/stable/resrep10784.3>, p. 5.
- 3 *Ibid.*, p. 5. See also Thomas Renard and Rik Coolsaet (eds), "Returnees: Who Are They, Why Are They (Not) Coming Back and How Should We Deal with Them: Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands", *Egmont Royal Institute for International Relations*, 2018, available at: https://www.egmontinstitute.be/content/uploads/2018/02/egmont.papers.101_online_v1-3.pdf?type=pdf, p. 3.
- 4 Amandine Scherrer, "The Return of Foreign Fighters to EU Soil: Ex Post Evaluation", *European Parliamentary Research Service Study*, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU\(2018\)621811_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf), Part I, p. 5.
- 5 Trudy Govier and David Boutland, "Dilemmas Regarding Returning ISIS Fighters", *Ethics & Global Politics*, Vol. 13, No. 2, 2020, p. 93.
- 6 "ISIS Foreign Fighters After the Fall of the Caliphate", *Armed Conflict Survey*, Vol. 6, 2020, p. 26.
- 7 There are indications that some of these FFs have managed to escape and are making their way back home. See, for example, Frank Gardner, "IS Prisoner Issue a Ticking Timebomb for the West", *BBC News*, available at: <https://www.bbc.com/news/world-middle-east-53428928>. It is the opinion of the present author that a controlled return would be better in terms of national security, especially in the longer term. On this point, see also Tanya Mehra and Christophe Paulussen, "The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-term Thinking", *ICCT Perspective*, 6 March 2019, available at: <https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/>; and "ISIS Foreign Fighters After the Fall of the Caliphate", above note 6, p. 23.
- 8 The situation is slightly different for the FFs held in prison in Iraq given that some of them are actually being prosecuted in Iraq for the acts that they have committed during their time with IS, albeit not without issues. See, for example, Margaret Coker and Falih Hassan, "A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects", *The New York Times*, 17 April 2018, available at: <https://www.nytimes.com/2018/04/17/world/middleeast/iraq-isis-trials.html>.
- 9 On this point see also, for example, T. Mehra and C. Paulussen, above note 7.

not an easy one. One of the main complicating factors in this regard is to be found in the difficult relationship between international humanitarian law (IHL) and counterterrorism (CT).

There is no uniform definition of FFs under international law. For the purpose of this paper, the following definition, as suggested by Sandra Krähenmann, will be used, namely that FFs are “individual[s] who [leave] [their] country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who [are] primarily motivated by ideology, religion, and/or kinship”.¹⁰ This definition is chosen here given that it, in the present author’s opinion, reflects the current reality of the FF phenomenon in the most adequate manner.

If FFs are considered to be basically individuals joining a non-State armed group (NSAG) in an armed conflict abroad, it is by definition important to also assess their conduct from an IHL perspective. IHL applicability is especially straightforward for those having a continuous combatant function within the NSAG, i.e. concerning individuals “recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf”.¹¹ It is slightly more complicated for those merely associated with the armed group, without having a combatant function. In order to assess whether their conduct could potentially be assessed under IHL, more specifically in terms of criminal accountability, a nexus with the armed conflict needs to be proven (see below).

Even if there is increasing consideration for the relevance of IHL in relation to the FF phenomenon, FFs are still mainly being assessed from a CT perspective. The term “Foreign Terrorist Fighter” used by the United Nations (UN) and the European Union (EU) in their policy documents on the matter represents a clear illustration of the underlying CT focus.¹² As Krähenmann argues, the use of the term “foreign terrorist fighters” in UN Security Council (UNSC) Resolution 2178 (2014) definitely “blurs the lines [between CT and IHL] rhetorically”.¹³ The EU is not doing a much better job, as it appears “to use the terms FF, foreign terrorist fighters (FTF), and terrorists almost inter-changeably”.¹⁴ As was clearly highlighted by the International Committee of the Red Cross (ICRC) on more than one occasion, this robust CT

10 Sandra Krähenmann, “Foreign Fighters under International Law”, Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No. 7, 2014, p. 6.

11 Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, May 2009, available at: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>, p. 35. For a more in-depth assessment of the question of membership determination see, for example, R. E. Vanlandingham, “Meaningful Membership: Making War a Bit More Criminal”, *Cardozo Law Review*, Vol. 35, No. 1, 2013, pp. 120–128.

12 See, for example, respectively, UN Security Council (UNSC) Resolution 2178 of 24 September 2014, adopted 24 September 2014; and “Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA”, *Official Journal of the European Union*, L 88/6, 31 March 2017.

13 Sandra Krähenmann, “The Interplay Between International Humanitarian Law, Terrorism and the ‘Foreign Terrorist Fighter’ Regime”, *Proceedings of the ASIL Annual Meeting*, Vol. 112, 2018, p. 309.

14 Bibi van Ginkel and Eva Entenmann (eds), “The Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies”, *ICCT Research Paper*, April 2016, available at: https://icct.nl/app/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf, p. 13.

discourse has significantly contributed to blurring the lines between armed conflict and terrorism and may potentially have important adverse effects on IHL.¹⁵

In this paper, a brief overview of the difficult relationship between IHL and CT will first be provided as well as its impact on the qualification of the activities of the FFs. Then, the question of prosecution of the (returning) FFs, central to this analysis, will be assessed. The assessment of the question of prosecution will start with a brief note on the opportunities for international prosecution as well as the avenues for domestic prosecution in the region, i.e. in Syria and Iraq. The further focus of the second section will be on prosecution by States of origin, and more particularly in an EU context. This focus is justified on the basis of two main grounds. First, the EU presents an interesting context because it allows for comparison between different States within a system which is striving towards more harmonization when it comes to criminalization more in general, but also with regard to the criminalization of FFs more in particular.¹⁶ Second, this is also the context the present author is most aware of, given that this has been at the centre of her previous research.¹⁷ Ultimately, it will be concluded that effectively prosecuting the FFs for the wrongful acts they may have committed is of utmost importance and that, when doing so, due regard must be paid to all relevant legal frameworks.

The difficult relationship between international humanitarian law and counterterrorism and how this impacts on the situation of foreign fighters

Whereas the relationship between CT and IHL has always been a difficult one, the separation between the two regimes has become further blurred after 9/11.¹⁸ The FF phenomenon has only further exacerbated these tensions in practice. Indeed, when people join a group that is generally characterized as being terrorist, such as IS for example, which is also at the same time operating in a situation of armed conflict, this increases the likelihood of IHL and CT being both relevant for the assessment of their conduct and hence complicates the question as to which specific body of rules is applicable to which facts.¹⁹ It is therefore crucial to clearly delimitate the

15 ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflict”, Report prepared for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 8–10 December 2015, p. 17 (hereafter ICRC Challenges Report 2015).

16 On this point, see Eurojust/the Genocide Network, “Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences”, May 2020, p. 5 (hereafter Eurojust Genocide Network Report on Cumulative Prosecution), available at: <https://www.eurojust.europa.eu/cumulative-prosecution-foreign-terrorist-fighters-core-international-crimes-and-terrorism-related>, p. 7.

17 This paper builds further upon Hanne Cuyckens and Christophe Paulussen, “The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship Between Counter-Terrorism and International Humanitarian Law,” *Journal of Conflict and Security Law*, Vol. 24, 2019, pp. 537–565.

18 Ben Saul, “Terrorism and International Humanitarian Law”, in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2020, p. 209.

19 David McKeever, “International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations”, *International & Comparative Law Quarterly*, Vol. 69, No. 1, 2020, p. 48.

relationship between IHL and CT in their regard. In order to do so, the difficulties concerning the relationship between IHL and CT more in general first need to be briefly outlined. The paper then briefly discusses how this affects FFs and the qualification of their conduct more specifically.

The difficult relationship between counterterrorism and international humanitarian law: A brief overview

Before being able to assess the specific relationship between CT and IHL it is important to start by briefly defining what is to be understood by CT. Whether CT can be considered a specific branch of international law similar to, for example, IHL is open to debate. Reference is most of the time made to the CT framework. This framework is made up of 19 international treaties as well as numerous regional treaties which are concerned with a series of acts commonly associated with terrorism such as, for example, hijacking, bombing and the taking of hostages.²⁰ A comprehensive convention on terrorism has been under negotiation for a while now but has not yet led to the adoption of such a convention. Actually, one of the main reasons why such negotiations have not yet been successful is the lack of agreement with regard to the relationship between CT and IHL.²¹ Another main issue blocking the adoption of such a convention, and challenging the CT framework more in general, is the lack of a single, generally recognized, definition of terrorism.²² There is also no specific international crime of terrorism.²³ Rather CT instruments merely “contain a list of acts that are typically linked with terrorism and must be criminalised and prosecuted by the state parties (...)”.²⁴ Also relevant to mention when assessing the CT framework is the important role that UNSC resolutions play as a source of CT rules.²⁵

20 D. McKeever, above note 19, p. 44. See also Hans-Peter Gasser, “Acts of Terror, ‘Terrorism’ and International Humanitarian Law”, *International Review of the Red Cross*, Vol. 84, No. 847, 2002, p. 550; and Daniel O’Donnell, “International Treaties Against Terrorism and the Use of Terrorism During Armed Conflict and by Armed Forces”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 853–854.

21 D. McKeever, above note 19, p. 43. On this point, see also, more particularly, Mahmoud Hmoud, “Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 1043.

22 Moira Macmillan, “The UN Foreign (Terrorist) Fighter Regime and International Criminal Law”, *American Society of International Law Proceedings*, Vol. 112, 2018, p. 311. See also Sandra Krähenmann, “Legal Framework Addressing Terrorism and Counter-Terrorism”, *Proceedings of the Bruges Colloquium*, 20–21 October 2016, *Collegium*, No. 47, Autumn 2017, p. 19; and H.-P. Gasser, above note 20, p. 552.

23 M. Macmillan, above note 22, p. 312.

24 Alejandro Sánchez Frías, “Bringing Terrorists to Justice in the Context of Armed Conflict: Interaction Between International Humanitarian Law and the UN Conventions Against Terrorism”, *Israel Law Review*, Vol. 53, No. 1, 2020, p. 80.

25 D. McKeever, above note 19, p. 46. For an assessment of the risks and benefits of UNSC resolutions imposing international legal obligations on UN Member States with respect to Foreign (Terrorist) Fighters see D. DeBartolo, “Security Council ‘legislation’ on Foreign (Terrorist) Fighters”, *American Society of International Law Proceedings*, vol. 112, 2018, pp. 303–306.

Given that both armed conflict and terrorism often involve acts of violence committed by non-state armed actors, there seems to be a “natural connection” between CT and IHL.²⁶ The difficulty in the relationship is hence mainly a consequence of the fact that they both regulate acts of violence. They do so on the basis of very different rationales, however. Consequently, there are some overlaps but also some very clear differences. In the words of Krähenmann, “[t]he superficial similarities obscure the significant conceptual differences between acts of violence in armed conflicts and these outside armed conflicts as well as the difference in the legal regimes governing them”.²⁷ The main difference is that IHL does not prohibit all acts of violence. Indeed, whereas IHL is based on a distinction between lawful and unlawful acts of violence, all acts of violence designated as terrorist are considered unlawful.²⁸ It is hence important to clearly define the relationship between both frameworks and disentangle them in order to avoid blurring and, ultimately, contradictions.

In light of this particular risk of overlap, it is important for international conventions addressing terrorism to include clauses regulating the relationship with IHL.²⁹ As Ferraro so rightfully pointed out: “[t]he formulation of such a clause will be critical in order to maintain IHL integrity and rationale, but also to avoid ambiguity and misinterpretation detrimental to IHL.” As was already highlighted above, the inclusion of such a clause is one of the main reasons why a comprehensive convention on terrorism has not yet been adopted on the international plane (see above). However, such clauses do already exist in other international and regional CT instruments. EU Directive 2017/541, for example, stipulates that:

[i]t does not govern the activities of armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of those terms under that law, and, inasmuch as they are governed by other rules of inter-national law, activities of the military forces of a State in the exercise of their official duties.³⁰

Without going into detail into the specific issue of the so-called exclusion clauses,³¹ the discussion surrounding the exact scope of such clauses, however, is important to briefly mention here. More specifically the question as to whether the exclusion clause would also cover situations of non-international armed conflict and hence also apply to NSAGs is of particular relevance. For an illustration of this debate in case law it is interesting to contrast the Dutch view with the Belgian one: the former seems to suggest that the clause does not apply to NSAGs whereas the

26 S. Krähenmann, above note 13, p. 307.

27 *Ibid.*

28 T. Ferraro, “Interaction and Overlap Between Counter-Terrorism Legislation and International Humanitarian Law in Terrorism”, *Proceedings of the Bruges Colloquium*, 20–21 October 2016, p. 28.

29 *Ibid.*, p. 30.

30 EU directive 2017/541, above note 12, preambular clause 37.

31 On this point, see, more particularly, the article by Thomas Van Poecke, Frank Verbruggen and Ward Yperman, “Terrorist Offences and the International Humanitarian Law Exclusion Clause: Belgium as the Odd One Out” in the same issue of the *International Review of the Red Cross*.

latter clearly deems the clause to be applicable to NSAGs.³² The debate ultimately revolves around the interpretation of the notion of “armed forces” as included in the exclusion clause. The Dutch court in, what has been commonly referred to as the *context* case, held on this specific point, that when interpreting the concept of “armed forces” in a literal sense, it would refer to the armed forces of a State and that organized armed groups are usually not referred to as “armed forces” but as “organized armed groups”.³³ Consequently, the Dutch court concluded that by using the term “armed forces”, the activities of the armed forces of a State are excluded from the realm of CT legislation.³⁴ By contrast, the reasoning of the Belgian courts in the *Sharia4Belgium* and *PKK* cases clearly shows that Belgium accepts the clause to be applicable both to State armed forces and NSAGs.³⁵ It is important to note that Belgium has incorporated the exclusion clause into its national criminal legislation as opposed to the Netherlands, but the formulation of the Belgian clause is very similar to the EU clause, and reference therein is also made to the notion of “armed forces”, so the difference in outcome is not based on the specific wording of the Belgian clause.³⁶

The difficulty in defining the exact relationship also rests on the fact that there is no generally accepted definition of terrorism.³⁷ More generally, this lack of commonly agreed definition of terrorism leaves room for abuse as it leaves it up to States to decide which individuals they qualify as “terrorist”.³⁸ Consequently, there is nothing preventing States from abusing the legal

32 Contrast *Prosecutor v. Imane B. et al.* (District Court of The Hague, 10 December 2015), §§ 7.37–7.44 with Rechtbank van eerste aanleg (Antwerpen), Vonnis, 11 February 2015, p. 31 (*Sharia4Belgium* case) and Hof van Beroep (Brussels), Beslissing van de Kamer van Inbeschuldigingstelling, 14 September 2017 (*PKK* indictment). For a further discussion of the question whether the exclusion clause refers exclusively to State armed forces or not, see also Marten Zwanenburg, “Foreign Terrorist Fighters in Syria: Challenges of the ‘Sending’ State”, *International Law Studies*, Vol. 92, No. 1, 2016, pp. 226–227.

33 *Prosecutor v. Imane B. et al.*, above note 32, paras 7.38 and 7.40.

34 *Ibid.*, para. 7.39.

35 *Sharia4Belgium* case and *PKK* indictment, above note 32. See also O. Venet, “Infractions terroristes et droit humanitaire: l’article 141bis du Code pénal”, *Journal des tribunaux*, No. 6387, March 2010, p. 169; V. Koutroulis, “Le jugement du Tribunal correctionnel d’Anvers dans l’affaire dite « *Sharia4Belgium* » et l’article 141bis du Code pénal belge”, in A. Jacobs and D. Flore (eds), *Les Combattants étrangers en Syrie*, L’Harmattan, Paris, 2005, p. 88; T. Ruys and S. Van Severen, “Art. 141bis Sw. – Vervolging tussen hamer en aambeeld van terreurbestrijding in internationaal humanitair recht”, *Rechtskundig Weekblad*, 2018–19, no. 14, p. 531; and J. Wouters and T. Van Poucke, “Van strijdkrachten, terroristen en het Belgisch strafrecht (noot onder Brussel, 14 september 2017)”, *Rechtskundig Weekblad*, 2018–19, No. 14, p. 1617.

36 Apart from Belgium, the only other EU Member State that seems to have also integrated such a clause in its national legislation is the Republic of Ireland; see T. Van Poecke, “The IHL Exclusion Clause, and why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences”, *EJIL: Talk!*, 20 March 2019, available at: <https://www.ejiltalk.org/author/thomasvanpoecke/>.

37 M. Macmillan, above note 22, p. 311. See also S. Krähenmann, above note 22, p. 19; and Julia Geneuss, “The Legal Limbo of Counter-Terrorism Criminal Law and Armed Conflict. Anti-Regime and Anti-IS (Foreign) Fighters Before European Courts”, *European Criminal Law Review*, Vol. 10, 2020, p. 342.

38 B. van Ginkel, “The New Security Council Resolution 2178 on Foreign Terrorist Fighters: A Missed Opportunity for a Holistic Approach”, *ICCT Perspectives*, 4 November 2014, available at: <https://icct.nl/publication/the-new-security-council-resolution-2178-on-foreign-terrorist-fighters-a-missed-opportunity-for-a-holistic-approach/>.

uncertainty that the failure to agree upon a single definition generates.³⁹ Having a clear and single definition would better prevent national prosecutors from using vague and overly broad national definitions of terrorism, to, for example, silence political opponents.⁴⁰ Similarly, the terms “terrorist group” and “terrorist organization” are also not adequately defined, leading here as well to a diversity in approaches.⁴¹ In order to determine whether a group can be considered terrorist or not, reference is often made to so-called national, regional or international “terrorist lists”, which raise a certain number of issues of their own, especially when it comes to the fairness of the listing process.⁴² Ultimately, in the absence of clear definitions, combined with the lack of a clear delimitation between both legal frameworks, States could just decide to qualify “any act of violence by a NSAG in an armed conflict as an act of terrorism, and therefore necessarily unlawful, even when the act in question is not in fact prohibited under IHL”.⁴³ Such an approach goes against the very nature of a system which does not prohibit attacks against lawful targets.⁴⁴ Macmillan stringently questions: if “[a]nything described as an ‘act of terrorism’ must always be unlawful. What do we mean when we refer to a foreign fighter as ‘terrorist’?”.⁴⁵

Finally, IHL itself also provides some guidance when it comes to regulating acts of terror committed in the framework of an armed conflict, international armed conflict as well as in non-international armed conflict.⁴⁶ There is both a specific prohibition concerning “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”,⁴⁷ as well as a more general

39 A. De Guttry, “The Role Played by the UN in Countering the Phenomenon of Foreign Terrorist Fighters”, in A. de Guttry, F. Capone and C. Paulussen (eds), *Foreign Fighters in International Law and Beyond*, T.M. C. Asser Press, The Hague, 2016, p. 266.

40 Christophe Paulussen, “Impunity for International Terrorists? Key Legal Questions and Practical Considerations”, *ICCT Research Paper*, April 2012, p. 12, available at: <https://www.icct.nl/app/uploads/download/file/ICCT-Paulussen-Impunity-April-2012.pdf>. On this point, see also Lisa Ginsborg, “One Step Forward, Two Steps Back: The Security Council, ‘Foreign Terrorist Fighters’ and Human Rights”, in Manfred Novak and Anne Charbod (eds), *Using Human Rights to Counter Terrorism*, Edward Elgar Publishing, Cheltenham, 2018, pp. 203–204.

41 Brian J. Philips, “What is a Terrorist Group? Conceptual Issues and Empirical Implications”, *Terrorism and Political Violence*, Vol. 27, No. 2, 2015, pp. 225–226.

42 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, Cambridge University Press, Cambridge, 2012, p. 28. For a more detailed assessment and criticism of the listing system that exists at the level of the UN, see, for example, Lisa Ginsborg, “The United Nations Security Councils Counter-Terrorism ISIL (Daesh) and Al-Qaida Sanctions Regime”, in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar Publishing, Cheltenham, 2020, pp. 550–563.

43 ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflict. Recommending to the Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions”, October 2019, p. 58 (hereafter ICRC Challenges Report 2019). See also Stéphane Ojeda, “Global Counter-Terrorism Must not Overlook the Rules of War”, *Humanitarian Law & Policy*, 13 December 2016, available at: <https://blogs.icrc.org/law-and-policy/2016/12/13/global-counter-terrorism-rules-war/>.

44 ICRC Challenges Report 2015, above note 15, p. 18.

45 M. Macmillan, above note 22, p. 313.

46 H.-P. Gasser, above note 20, p. 562.

47 ICRC, Customary IHL Database, Rule 2 (applicable in both international armed conflicts and non-international armed conflicts), available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2 (emphasis added). See also Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8

prohibition relating to a range of other acts of violence when committed against civilians or civilian objects.⁴⁸ As pointed out by Ojeda, “IHL already provides a strong legal framework with explicit prohibitions applicable also to NSAGs designated as terrorists whose serious violations entail individual criminal responsibility both at domestic and international level (e.g. universal jurisdiction for acts amounting to war crimes).”⁴⁹ The argument sometimes used that relying on an IHL perspective would lead to impunity is hence incorrect.⁵⁰ In addition, IHL does not prohibit members of NSAGs from being prosecuted for mere participation in hostilities under national law in the absence of combatant privilege.⁵¹ This possibility raises a certain number of challenges, notably in terms of compliance, given that it may risk disincentivizing NSAGs from abiding by IHL.⁵² Numerous calls have been made under IHL to grant the broadest possible amnesty to persons who have participated in armed conflict and hence not to prosecute those members of NSAGs for lawful acts of war.⁵³ In the framework of specifically the relationship between CT and IHL, the present author would argue that the possibility of prosecuting NSAGs for mere participation in hostilities generates an additional risk. Dutch courts have, for example, relied on the absence of combatant privilege to justify relying on national CT legislation.⁵⁴ This argument is based on the fact that the existence of an armed conflict does not necessarily discard other international law rules, including CT, but the present author believes a similar conclusion can be reached without reference to the absence of combatant privilege.⁵⁵ Albeit not wrong from a legal perspective, the reasoning provided for by the Dutch courts may further blur the relationship between CT and IHL given that it again may provide the suggestion that all acts of NSAGs are terrorist in nature.

June 1977 (entered into force 7 December 1978) (AP I), Art. 51(2); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (AP II), Art. 13(2); and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 33.

48 ICRC Challenges Report 2015, above note 15, p. 18.

49 S. Ojeda, above note 43. On this point, see also D. McKeever, above note 19, p. 52.

50 O. Venet, above note 35, p. 169. See also H.-P. Gasser, above note 20, p. 566; and *Proceedings of the Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law*, 20–21 October 2016, *Collegium*, No. 47, Autumn 2017, pp. 43–44.

51 On this point, see, more particularly, J. K. Kleffner, “From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference”, *Netherlands International Law Review*, Vol. 54, 2007, pp. 321–323.

52 S. Krähenmann, above note 22, p. 20. On this point, see also, more particularly, H. Højfeldt, “Prohibiting Participation in Armed Conflict”, *The Military Law and the Law of War Review*, Vol. 54, 2015–2016, p. 31.

53 See Art. 6(5) of AP II, stating that “at the end of the hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict”. See also ICRC, Customary IHL database, Rule 159, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159. The granting of amnesties to those who have merely participated in hostilities has also been encouraged by various UN bodies, including the UNSC, as well as by NATO and the EU; see <https://www.icrc.org/en/document/amnesties-and-ihl-purpose-and-scope>.

54 For a more in-depth assessment of the Maher and Context cases and the relationship between combatant immunity, see. H. Cuyckens and C. Paulussen, above note 17, pp. 548–551.

55 *Ibid.*, pp. 550–551.

The qualification of the criminal acts committed by foreign fighters under counterterrorism and international humanitarian law

This part will briefly assess how the tension between CT and IHL is further manifested by the situation of FFs. This question is of particular relevance for FFs who have joined armed groups which at the same time have also generally been qualified as terrorist by the international community.⁵⁶ Nowadays the term FF is mostly used in relation to the conflict in Syria and Iraq and is particularly linked to the evolution of jihadist groups such as ISIS, for example.⁵⁷ ISIS is definitely a good example of what the present author would like to refer to as a dual-nature group, meaning a group that is at the same time a NSAG involved in a non-international armed conflict and a terrorist organization. Reference is also made in UNSC Resolution 2178 (2014) to Jabhat Al-Nusra, for example, as an entity of concern when it comes to attracting F(T)Fs. This is also a good example of a so-called dual-nature group: it is considered a terrorist organization with links to Al-Qaida as well as a party to the conflict in Syria.⁵⁸ For such groups both IHL and CT may be of relevance. Recognizing that their conduct may also fall under IHL does not exclude CT *per se*, it is important to look at each particular act committed by the FF in question and then assess whether the act in question falls under CT or IHL.⁵⁹

Acts will have to be assessed under the CT framework when they meet the definitions provided in the relevant international and regional CT instruments. As stated above, in the absence of a generally recognized definition of terrorism, international and regional instruments request States to criminalize a certain number of acts associated with terrorism.

UNSC Resolution 1566 (2004) describes terrorism as “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism”.⁶⁰ UNSC Resolution 1373 (2001) more specifically requires States to ensure that anyone “who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are

56 Qualification as a terrorist organization is made here on the basis of the UNSC’s list of terrorist organizations; available at: <https://scsanctions.un.org/consolidated/#alqaedaent>.

57 A. Ali, “La risposta della comunità internazionale al fenomeno dei foreign terrorist fighters”, *La comunità internazionale*, Vol. 2, 2015, p. 181. See, also, H. Cuyckens and C. Paulussen, above note 17, p. 541.

58 It is included on the UNSC’s list of terrorist organizations. For the qualification of Jabhat Al Nusra as a party to the conflict in Syria, see, for example, T. Gill, “Classifying the Conflict in Syria”, *International Law Studies* (Naval War College), Vol. 92, 2016, p. 374.

59 On this point, also see A. Sánchez Frías, above note 24, p. 99.

60 UNSC Resolution 1566 (2004), adopted 8 October 2004, para. 3.

established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist act”.⁶¹ Concerning more specifically F(T)Fs, UNSC Resolution 2178 (2014) calls upon States to criminalize (attempted) travel “for the purpose of perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training”, as well as the incitement and financing of such travel.⁶² “Terrorist acts” are, however, not defined.⁶³ The “terrorist” element of the crime concerned in this paragraph is linked to the conduct of the group that the individual is joining rather than based on the individual’s own conduct.⁶⁴ In other words, the travelling (or the incitement and financing of such travel) will be punishable as an act under CT on the basis of the nature of the group joined, so it will ultimately depend on whether the joined group is considered to be a terrorist group or not.

In the European context that this paper is more directly concerned with, EU directive 2017/541 provides a definition of terrorist offences and more particularly highlights a certain number of preliminary and preparatory offences that need to be criminalized.⁶⁵ Directive 2017/541 lists a certain number of intentional acts (such as attacks on a person’s life or physical integrity, kidnapping, extensive destruction of facilities, etc.) which need to be considered as terrorist offences when committed with the aim of: (a) seriously intimidating a population; (b) unduly compelling a government or an international organization to perform or abstain from performing any act; or (c) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.⁶⁶ As will be shown in more detail later on in this paper, most FFs have been prosecuted for preparatory acts or membership of a terrorist organization, given that this is easier to prove than the actual commission of a terrorist offence abroad. The preliminary and preparatory acts concerned by the directive relate to incitement, recruitment, providing or receiving training, travelling and financing.⁶⁷ Concerning more particularly membership, the directive states that directing or participating in the activities of a terrorist group shall be made punishable as a criminal offence.⁶⁸ A terrorist group is defined as “a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences”.⁶⁹ This EU definition remains rather broad and vague and hence States need to rely on other means, such as, for example, the UN terrorist list or a more specific national

61 UNSC Resolution 1373 (2001), adopted 28 September 2001, para. 2(e).

62 UNSC Resolution 2178 (2014), above note 12.

63 M. Macmillan, above note 22, p. 313.

64 *Ibid.*

65 Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 7.

66 EU directive 2017/541, above note 12, art. 3.

67 *Ibid.*, arts 5 to 11.

68 *Ibid.*, art. 4.

69 *Ibid.*, art. 2(3).

definition if such a definition were to exist, in order to determine whether a group should be considered terrorist or not.⁷⁰ There was quite some controversy in the Netherlands surrounding Jitse Akse, a Dutch former member of the armed forces who travelled to Syria in order to join the Syrian Kurdish People's Protection Units (YPG). No charges under the CT framework were imposed upon him, which seems to be in line with the fact that the YPG is not a listed terrorist entity.⁷¹ In addition, whereas the prosecutor did first express the willingness to prosecute him for mere participation in hostilities, more specifically for the killing of IS fighters in the context of the armed conflict in Syria, this was later on abandoned.⁷² Officially this was justified on the basis of lack of evidence; however, some claimed that the prosecution was abandoned as a consequence of public uproar claiming that he should not be prosecuted because he fought against the "bad guys".⁷³ The potential risk highlighted by this case is that States might be able to decide to limit prosecution for mere participation in hostilities to members who have joined NSAGs also considered terrorist. Not only would this further blur the relationship between CT and IHL, but making the type of prosecution dependent on the (alleged) nature of the NSAG joined could lead to selected application of justice and may hence also affect the principle of foreseeability. In addition, the case of Jitse Akse also confirms that not all FFs can be considered foreign terrorist fighters. This further supports the point that the terms FFs and FTFs should not be used interchangeably. Albeit rather exceptional in the context of the war in Syria given that most FFs seem to have joined jihadist groups, you can be a FF without at the same time falling under the CT framework.⁷⁴

Concerning more specifically IHL, the term "foreign fighter" is not a "term of art in IHL",⁷⁵ meaning that it is not a legal term nor a legal category as such under IHL. In order to assess whether a specific conduct could qualify as a war crime, the criminal conduct must be connected to the armed conflict, meaning that the so-called nexus requirement must be met.⁷⁶ The International Criminal Tribunal for

70 For the UNSC's list of terrorist organizations, see *United Nations Security Council Consolidated List*, available at: <https://scsanctions.un.org/consolidated/#alqaedaent>.

71 Christophe Paulussen and Kate Pitcher, "Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges", *ICCT Research Paper*, 2018, p.25, available at: <https://icct.nl/app/uploads/2018/01/ICCT-Paulussen-Pitcher-Prosecuting-Potential-Foreign-Fighters-Legislative-Practical-Challenges-Jan2018.pdf>, p. 16.

72 R. J. Speerstra and M. Pennewaard, "Jitse Akse niet vervolgd voor het doden van IS-strijders", *Algemeen Dagblad*, 22 June 2016, available at: <https://www.ad.nl/nieuws/jitse-akse-niet-vervolgd-voor-het-doden-van-is-strijders~a37f487e>. On this case, see also C. Paulussen and K. Pitcher, above note 71, p. 25; and J. Geneuss, above note 37, p. 358.

73 C. Paulussen and K. Pitcher, above note 71, p. 25; and J. Geneuss, above note 37, p. 358.

74 For a historical overview in support of the point that the FF phenomenon is neither new nor uniquely Islamic, see David Malet, "Why Foreign Fighters? Historical Perspectives and Solutions", *Orbis*, Vol. 54, No. 1, 2010, pp. 97–114.

75 ICRC Challenges Report 2019, above note 43, p. 62.

76 P. Gaeta, "War Crimes and Other International 'Core' Crimes", in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, p. 750. See also Harmen van der Wilt, "War Crimes and the Requirement of a Nexus with an Armed Conflict", *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012, pp. 1113–1114; Antonio Cassese, "The

the former Yugoslavia (ICTY) has identified a certain number of facts that can be taken into account to determine whether an act is sufficiently related to the armed conflict, namely:

(...) the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.⁷⁷

The parameters highlighted above should assist in determining whether a particular conduct falls under CT or IHL relevant for the subsequent question of prosecution.

The important question of the prosecution of (returning) foreign fighters

There are numerous allegations of serious wrongful acts having been committed by FFs in the context of the war in Syria. As already stated in the introduction, it is of crucial importance for FFs to be effectively prosecuted for those wrongful acts they may have committed. In this section the different opportunities for prosecution will be critically assessed. A brief note on international prosecution and domestic prosecution in Iraq and Syria will first be provided, after which the focus will turn to domestic prosecution in the State of origin.

A brief note on international prosecution and domestic prosecution in Iraq and Syria

Concerning first the potential avenues for international prosecution, the idea of setting up an international tribunal in the region was popular for a while, especially in Europe.⁷⁸ This is not surprising given the unwillingness of EU countries of origin to repatriate their FFs.⁷⁹

However, this option is not without constraints. First, there is the fundamental question of the need for such a tribunal in light of the existence of

Nexus Requirement for War Crimes", *Journal of International Criminal Justice*, 2012, Vol. 10, No. 5, pp. 1395–1417; and Guénaél Mettraux, "Nexus with Armed Conflict", in Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 435–436.

77 International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Kunarac and others*, IT-96-23, 12 June 2002, para. 59.

78 Anthony Dworkin, "A Tribunal for ISIS Fighters?", *ECFR Commentary*, 31 May 2019, available at: https://ecfr.eu/article/commentary_a_tribunal_for_isis_fighters/.

79 Francesca Capone, "Is Trump Right? Foreign Fighters and the States' Obligation to Repatriate Them", *Verfassungsblog*, 10 March 2019, available at: <https://verfassungsblog.de/is-trump-right-foreign-fighters-and-the-states-obligation-to-repatriate-them/>.

the International Criminal Court (ICC).⁸⁰ There might, however, be some challenges in terms of jurisdiction for the ICC to be able to deal with this issue given that both Syria and Iraq are not parties to the Rome Statute. Even if some form of ICC jurisdiction may be asserted with regard to the FFs originating from the EU, on the basis of the fact that they are nationals of a country which is a party to the ICC, this would provide only for a limited form of accountability. Not only would this option be limited to those FFs originating from States that are a party to the Rome Statute but given that international justice is often limited to those higher up in the chains of command it may concern only “those most responsible”, hence those involved in the leadership of the group joined.⁸¹ In addition, there might also be some issues with regard to the principle of complementarity.⁸² However, the setting up of a specific international tribunal, be it *ad hoc* or in some hybrid form, raises similar issues in terms of feasibility. As Nollkaemper has pointed out in his legal advice provided to the Dutch Ministry of Foreign Affairs on this specific issue: the lack of UNSC mandate as well as the lack of consent by Syria and Iraq tremendously limit the options for establishing such a tribunal.⁸³ Second, and this is a fundamental point in the opinion of the present author, more specifically in terms of design, it would be difficult to justify setting up a tribunal merely for the prosecution of ISIS fighters as this would exclude “numerous other perpetrators who equally committed horrible crimes within the Syrian conflict”.⁸⁴ Such a tribunal might be pursuing victor’s justice and consequently be perceived as not being impartial.⁸⁵

Regardless of whether the establishment of such an international tribunal would even be feasible or desirable, the present author is of the opinion that the establishment of such a tribunal would in any case not suffice on its own and hence could only be complementary to national prosecution.⁸⁶ This is so based on three main reasons. First, such an international tribunal, in the absence of an international crime of terrorism, would only be concerned with war crimes, crimes against humanity and the crime of genocide, unless the UNSC would expressly set up an *ad hoc* tribunal that would also be competent for terrorist-related offences.⁸⁷ As will be demonstrated below, national jurisdiction has the

80 Rachel Behring, “One-Eyed Prosecution? On the Possibility to Restrict the Personal Jurisdiction of an International Ad Hoc-Tribunal for ISIS-Fighters?”, *Volkerrechtblog*, 4 February 2020, available at: <https://voelkerrechtsblog.org/de/one-eyed-prosecution/>.

81 P. A. Nollkaemper, “Advies Internationaal Tribunaal ISIS”, 22 July 2019, available at: <https://www.rijksoverheid.nl/documenten/rapporten/2019/07/24/advies-internationaal-tribunaal-isis>, p. 3.

82 *Ibid.*, p. 3. See also “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS”, 8 April 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>.

83 P. A. Nollkaemper, above note 81, p. 15.

84 R. Behring, above note 80.

85 T. Mehra and C. Paulussen, above note 7.

86 P. A. Nollkaemper, above note 81, raises a similar point in the above-mentioned legal advice.

87 This does not mean that when the act of terrorism in question also meets the definition of war crimes, crimes against humanity or genocide as defined in the Rome Statute they would not be able to still be prosecuted under the international criminal law framework. But terrorism does not constitute an international core crime as such; M. Macmillan, above note 22, p. 312. For a more in-depth assessment of this question, see, for example, R. Arnold, “Terrorism, War Crimes and the International Criminal

possibility to deal with both CT-related and core international crimes. Second, as was already mentioned above, international justice is most often limited to those higher up in the chain of command, whereas this limitation does not exist for national prosecution. Third, international criminal justice is often limited by the resources available to it obliging international criminal courts and tribunals to make choices in terms of prosecutorial scope.⁸⁸

In relation to the question of domestic prosecution in Syria and Iraq, two main questions need to be dealt with, namely the challenges that have arisen regarding the prosecution by Iraq and Syria in and out of itself, and the question as to whether NSAGs would have the authority to prosecute the FFs in their custody.

Both Syria and Iraq have the competence to prosecute the FFs in their custody on the basis of the territoriality principle, i.e. the fact that the alleged crimes were perpetrated on their territory. National prosecution in the country on the territory of which the alleged crimes took place offers some advantages, notably when it comes to collection of evidence, for example.⁸⁹ However, carrying out such trials in post-conflict areas raises important challenges in terms of resources.⁹⁰ Nonetheless, Iraq has been prosecuting FFs domestically. The way these trials have been conducted have, however, been strongly criticized. Iraq has been prosecuting the FFs on the basis of overly broad national terrorist laws.⁹¹ In addition, a major point of contention therein has been the use of the death penalty. Indeed, Iraqi CT legislation allows for the death penalty for anyone who commits, incites, plans, finances or assists in acts of terrorism, which in turn is interpreted rather broadly, amounting to a one-size-fits-all approach.⁹² Consequently, the criminal conviction is not proportionate to the culpability of the perpetrator.⁹³ Another consequence of such a one-size-fits-all approach on the basis of CT legislation alone is also that the other crimes that have been potentially committed such as war crimes, crimes against humanity and genocide

Court, in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2020, pp. 271–284.

88 On this point, see, for example, Helen Brady and Fabricio Guariglia, “An Insider’s View: Consistency and Transparency While Preserving Prosecutorial Discretion”, *International Criminal Justice Today*, 15 December 2016, available at: <https://www.international-criminal-justice-today.org/arguendo/an-insiders-view/>.

89 T. Mehra and C. Paulussen, above note 7.

90 Tanya Mehra, “Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape. Part I: Prosecution by Iraqi and Syrian Courts”, *ICCT Perspectives*, 22 December 2017, available at: <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/>. See also, Roger Lu Philips, “A Tribunal for ISIS Fighters – A National Security and Human Rights Emergency”, *Just Security*, available at: <https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/>.

91 Tanya Mehra, “Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape. Part II: Prosecution by Foreign National Courts”, *ICCT Perspectives*, 12 January 2018, available at: <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-ii-prosecution-by-foreign-national-courts/>.

92 M. Coker and F. Hassan, above note 8.

93 United Nations Counter-Terrorism Implementation Task Force (Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism), “Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters”, New York, 2018, p. 38 (hereafter Guidance on HR-Compliant Responses to the Threat Posed by FFs).

are not being investigated.⁹⁴ The fact that Iraq has not included these international crimes into its domestic jurisdiction further exacerbates the issue.⁹⁵ Victims are hence not getting the appropriate moral reparation. Other issues that have been raised have to do with the lack of fair trial standards as well as inhumane detention conditions.⁹⁶ Concerning Syria, not much information can be found as to whether FFs have actually been successfully prosecuted by the Syrian government.⁹⁷ However, if trials were to be happening, similar issues as the ones relating to the trials in Iraq would most probably arise.

Moving onto the second question, the question has, for example, been raised with regard to the Kurdish-dominated Autonomous Administration of North and East Syria (AANES), when it announced its willingness to prosecute the FFs currently in their custody in light of the failure of the international community to come up with a solution for the FFs still left under their control.⁹⁸ These FFs (and their families) are more particularly held in camps under the control of the Syrian Democratic Forces (SDF), the unified military force of AANES.⁹⁹ This raises the question as to whether a NSAG would actually be competent to prosecute these FFs from a legal point of view.¹⁰⁰ A follow-up question is whether having them trialled by a non-State actor would actually discharge States from their obligation to do so.¹⁰¹ Focusing on the question as to whether they would actually have such competence, the question of the administration of justice by NSAGs is not a new one and there are examples of NSAGs having set up their own courts.¹⁰² IHL seems to implicitly allow NSAG to establish such courts, provided that a certain number of minimum guarantees are met.¹⁰³ On the basis of Article 3 common to the four Geneva Conventions, “the passing of sentences (...) without previous judgment pronounced by a regularly

94 Human Rights Watch (HRW) report, “‘These are the Crimes we are Fleeing’: Justice for Syria in Swedish and German Courts”, *Human Rights Watch*, 3 October 2017, available at: <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>, p. 4.

95 T. Mehra, above note 90.

96 See, for example, F. Capone, above note 79; and R. L. Philips, above note 90. See also HRW report, “Flawed Justice: Accountability for ISIS crimes in Iraq”, *Human Rights Watch*, 5 December 2017, available at: <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq>.

97 T. Mehra, above note 90.

98 Dan Sabbagh, “Syrian Kurds to Put Isis Fighters from Dozens of Countries on Trial”, *The Guardian*, 6 February 2020, available at: <https://www.theguardian.com/world/2020/feb/06/syrian-kurds-to-put-isis-fighters-from-dozens-of-countries-on-trial>.

99 Tanya Mehra and Matthew Wentworth, “New Kid on the Block: Prosecution of ISIS Fighters by the Autonomous Administration of North and East Syria”, *ICCT Perspective*, 16 March 2021, available at: <https://icct.nl/publication/prosecution-of-isis-fighters-by-autonomous-administration-of-north-east-syria/>.

100 For the qualification of the SDF as a NSAG, see RULAC, *Non-International Armed Conflicts in Syria*, available at: <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse5accord>.

101 This question is more particularly raised in Hannes Jöbstl, “Outsourcing Justice: State Obligations and the Prosecution of Foreign Fighters by Armed Groups in Syria”, *Armed Groups and International Law Blog*, 6 April 2020, available at: <https://armedgroups-internationallaw.org/2020/04/06/outourcing-justice-state-obligations-and-the-prosecution-of-foreign-fighters-by-armed-groups-in-syria/>.

102 Geneva Call, “Administration of Justice by Armed Non-State Actors”, Report from the 2017 Garance Talks, available at: https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issue02_Report_2018_web.pdf, p. 7.

103 T. Mehra and M. Wentworth, above note 99.

constituted court, affording all the judicial guarantees (...)” would, for example, be prohibited. Additional guarantees that need to be provided are included in article 6 of Protocol Additional II and further reflected in customary IHL as well (see customary law rule 100). The fact that the establishment of such courts is legally possible does not mean that it does not raise a certain number of challenges in practice. The NSAGs may lack the capacity and resources to effectively administer justice.¹⁰⁴ Meeting the judicial guarantees outlined above may prove especially challenging.¹⁰⁵ Concerning more directly the prosecution of FFs by such courts, the needed impartiality and independence of such courts may prove to be particularly problematic.¹⁰⁶ The ICRC has, however, stated that: “[a]lthough the establishment of such courts may raise issues of legitimacy, trial by such means may constitute an alternative to summary justice and a way for armed groups to maintain ‘law and order’ and to ensure respect for humanitarian law”.¹⁰⁷ Whereas the prosecution of FFs by NSAGs may not be discarded completely, the capacity to provide the needed judicial guarantees is still an important obstacle, especially without some form of State assistance in terms of resources and capacity building. In addition, whereas it would somewhat be logical to limit this capability to providing justice for violations of IHL due to its design, in practice the range of laws applied by some of these courts has not always been so clear.¹⁰⁸ Finally, it is also not certain whether States would validate and recognize the decisions taken by such courts.¹⁰⁹

Concerning the highlighted problems that may arise, in terms of prosecution by Iraq and Syria and the numerous challenges prosecution by NSAGs in the region may raise, the present author strongly believes that repatriation and prosecution of FFs by their home States should be the preferred option in terms of domestic prosecution.

Domestic prosecution in the country of origin

FFs can be prosecuted in their country of origin on the basis of the active personality principle, i.e. on the basis of the nationality of the alleged perpetrator.¹¹⁰ The examples provided here concern FFs who have joined so-called dual-nature groups, i.e. groups that both meet the requirements under IHL to be considered a NSAG and are generally considered as terrorist by the international community as well (see above). Whereas there are also examples of prosecution in countries

104 Ezequiel Heffes, “Administration of Justice by Armed Groups: Some Legal and Practical Concerns”, *Humanitarian Law & Policy*, 22 November 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/11/22/administration-of-justice-armed-groups-some-legal-practical-concerns/>.

105 *Ibid.*

106 *Ibid.*

107 ICRC, *Commentary of 2016. Article 3: Conflicts not of an International Character*, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDDFA490736C1C1257F7D004BA0EC>, para. 689.

108 E. Heffes, above note 104.

109 T. Mehra and M. Wentworth, above note 99.

110 T. Mehra, above note 91.

of “origin” of asylum seekers that were previously members of dual-nature groups, these cases, albeit raising similar issues, fall outside the ambit of the present paper. The focus will hence be on examples of prosecution of those individuals who actually left their country of origin to join such groups and have since then returned to said country of origin. In addition, as was mentioned already in the introduction, focus will be on examples emanating from EU Member States.

As a consequence of the transposition of UNSC 2178 Resolution and EU Directive 2017/541 the capacity of EU Member States to generate criminal prosecutions against returned FFs has expanded.¹¹¹ EU jurisprudence in this area is, however, still rather in its infancy and there are some differences across jurisdictions, notably when it comes to also taking the IHL perspective into account.¹¹² So far most returning FFs in the EU have been prosecuted for terrorist-related offences.¹¹³ More particularly, they have mainly been prosecuted for preparatory acts and/or membership.¹¹⁴ On the basis of statistics made available to it by EU Member States, Europol established that “[t]he majority of proceedings concluded in 2019 concerned terrorist offences such as participation in (the activities of) a terrorist group, financing of terrorism, (self-)indoctrination or training for terrorist purposes, recruitment, incitement to or glorification of terrorism and humiliation of victims, threatening to commit terrorist acts”.¹¹⁵ One of the reasons most often used in order to justify this focus on CT is the fact that preparatory acts and/or membership are relatively easy to prove.¹¹⁶

There are, however, also some examples of cumulative prosecution, i.e. prosecution for both terrorist-related offences and war crimes, mainly in Germany and the Netherlands.¹¹⁷ These examples seem to suggest that cumulative prosecution is in fact possible when a member of such a dual-nature group has committed both terrorist-related offences as well as war crimes (or other core international crimes). Early examples of cumulative prosecution concerned the war crime of outrages upon personal dignity.¹¹⁸ The use of photographic or video evidence in those cases allowed the assertion that protected persons had been treated in a gravely humiliating or degrading manner: in the German *Aria L.* case, the defendant filmed and encouraged his fellow IS

111 Francesco Ragazzi and Josh Walmsley, “The Return of Foreign Fighters to EU Soil: Ex-Post Evaluation”, *European Parliamentary Research Service Study*, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU\(2018\)621811_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf), Part II, p. 43.

112 With relation to the first point, see F. Ragazzi and J. Walmsley, above note 111, p. 43. Concerning the second claim, see, more particularly, H. Cuyckens and C. Paulussen, above note 17, p. 561.

113 Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 5.

114 *Ibid.*, p. 7. See also C. Paulussen and K. Pitcher, above note 71, p. 16.

115 Europol, “European Union Terrorism Situation and Trend Report (Te-Set) 2020”, available at: <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-set-2020>, p. 28.

116 F. Ragazzi and J. Walmsley, above note 111, p. 44. See also “ISIS Foreign Fighters After the Fall of the Caliphate”, above note 6.

117 Europol, above note 115, p. 25.

118 For Germany, see for example, *Prosecutor v. Abdelkarim El. B.*, Higher Regional Court (Frankfurt am Main), Judgment, 8 November 2016, Case number 5-3 StE 4/16 – 4 – 3/16. For the Netherlands, see *Prosecutor v. Oussama A.* (District Court of The Hague, 23 July 2019). The English translation is available at: <http://deeklink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2019:10647>.

fighters to cut off the nose and ears of a dead body, to step on it and to shoot it in the face, whereas in the Dutch *Oussama A.* case, the defendant posed smiling next to a crucified man and subsequently posted this picture on Facebook.¹¹⁹ The available evidence did not allow the courts to assess whether the death of these persons in and out of itself was the consequence of illegal acts committed by the defendants. The potential difficulties associated with evidence will be addressed later on in this section.

Interestingly, a Dutch woman was also recently prosecuted for both membership of a terrorist organization, *in casu* ISIS, and the war crime of outrages upon personal dignity in relation to the conflict in Syria, for acts that took place in the Netherlands.¹²⁰ She had shared two videos in which captured persons were killed in a gruesome manner by IS members and she had provided one of the videos with degrading comments.¹²¹ Whereas there is some confusion as to whether she had travelled to Syria or not before, the specific acts on the basis of which she was convicted for the war crime of outrages upon personal dignity took place in the Netherlands. The Dutch Court, however, held that there was a sufficient nexus with the armed conflict in Syria for her to be prosecuted for war crimes.¹²² Referring to the jurisprudence of the ICTY on the matter, the Court reiterates that it is not necessary for the conduct to have been committed in the framework of the hostilities or occur at the time when or in the place where the actual fighting is taking place, as long as the existence of the armed conflict has played a substantial part in the perpetrator's ability to commit or decide to commit the act in question, the manner in which it was committed or the purpose for which it was committed.¹²³ As was highlighted previously in this paper, and recalled by the Court in the case at hand, the factors that may be taken into account in order to determine whether an act is sufficiently related to the armed conflict are, amongst others: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.¹²⁴ The Court is of the opinion that the nexus requirement was met in the case at hand given that the acts committed by the defendant contributed to the media strategy of ISIS and that even long after the prisoners shown in the video were actually killed, the spreading of the videos continued to affect them in their personal dignity.¹²⁵

More recently, Germany has looked more particularly at the conduct of the so-called "ISIS spouses" in their quest towards cumulative prosecution.

119 *Abdelkarim El. B.*, above note 118; and *Oussama A.*, above note 118, § 5.4.

120 District Court of the Hague, case number 09/748012-19, 29 June 2021, available in Dutch at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:6620&showbutton=true>.

121 *Ibid.*

122 Case number 09/748012-19, above note 120, § 6.4.2.

123 *Ibid.*

124 *Ibid.*

125 *Ibid.*

Investigations and prosecution practices regarding returning FFs seem to be shifting more generally towards women “in light of evolving understandings of the roles of female detainees in Iraq and Syria”.¹²⁶ The specific war crimes investigated in the German cases regard concerned pillage, recruitment of child soldiers and the killing of a person protected under IHL.¹²⁷ Whereas in the earlier cases of prosecution the defendants were clearly fighters, the status of the defendants in some of the latter cases is more ambiguous. Thus, the courts consequently spend quite some time investigating the needed nexus for prosecution on the basis of war crimes. The question of the nexus was the most salient regarding the war crime of pillage, given that there is a fine line between appropriation of property as a common crime and actual pillage. More specifically, these cases related to the fact that these women were living in houses that were seized by ISIS after their owners had left them because they had fled the war or had been killed by the latter.¹²⁸ It was argued that given that the appropriation of the houses would not have been possible without the existence of an armed conflict in the region, the nexus requirement was met and the appropriation could thus qualify as pillage as understood under IHL.¹²⁹

One of the reasons explaining this cautious approach towards IHL is the misconception that invoking IHL would lead to impunity, in the sense that IHL is sometimes seen as an obstacle to effectively combat terrorism.¹³⁰ Another reason that seems to justify why IHL is not frequently relied upon in domestic courts is the fact that domestic judges do not always seem to be well acquainted with IHL.¹³¹ The most compelling reason, however, is what has been referred to as the judicial efficiency argument, or, in other words, the fact that membership of a terrorist organization is often easier to prove than actual acts committed during their time in Syria or Iraq, including war crimes.¹³² As has been duly noted by the UN Counter-Terrorism Committee, “in most States, prosecutions of foreign terrorist fighters can be undermined by difficulties in collecting admissible evidence abroad, particularly from conflict zones, or in converting intelligence into admissible evidence from information obtained through information and

126 F. Ragazzi and J. Walmsley, above note 111, p. 45.

127 For pillage, see Higher Regional Court of Stuttgart, 5 July 2019, Case No. 5-2 StE 11/18; Higher Regional Court of Düsseldorf, 4 December 2019, Case No. 2 StS 2/19; and Federal Court of Justice (GE), Ruling on Pre-Trial Detention, 4 April 2019, Case No. BGH AK 12/19. For recruitment of child soldiers, see Federal Court of Justice (GE), 17 October 2019, Case No. AK 56/19. For the killing of person protected under IHL, see Der Generalbundesanwalt beim Bundesgerichtshof, Presse: “Anklage gegen ein mutmaßliches Mitglied der ausländischen terroristischen Vereinigung „Islamischer Staat (IS)“ wegen Mordes und der Begehung eines Kriegsverbrechens erhoben”, 28 December 2018, available at: www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2018/Pressemitteilung-vom-28-12-2018.html?nn=478298. See also, more generally, Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, pp. 17–20.

128 Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, pp. 17–18.

129 Higher Regional Court of Düsseldorf, above note 127, para. 251.

130 H.-P. Gasser, above note 20, p. 566. See also *Proceedings of the Bruges Colloquium*, above note 50, pp. 43–44 and O. Venet, above note 35, p. 169.

131 *Proceedings of the Bruges Colloquium*, above note 50, pp. 43–44.

132 *Ibid.*

communications technology, particularly social media”.¹³³ Whilst recognizing that this is definitely an important challenge, the present author believes that open-source intelligence and military/battlefield evidence may assist in overcoming these difficulties.¹³⁴ The value of internet evidence has, for example, been shown in the German and Dutch cases concerning the war crime of outrages upon personal dignity relayed above. More specifically concerning the potential international crimes committed by the FFs in the context relayed here, agencies such as UNITAD (UN Investigative Team to Promote Accountability for Crimes Committed by Da’esh), for example, may play an important role in securing further evidence of international crimes, including war crimes.¹³⁵ UNITAD was established with the aim “to support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da’esh) in Iraq, to the highest possible standards (...) to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request”.¹³⁶ The main obstacles for national prosecutors in terms of collection of evidence seem to be founded on the impossibility of travelling to the (previously) war-torn areas and the difficulties in securing cooperation with Syria and Iraq that may arise.¹³⁷ By outsourcing the evidence collection to impartial, international bodies, present in the area and working in collaboration with the local authorities, these challenges may be overcome. The Soufan Center has, for example, highlighted in its most recent report that the work of UNITAD may prove especially useful for domestic prosecutors in terms of the volume and range of the potential evidence collected, thanks to its innovative use of technologies enabling remote interactions with witnesses and victims.¹³⁸ Finally, a potential role can also be played by non-governmental organizations (NGOs) when it comes to providing the needed evidence. Indeed, the number of NGOs documenting human rights and other abuses has increased and become professionalized over recent years.¹³⁹ There are, however, some concerns as to the credibility and admissibility of such evidence in

133 Guidance on HR-Compliant Responses to the Threat Posed by FFs, above note 93, p. 38.

134 On these points, see, more particularly, Eurojust/Genocide Network, “Prosecuting War Crimes of Outrage Upon Personal Dignity Based on Evidence From Open Sources – Legal Framework and Recent Developments in the Member States of the European Union”, The Hague, February 2018; as well as B. van Ginkel and C. Paulussen, “The Role of the Military in Securing Suspects and Evidence in the Prosecution of Terrorism Cases before Civilian Courts: Legal and Practical Challenges”, *ICCT Research Paper*, 7 May 2015, available at: <http://www.icct.nl/download/file/ICCT-Van-Ginkel-Paulussen-The-Role-Of-The-Military-In-Securing-Suspects-And-Evidence-In-The-Prosecution-Of-Terrorism-Cases-Before-Civilian-Courts.pdf>.

135 Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 5.

136 UNSC Resolution 2379 (2017), adopted 21 September 2017, para. 2.

137 T. Mehra and C. Paulussen, above note 7.

138 The Soufan Center, “Bringing Terrorists to Justice: Prosecuting ISIL War Crimes and Terrorism”, June 2021, available at: <https://thesoufancenter.org/research/bringing-terrorists-to-justice-prosecuting-isil-war-crimes-and-terrorism/>, p. 1.

139 T. Mehra, “Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape. Part III: Collecting Evidence from Conflict Situations”, *ICCT Perspectives*, 12 June 2018, available at: <https://icct.nl/>

court proceedings.¹⁴⁰ That NGOs may be successful in securing the needed evidence to effectively prosecute FFs for violations of international criminal law committed abroad is, for example, proven by the work of the Commission for International Justice and Accountability (CIJA).¹⁴¹ CIJA, whose work focuses on the situation in Syria, “has provided evidence, analysis and briefings to support the law enforcement and prosecutorial authorities of 12 governments conducting numerous criminal investigation into current and former members of Da-esh”.¹⁴² Reference is, for example, made to one of its reports in the *Oussama A.* case cited above.¹⁴³ Finally, more particularly in the EU context, some mechanisms, such as the Genocide Network, are in place to assist the prosecution services of Member States to effectively prosecute the allegedly committed international crimes in Syria and/or Iraq by encouraging the sharing of information and the exchange of best practices and by facilitating law enforcement and judicial cooperation.¹⁴⁴

Conclusion

The ambit of this paper was to provide an overview of the current state of affairs concerning the relationship between IHL and CT in relation to the prosecution of FFs. After having, amongst others, highlighted that the exact relationship between CT and IHL remains one of the main stumbling blocks for the adoption of a Comprehensive Convention on Terrorism and that FFs are by definition at the confines between CT and IHL, this paper investigated the different opportunities for prosecution and how they relate to the tensions between CT and IHL.

The author of the present paper would like to advocate for FFs to be prosecuted in a system which duly recognizes their complex nature and takes all relevant legal frameworks into account. This is the only way in which effective justice can be guaranteed. Whilst duly recognizing the potential practical difficulties, focusing mainly (if not exclusively) on CT when prosecuting FFs can generate a certain number of issues. It first of all disregards the right of the victims to obtain adequate reparation. Indeed, failing to prosecute the FFs for the acts that they have actually committed – be it under CT, IHL or cumulatively – may lead to issues of accountability and fails to provide adequate justice for victims.¹⁴⁵ In addition, from the perspective of the FFs and their due process

[publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-iii-collecting-evidence-from-conflict-situations/](#).

¹⁴⁰ *Ibid.*

¹⁴¹ See <https://cijaonline.org/key-successes>. CIJA is also listed amongst the specialized civil society organizations that may play a role in the prosecution of FFs in the Eurojust and Genocide Network report on cumulative prosecution; see Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 25.

¹⁴² See <https://cijaonline.org/key-successes>.

¹⁴³ See *Oussama A.*, above note 118, footnote 48.

¹⁴⁴ See also, more generally, Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 25. See also T. Mehra, above note 139.

¹⁴⁵ H. Cuyckens and C. Paulussen, above note 17, p. 563. See also Guidance on HR-Compliant Responses to the Threat Posed by FFs, above note 93, p. 36.

rights, adopting some form of “one-size fits all” approach by prosecuting everyone for membership regardless of the distinction in gravity of the acts that have actually been committed also does not seem fair. Indeed, it is imperative for any criminal conviction to be in proportion to the culpability of the perpetrator.¹⁴⁶ Finally, States also actually have an obligation “to investigate war crimes allegedly committed by their nationals”.¹⁴⁷ This rule applies both in international and non-international armed conflict.¹⁴⁸

As was also clearly pointed out in the Eurojust and Genocide Network report on the matter:

Some EU Member States have already demonstrated that it is possible to cumulatively prosecute and bring to justice FTFs for both sets of criminal acts – core international crimes and terrorism-related offences. Prosecuting terrorism offences combined with acts of war crimes, crimes against humanity, genocide or other criminal acts bring numerous advantages and ensures full criminal responsibility of perpetrators, delivers more justice for victims and results in higher sentences.¹⁴⁹

Up until now prosecution in the country of origin, at least when it comes to EU countries of origin, seems to provide the best opportunities for such cumulative prosecution given that both terrorist-related offences as well as core international crimes are included in the national legislation of those countries. In addition, they also seem to provide the best option when it comes to ensuring judicial guarantees. The present author would hence like to encourage EU Member States to actively repatriate their nationals and bring them to justice in their country of origin.

Finally, whilst a criminal justice response is definitely crucial, ultimately a more holistic approach should be adopted, and due attention should also be put on de-radicalization and reintegration programmes alongside effective prosecution where needed.¹⁵⁰

146 Guidance on HR-Compliant Responses to the Threat Posed by FFs, above note 93, p. 36.

147 Customary rule 158, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.
On this point, see also Jöbstl, above note 101.

148 *Ibid.*

149 Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 5.

150 On this point, see also, more particularly, Kerstin Braun, “‘Home, Sweet Home’: Managing Returning Foreign Terrorist Fighters in Germany, the United Kingdom and Australia”, *International Community Law Review*, Vol. 20, No. 3–4, 2008, pp. 311–346.

Stripping foreign fighters of their citizenship: International human rights and humanitarian law considerations

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Abstract

This article will briefly present a number of international human rights law considerations related to the topic of citizenship stripping of foreign fighters, that is: “individuals, driven mainly by ideology, religion and/or kinship, who leave their

country of origin or their country of habitual residence to join a party engaged in an armed conflict”, most notably the conflict in Syria and Iraq. After that, the article will focus on considerations in the context of international humanitarian law, which have been less frequently the subject of academic debate. This contribution concludes that citizenship stripping is not only highly problematic under international human rights law, but also from the perspective of international humanitarian law. The measure – which is likely to constitute cruel, inhuman or degrading treatment or punishment – violates Article 3 Common to the four Geneva Conventions, but it also undermines accountability for international humanitarian law violations already committed and can engender new violations through the non-removal of the suspect from the conflict zone. One of the few positive sides of the connection between the measure and international humanitarian law is that even if nationality is deprived, this will not have an effect on the international humanitarian law obligation to treat that deprived person humanely. In that sense, international humanitarian law provides a welcome – albeit temporary – safety net of decent treatment for people who have become victims of countries’ refusal to take responsibility for their own citizens.

Keywords: citizenship stripping, deprivation of nationality, foreign fighters, international humanitarian law, international human rights law.

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Introduction

Various armed conflicts around the world have attracted foreign fighters, who have been defined as “individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict”.¹ Examples are the British national George Orwell, who participated in the Spanish civil war in the 1930s on the side of the republicans, the Saudi national Osama bin Laden, who arrived in Afghanistan in

1 A. de Guttry, F. Capone and C. Paulussen, “Introduction”, in A. de Guttry, F. Capone and C. Paulussen (eds), *Foreign Fighters under International Law and Beyond*, Asser Press/Springer: The Hague 2016, p. 2. This definition (and hence also this article) excludes mercenaries, as the latter are motivated to take part in the hostilities essentially by the desire for private gain. See also S. Krähenmann, *Foreign Fighters under International Law*, Academy Briefing No. 7, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, October 2014, p. 16. However, for a different opinion, see UN General Assembly, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination: Note by the Secretariat*, A/73/303, United Nations, New York, 6 August 2018, para. 9: “In the absence of either an internationally agreed legal definition of foreign fighters or a specific regime governing them, the Working Group has defined foreign fighters as individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict. They are motivated by a range of factors, notably ideology, although the Working Group has found financial motivations to be a key factor as well. In this regard, the Working Group deems foreign fighters as a mercenary-related activity [original footnote omitted].” For more information on the status of foreign fighters under international humanitarian law more generally, see E. Sommario, “The Status of Foreign Fighters under International Humanitarian Law”, in A. de Guttry, F. Capone and C. Paulussen (eds), above, pp. 141–160.

1980 to challenge the Soviet occupation of that country, and, more recently, the British national Mohammed Emwazi, better known as “Jihadi John”, who in 2012 travelled to Syria to join the Islamic State of Iraq and Syria (ISIS) and who would become one of the terrorist organization’s most infamous executioners.² Notably the conflict in Syria and Iraq has attracted an unprecedented number of foreign fighters: on 28 November 2017, Vladimir Voronkov, Under-Secretary-General of the United Nations (UN) and Head of its Office of Counter-Terrorism, briefed the UN Security Council and “said that, at one stage more than 40,000 foreign terrorist fighters from 110 countries might have travelled to join the conflict in Syria and Iraq”.³ Indeed, many of these foreign fighters joined terrorist groups, such as al-Nusra or ISIS, which is why the attention quickly moved from foreign fighters as such to foreign *terrorist* fighters (FTFs), defined by the UN Security Council as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”.⁴

In responding to the foreign fighter and especially the FTF phenomenon and the groups that they have joined, states, and international and regional organizations have implemented a broad set of measures, from a full-out military campaign,⁵ to criminal⁶ and administrative measures.⁷ It is interesting to note that in the context of criminal law, the focus has recently shifted from the initial limited counterterrorism perspective—with foreign fighters being mainly prosecuted for membership of a terrorist organization—to broader charges, showing the realization that foreign fighters can also commit crimes as individuals participating in hostilities, such as war crimes.⁸ But as the standards of criminal law may be difficult to meet, especially in view of the difficulty of securing evidence in (post-) conflict situations, states have increasingly resorted to administrative measures. One of these is citizenship stripping or deprivation of

2 See more generally N. Arielli, *From Byron to bin Laden: A History of Foreign War Volunteers*, Harvard University Press, Cambridge, MA, 2018.

3 UN Security Council, 8116th Meeting (PM), *Greater Cooperation Needed to Tackle Danger Posed by Returning Foreign Fighters, Head of Counter-Terrorism Office Tells Security Council*, SC/13097, 28 November 2017, available at: <https://www.un.org/press/en/2017/sc13097.doc.htm> (all internet references were accessed in July 2021).

4 UN Security Council, “Preamble”, in *Resolution 2178 (2014)*, S/RES/2178 (2014), 24 September 2014, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2178.pdf, p. 2.

5 See Operation Inherent Resolve, available at: <https://www.inherentresolve.mil/About-CJTF-OIR/>.

6 See C. Paulussen and K. Pitcher, “Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges”, *ICCT Research Paper*, January 2018, available at: <https://icct.nl/app/uploads/2018/01/ICCT-Paulussen-Pitcher-Prosecuting-Potential-Foreign-Fighters-Legislative-Practical-Challenges-Jan2018.pdf>.

7 See B. Boutin, “Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards”, *ICCT Research Paper*, December 2016, available at: <https://icct.nl/app/uploads/2016/12/ICCT-Boutin-Administrative-Measures-December2016-1.pdf>.

8 For further information on cumulative prosecution of foreign fighters, see the article by Hanne Cuyckens, “Foreign Fighters and the Tension Between Counterterrorism and International Humanitarian Law: A Case for Cumulative Prosecution Where Possible”, in this issue of the *International Review of the Red Cross*.

nationality, a measure more and more used by states in the counterterrorism and national security context, including against alleged foreign (terrorist) fighters.

This article will briefly present a number of international human rights law considerations related to the topic of citizenship stripping of foreign fighters before focusing on considerations in the context of international humanitarian law. These are obviously the most interesting for the readers of the *International Review of the Red Cross* and, moreover, they have been less frequently the subject of academic debate. In the final part of this article, a number of conclusions will be offered.

Before starting though, the relevance of this contribution in this special issue on “Counterterrorism and sanctions” must first be clarified. Indeed, should citizenship stripping or deprivation of nationality (the two terms will be used interchangeably here) be seen as a sanction in the first place? This contribution argues that it should. Although the word “sanction” is often linked to punishment, an objective sometimes lacking in the context of citizenship stripping,⁹ its scope is in fact broader. According to *Black’s Law Dictionary*, a sanction is defined as, among other things, “[a] penalty or coercive measure that results from failure to comply with a law, rule, or order”.¹⁰ Deprivation of nationality in any case fits the second part of this definition. But even if we were to view a sanction to be limited to a penalty, and even if some governments present citizenship stripping as a non-punitive measure meant to protect national security, the connection to crime and punishment is in fact made at other times. Sandra Mantu has, for example, noted that “we are actually witnessing a new way of conceptualising state power whereby depriving individuals of their citizenship status is a form of penal sanction to be applied to citizens in response to perceived crimes against public security by act or by association [original footnote omitted]”.¹¹ Hence, in all cases, it can be argued that citizenship stripping constitutes a (*de facto*) sanction, even if we were to follow a definition limited to measures of a punitive nature, and thus fits this special issue.

9 For example, when the Dutch Government, in December 2014, proposed a new bill on the amendment of the Netherlands Nationality Act, to allow the Government to withdraw Dutch citizenship, without a criminal conviction, when the person in question had joined an organization which is taking part in a national or international armed conflict and which has been placed by the Minister of Security and Justice on a list of organizations that constitute a threat to national security, the Minister clarified that the objective of this measure is the protection of national security, which should be distinguished from the objective of using criminal law. See C. Paulussen, “Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe: Towards an Effective Response Based on Human Rights”, *ICCT Research Paper*, November 2016, available at: <https://icct.nl/app/uploads/2016/11/ICCT-Paulussen-Rule-of-Law-Nov2016-1.pdf>, p. 16. See also, more generally, M. Tripkovic, “Transcending the Boundaries of Punishment: On the Nature of Citizenship Deprivation”, *British Journal of Criminology*, 23 February 2021, available at: <https://academic.oup.com/bjc/advance-article-abstract/doi/10.1093/bjc/azaa085/6146956>, abstract: “Departing from a dominant perspective that considers denationalization as punishment, this article conducts an original study of citizenship policies in 37 European democracies and contrasts them with key principles of punishment. The findings raise serious doubts regarding the penal nature of denationalization: I propose instead that denationalization is better understood as a *sui generis* sanction, which seeks to relieve the polity of those members who fail to satisfy fundamental citizenship requirements.”

10 B. A. Garner, *Black’s Law Dictionary*, 8th ed., Thomson West, St. Paul, MN, 2004, p. 1368.

11 S. Mantu, “Citizenship in Times of Terror: Citizenship Deprivation in the UK”, *Nijmegen Migration Law Working Papers Series*, 2015/02, available at: <https://repository.ubn.ru.nl/handle/2066/143370>, p. 5.

International human rights law¹²

This brief part will look at the legality of deprivation of nationality under international human rights law. The measure has an impact on a crucial right, namely the right to nationality, as can be found in various international and regional human rights treaties.¹³ The famous philosopher Hannah Arendt referred in her *The Origins of Totalitarianism* to “the right to have rights”,¹⁴ which clarifies immediately how serious the impact of deprivation of nationality can be. For this reason alone, it has been argued that the measure can never be in compliance with modern international human rights law.¹⁵ It is submitted that this is indeed correct. According to Article 8, paragraph 1 of the 1961 Convention on the Reduction of Statelessness, “[a] Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.” However, this rule is not the only element to consider. The basic rule of the recent publication *Principles on Deprivation of Nationality as a National Security Measure*, which was developed after two and half years of research, involving more than 60 international experts and synthesizing all relevant international standards, reads that “States shall not deprive persons of nationality for the purpose of safeguarding national security.”¹⁶ The Principles then explain that if this happens nonetheless, “the exercise of this exception should be interpreted and applied narrowly, only in situations in which it has been determined by a lawful conviction that meets international fair trial standards, that the person has conducted themselves in a manner seriously prejudicial to the vital interests of the state”.¹⁷ Moreover, this exception is further limited by other international law standards, including not only the just-mentioned avoidance of

12 This part is based on C. Paulussen, “Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies”, *Journal of Conflict and Security Law*, Vol. 26, Issue 1 (Spring 2021), available at: <https://doi.org/10.1093/jcsl/kraa022>, Section 2.B.

13 See Universal Declaration of Human Rights, Art. 15, para. 1; International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5, para. d(iii); Convention on the Elimination of All Forms of Discrimination against Women, Art. 2; Convention on the Rights of the Child, Arts 7 and 8; American Convention on Human Rights, Art. 20; European Convention on Nationality, Art. 4 (a); Arab Charter on Human Rights, Art. 24; Covenant on the Rights of the Child in Islam, Art. 7; ASEAN Human Rights Declaration, Art. 18; CIS Convention on Human Rights and Fundamental Freedoms, Art. 24. See Institute on Statelessness and Inclusion, *Draft Commentary to the Principles on Deprivation of Nationality as a National Security Measure*, 2020, available at: https://files.institutesi.org/PRINCIPLES_Draft_Commentary.pdf, pp. 27–28.

14 See H. Arendt, *The Origins of Totalitarianism*, Penguin Classics, Random House UK, London, 2017, pp. 388 and 390. See also L. Faghfour Azar, “Hannah Arendt: The Right to Have Rights”, *Critical Legal Thinking*, 12 July 2019, available at: <https://criticallegalthinking.com/2019/07/12/hannah-arendt-right-to-have-rights/>.

15 See Office of the United Nations High Commissioner for Human Rights, *Amicus Brief, Presented by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. Before: The Dutch Immigration and Naturalisation Service*, 23 October 2018, available at: https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/DutchImmigration_Amicus.pdf, para. 25.

16 Institute on Statelessness and Inclusion, *Principles on Deprivation of Nationality as a National Security Measure*, February 2020, available at: <https://www.institutesi.org/year-of-action-resources/principles-on-deprivation-of-nationality>, p. 9.

17 *Ibid.*

statelessness, but also the prohibition of discrimination, the prohibition of arbitrary deprivation of nationality, the right to a fair trial, remedy and reparation, and other obligations and standards set forth in international human rights law, international humanitarian law and international refugee law.¹⁸ Zooming in on the prohibition of arbitrary deprivation of nationality,¹⁹ the Principles clarify that

[t]he deprivation of nationality of citizens on national security grounds is presumptively arbitrary. This presumption may only be overridden in circumstances where such deprivation is, at a minimum: [...] Carried out in pursuance of a legitimate purpose; [...] Provided for by law; [...] Necessary; [...] Proportionate; and [...] In accordance with procedural safeguards.²⁰

Zooming in even further on the element of proportionality, the Principles subsequently stipulate that this requires that

[t]he immediate and long-term impact of deprivation of nationality on the rights of the individual, their family, and on society is proportionate to the legitimate purpose being pursued; [...] The deprivation of nationality is the least intrusive means of achieving the stated legitimate purpose; and [...] The deprivation of nationality is an effective means of achieving the stated legitimate purpose.²¹

Similar requirements have been brought forward in a more general way (in his model provision on consistency of counterterrorism practices with human rights and refugee law, and humanitarian law) by the first UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. In his report *Ten Areas of Best Practices in Countering Terrorism*, Scheinin writes that even if permissible under national law, the exercise of certain functions and powers “may never violate peremptory or non-derogable norms of international law, nor impair the essence of any human right”²² – such as the principles of non-discrimination and equality²³ and

[w]here the exercise of functions and powers involves a restriction upon a human right that is capable of limitation, any such restriction should be to

18 *Ibid.*

19 See also Institute on Statelessness and Inclusion, above note 13, pp. 43–65; and OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework*, 2018, available at: https://www.osce.org/files/f/documents/4/7/393503_2.pdf, pp. 49–51.

20 Institute on Statelessness and Inclusion, above note 16, p. 10.

21 *Ibid.*, pp. 11–12.

22 Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Martin Scheinin: *Ten Areas of Best Practices in Countering Terrorism*, A/HRC/16/51, para. 16.

23 See OSCE Office for Democratic Institutions and Human Rights (ODIHR), above note 19, p. 32; UN Counter-Terrorism Implementation Task Force (CTITF), Working Group on Protecting Human Rights while Countering Terrorism, *Basic Human Rights Reference Guide: Security Infrastructure*, Updated 2nd ed., March 2014, para. 5; and UN General Assembly, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, A/72/287, 4 August 2017, para. 47.

the least intrusive means possible and shall: (a) Be necessary in a democratic society to pursue a defined legitimate aim, as permitted by international law; and (b) Be proportionate to the benefit obtained in achieving the legitimate aim in question.²⁴

As argued before,²⁵ deprivation of nationality can never be seen as the least intrusive means available and be necessary and proportionate. After all, mono-citizens who may have been in the same situation, who may have committed similar crimes and who may pose a similar security risk will not be deprived of their nationality (to avoid statelessness) but will face other, less far-going measures, such as a temporary area ban. If mono-citizens can be responded to in a less intrusive way, then why can these responses not also be applied to dual citizens? This entails that it is extremely difficult to justify deprivation of nationality as the least intrusive and thus necessary and proportionate means towards a certain aim, hence making the measure arbitrary, and thus prohibited under international law. Moreover, as explained above, the measure may never violate peremptory or non-derogable norms of international law, nor impair the essence of any human right, such as the principles of non-discrimination and equality.²⁶ In this respect, serious problems under international law arise as well, for the measure can and will only be applied to dual citizens. This clearly creates two different classes of citizens. Indeed, in an *amicus curiae* brief submitted to the Dutch Immigration and Naturalisation Service, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance E. Tendayi Achiume likewise concluded:

The Netherlands' policy to subject Dutch citizens to differential treatment on the basis of their mono or dual citizenship is inconsistent with its international human rights law [obligations]. The Netherlands' policy to use individuals' status as Dutch mono or dual nationals to determine eligibility for citizenship revocation results in discriminatory tiers of citizenship: full citizenship for Dutch mono nationals and less-secure citizenship for Dutch dual nationals. Because this result contradicts its international human rights law obligations to guarantee equality before the law and equal protection of the law to all of its citizens, the Netherlands must not rely on any mono-/dual-nationality distinction in determining permissibility of citizenship revocation.²⁷

This brief part has demonstrated that deprivation of nationality is highly problematic under international human rights law. But the measure is also

24 Human Rights Council, above note 22, para. 16.

25 C. Paulussen, above note 12, p. 226.

26 See also Institute on Statelessness and Inclusion, above note 16, p. 10: "[a] State must not deprive any person or group of persons of their nationality as a result of direct or indirect discrimination in law or practice, on any ground prohibited under international law, including race, colour, sex, language, religion, political or other opinion, national or social origin, ethnicity, property, birth or inheritance, disability, sexual orientation or gender identity, or other real or perceived status, characteristic or affiliation."

27 Office of the United Nations High Commissioner for Human Rights, above note 15, para. 36.

problematic for other reasons. For example, it removes important jurisdictional links to try possible offenders, it undermines international cooperation to fight impunity; it can, through its discriminatory character, lead to even more alienation and resentment and thus possible radicalization in minority groups, who are disproportionately targeted by the measure, and finally it can increase long-term security risks.²⁸ Nonetheless, “only” the problematic international human rights law dimension should already be enough to conclude that the measure is not to be resorted to.

International humanitarian law

Although international human rights law is clearly relevant, and has thus also been discussed in the literature when assessing the legality of the measure,²⁹ the centre of attention of this article will be on discussing the measure from a quite novel perspective, that is, in the context of the *International Review of the Red Cross*’s main field of focus: international humanitarian law. Indeed, what are the links between deprivation of nationality and international humanitarian law?

To start with, and this will not come as a surprise, the measure of deprivation of nationality or citizenship stripping itself is not to be found in conventional³⁰ and customary³¹ international humanitarian law. This is different for the concept of nationality as such, although it is usually seen as an irrelevant criterion to international humanitarian law,³² for instance when it comes to providing protection and care. An example can be found in Article 12 of the First and Second Geneva Conventions, which stipulates that the protected persons of these Conventions “shall be treated humanely and cared for by the Party [Geneva Convention I]/Parties [Geneva Convention II] to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria”.³³ At other times though, nationality is taken into account, for instance in the context of prescriptions

28 For more on this, see again C. Paulussen, above note 12, pp. 219–249.

29 See especially the work of Laura van Waas in this field, including L. van Waas, “Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications”, in A. de Guttry, F. Capone and C. Paulussen (eds), above note 1, pp. 469–487.

30 For this purpose, the texts of the four Geneva Conventions and the three Additional Protocols were searched.

31 For this purpose, the *Customary International Humanitarian Law Study of the ICRC*, Vol. 1: *Rules* was searched.

32 See e.g. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Arts 18 and 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (entered into force 21 October 1950) (GC II), Arts 14, 30 and 50. Nationality is also irrelevant “for determining whether a particular person can be qualified as a combatant and hence is entitled to POW status (with the possible exception of nationals of the detaining power) [original footnotes omitted]”. S. Krähenmann, above note 1, pp. 17–18.

33 See also Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949 (entered into force 21 October 1950) (GC III), Art. 16; and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (entered into force 21 October 1950) (GC IV), Art. 13.

regarding the dead,³⁴ internment³⁵ or “in determining whether civilians in the hands of the enemy are protected under Geneva Convention IV”.³⁶ As regards the last example, Article 4 of Geneva Convention IV stipulates that

[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

Although Geneva Convention IV will usually not be relevant to the phenomenon of foreign fighters, as most of them are involved in non-international armed conflicts,³⁷ the provision shows that, in theory, deprivation of nationality could have an effect on an individual’s protection. Imagine a foreign fighter who has two nationalities, each of a neutral State, and that the country of second nationality, in contrast to the country of first nationality, has no “normal diplomatic representation in the State in whose hand [the foreign fighter is]”. It seems that this would mean that if the country of first nationality revokes nationality, the foreign fighter, now only in the possession of the nationality of the second country, would be regarded as a protected person under Geneva Convention IV, whereas if he or she still had ties to the country which has normal diplomatic representation in the State in whose hands he or she is, he or she would not. Sandra Krähenmann has explained that the exclusions of Article 4 of Geneva Convention IV “are based on the premise that nationals of neutral or co-belligerent states will be protected by their state of origin through normal diplomatic channels, including exercise of diplomatic protection [...], and therefore do not need the additional protection provided by Geneva Convention IV.”³⁸ But in the case of citizenship stripping, this basic premise is undermined, as the country of origin does not protect its own citizen but, to the contrary, passes the buck to other actors.³⁹

The above-mentioned consequence would not only follow for those foreign fighters not directly participating in hostilities (the term foreign fighter is a little

34 See GC I, Art. 17.

35 See GC III, Art. 22; and GC IV, Art. 82.

36 S. Krähenmann, above note 1, p. 18.

37 *Ibid.*, p. 15.

38 *Ibid.*, p. 18.

39 Sandra Krähenmann has noted that the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case replaced the nationality standard by the concept of allegiance and that “[a]rguably, a similar reasoning could apply to foreign fighters whose allegiance is not defined by nationality, but religion or ideology. Such an approach might be especially relevant when states of origin show reluctance to exercise diplomatic protection on their behalf [original footnotes omitted]”. (*Ibid.*, p. 19.)

misleading but “join[ing] a party engaged in an armed conflict” does not necessarily mean being involved in direct participation in hostilities, which entails carrying out “specific acts [...] as part of the conduct of hostilities between parties to an armed conflict”).⁴⁰ Also “[c]ivilians who directly participate in hostilities [...] remain protected civilians when they fall into the hands of the enemy, provided they fulfil the nationality criteria set out in Article 4”.⁴¹

It is also interesting to see where nationality is not mentioned in the different texts. For instance, in paragraph 1 of Article 3 common to the four Geneva Conventions – and this provision is of course of particular interest to the phenomenon of foreign fighters, as most of these fighters are active in non-international armed conflicts – nationality is not listed as a prohibited ground for adverse distinction among protected persons:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

The question is of course whether nationality would fall under the concept of “other similar criteria”? According to the 2016 Commentary to common Article 3, that is indeed the case. Although

the Working Party preparing the draft of the final text of common Article 3 at the 1949 Diplomatic Conference [...] decided not to include nationality as a criterion, given that it might be perfectly legal for a government to treat insurgents who are its own nationals differently in an adverse sense from foreigners taking part in a civil war [for instance “foreign fighters”],⁴²

this different treatment “has no bearing on common Article 3’s imperative of humane treatment without any adverse distinction.”⁴³ Hence, although “[i]n the *domestic* judicial assessment of a non-international armed conflict, nationality may be regarded as an aggravating or extenuating circumstance, [...] it cannot be regarded as affecting in any way the *humanitarian* law obligation of humane treatment [emphasis added]”.⁴⁴

To conclude this part, the measure of deprivation of nationality or citizenship stripping cannot be found in international humanitarian law and the concept of nationality is irrelevant when it comes to fundamental guarantees of humane treatment under international humanitarian law. Indeed, in theory states

40 “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009”, *International Review of the Red Cross*, Vol. 90, No. 872 (December 2008), available at: <https://www.icrc.org/en/doc/assets/files/other/irrc-872-reports-documents.pdf>, p. 995.

41 S. Krähenmann, above note 1, p. 18.

42 ICRC, *Commentary of 2016. Article 3: Conflicts not of an International Character*, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>, para. 571.

43 *Ibid.*, para 572.

44 *Ibid.*

could deprive someone of nationality under domestic law,⁴⁵ but that deprivation cannot affect that person's humane treatment under international humanitarian law.

A clearer link between the measure and international humanitarian law can be identified in the following context: according to Rule 158 of the *Customary International Humanitarian Law Study of the ICRC*, Vol. 1: *Rules*, "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects."⁴⁶ It is undisputed that foreign fighters, often as members of groups such as ISIS, have committed the most horrible war crimes.⁴⁷ It can be argued that if states, rather than investigating the war crimes allegedly committed by their nationals, instead rescind responsibility by depriving them of their nationality and make their former nationals the problem of other actors, they violate this customary international humanitarian law obligation. Indeed, as also briefly mentioned at the end of the previous part, deprivation of nationality removes an important jurisdictional link to try possible offenders, the active nationality principle, and thus undermines the fight against impunity.⁴⁸ By violating this customary international humanitarian law obligation, states also violate the more general obligation of UN Security Council Resolution 2178, the most authoritative resolution on the phenomenon of FTFs, that "Member States must ensure that any measures taken to counter terrorism [such as deprivation of nationality] comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law".⁴⁹

45 Although the conclusion of the previous part should be repeated here again, namely that under international human rights law, the measure is highly problematic.

46 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press: Cambridge, 2005 (reprinted with corrections 2009), p. 607.

47 See e.g. Eurojust, Network for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-related Offences*, The Hague, May 2020, available at: https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.PDF, pp. 12–13: "The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic (UN CoI Syria) stated that ISIS had endangered and directed acts of violence against the civilian population in areas controlled by them, and persons not taking part in hostilities. Accordingly, they committed the war crimes of murder, execution without due process, mutilation, enforced disappearance, torture, cruel treatment, hostage-taking, rape and sexual violence, forced pregnancy, the use and recruitment of children in hostilities and attacking protected objects, forcibly displacing civilians, outrages upon personal dignity as well as other serious violations of IHL [international humanitarian law]. ISIS violated its obligations towards civilians and persons hors de combat which amounted to war crimes by beheading, shooting and stoning men, women, children and captured soldiers. They mutilated their bodies and carried out amputations and lashings in public spaces. Prisoners of ISIS had to survive beatings, whipping, electrocution, and suspension from walls or ceilings. Moreover, ISIS was engaged in abductions, and women and girls suffered from sexual slavery, gang raping, executions for unapproved contact with the opposite sex and stoning for adultery. According to the UN CoI Syria, the commanders of ISIS had wilfully perpetrated these war crimes with the indisputable intent of attacking persons while they were aware of their status as civilians or persons no longer participating in hostilities. Yazidis were especially targeted by horrific abuse by ISIS due to their community's religious identity [original footnotes omitted]."

48 H. Cuyckens, above note 8, "Domestic prosecution in the country of origin" section.

49 UN Security Council, above note 4, p. 1.

It is admitted that stripping of citizenship and thus the removal of the active nationality principle does not mean that investigation and prosecution of war crimes committed by one's former nationals will never be possible. After all, Rule 157 of the same *Customary International Humanitarian Law Study of the ICRC*, Vol. 1: *Rules* clarifies that "States have the right to vest universal jurisdiction in their national courts over war crimes".⁵⁰ However, in practice, one can see that investigation and prosecution based on "pure" universal jurisdiction⁵¹ – especially after Belgium experienced the political consequences of such a broad law –⁵² are scarce, and that the exercise of universal jurisdiction has now often been made dependent on certain conditions. In the Netherlands, for example, the International Crimes Act of 2003 stipulates that universal jurisdiction for international crimes such as war crimes committed abroad is conditional upon the suspect's presence in the Netherlands.⁵³ Hence, if a Dutch foreign fighter's citizenship is stripped, prosecution for war crimes may still be possible under universal jurisdiction, but only if that person is present in the Netherlands, which often will not be the case. It has therefore also been argued that the Netherlands should stop applying the measure of deprivation of nationality, for it undermines accountability efforts among other things, not only in the context of terrorist crimes, but also in the context of international crimes such as war crimes.⁵⁴ Going further, the point could be made that if a state does not bring its foreign fighters to justice (either in its own courts or elsewhere), it will not only undermine the fight against impunity for crimes already committed, but also it may lead to a prolongation of the conflict,⁵⁵ which, in turn, will lead to new international humanitarian law violations.⁵⁶

50 J.-M. Henckaerts and L. Doswald-Beck, above note 46, p. 604.

51 "Pure universal jurisdiction takes place when a state asserts jurisdiction (either through an investigation or by seeking extradition) of a suspect who is not present in the state's territory." See International Center for Transitional Justice, *Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes*, December 2020, available at: https://www.ictj.org/sites/default/files/ICTJ_Report_Universal_Jurisdiction.pdf, p. 13.

52 See e.g. S. R. Ratner, "Belgium's War Crimes Statute: A Postmortem", *American Journal of International Law*, Vol. 97, No. 4, 2003, pp. 888–897.

53 Netherlands International Crimes Act, 2003, Section 2, para. 1 (a).

54 See C. Paulussen, *Reactie op het wetsvoorstel permanentmaking bevoegdheid tot intrekking Nederlanderschap in het belang van de nationale veiligheid* (Keten-ID: 10430), 25 January 2021, available at: <https://www.internetconsultatie.nl/intrekkingnederlanderschap/reactie/152199/bestand>, pp. 4–6.

55 See also UN Security Council, "Preamble: 'Concerned that foreign terrorist fighters increase the intensity, duration and intractability of conflicts'", in *Resolution 2178* (2014), S/RES/2178 (2014), 24 September 2014, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2178.pdf, p. 2.

56 See also Council of Europe Parliamentary Assembly, *Withdrawing Nationality as a Measure to Combat Terrorism: a Human-rights Compatible Approach?*, Resolution 2263 (2019), available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25430&lang=en>, para. 8: "The Assembly also notes that the practice of depriving of their nationality persons involved in terrorist activities (including "foreign fighters") or suspected of such involvement may lead to the "exporting of risks", as those persons may move to or remain in terrorist conflict zones outside Europe. Such a practice goes against the principle of international co-operation in combating terrorism, reaffirmed, *inter alia*, in UN Security Council Resolution 2178 (2014), which aims at preventing foreign fighters from leaving their State of residence or nationality, and may expose local populations to violations of international human rights and humanitarian law."

Finally, the already mentioned *Principles on Deprivation of Nationality as a National Security Measure* clarify in Principle 9.3.2 that “[d]eprivation of nationality is likely to constitute cruel, inhuman or degrading treatment or punishment, particularly where it results in statelessness”.⁵⁷ As regards the deprivation itself: the *Draft Commentary to the Principles*, referring to the cases *Maritza Urrutia v. Guatemala* (Inter-American Court of Human Rights)⁵⁸ and *Trop v. Dulles* (United States Supreme Court),⁵⁹ explains that the measure “may cause severe mental suffering, as the identity of the person concerned has been taken away and that person is left in a state of uncertainty.”⁶⁰ In addition to the deprivation itself, measures following citizenship stripping, such as statelessness,⁶¹ could even amount to torture.⁶² As such, citizenship stripping is a violation not only of international human rights law, but also of international humanitarian law, such as common Article 3. This provision was applicable to several Western countries depriving their former citizens of nationality as these countries, such as the Netherlands and the United Kingdom, were “involved in the non-international armed conflicts against the Islamic State group in Iraq and Syria by undertaking airstrikes as part of the international coalition led by the United States.”⁶³

Conclusion

This brief contribution has demonstrated that depriving foreign fighters of their nationality is problematic from a variety of perspectives, not only from an international human rights law point of view (in which context the measure has already been addressed before), but also from the standpoint of the *International Review of the Red Cross*’s main field of focus: international humanitarian law. As just mentioned, the measure in itself – which is likely to constitute cruel, inhuman or degrading treatment or punishment – violates common Article 3. However, also from a more indirect standpoint the measure should not be resorted to: it clearly undermines accountability for international humanitarian law violations already committed and can engender new violations through the non-removal of the suspect from the conflict zone. One of the few positive sides of the connection between the measure and international humanitarian law is that even

57 Institute on Statelessness and Inclusion, above note 16, p. 14.

58 Institute on Statelessness and Inclusion, above note 13, p. 77: “the elements of the concept of torture [...] include methods to obliterate the personality of the victim in order to attain certain objectives, such as intimidation or punishment.”

59 *Ibid.*: “[T]he punishment [of denaturalization is cruel and unusual as it] strips the citizen of his status in the national and international political community. [...] In short, the expatriate has lost the right to have rights.” Here, the Supreme Court is clearly echoing the earlier-mentioned words of Hannah Arendt.

60 *Ibid.*

61 It is recalled that deprivation of nationality may not lead to statelessness; see the earlier reference to the 1961 Convention on the Reduction of Statelessness. However, in practice, this still happens, either *de jure* or *de facto*.

62 Institute on Statelessness and Inclusion, above note 13, p. 77.

63 Geneva Academy, RULAC, *Netherlands*, available at: <https://www.rulac.org/browse/countries/the-netherlands>.

if nationality is deprived, this will not have an effect on, for example, the international humanitarian law obligation to treat that deprived person humanely. In that sense, international humanitarian law provides a welcome—albeit temporary—safety net of decent treatment for people who have become victims of countries' refusal to take responsibility for their own citizens.

Biometric data flows and unintended consequences of counterterrorism

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Abstract

Examining unintended consequences of the makings and processing of biometric data in counterterrorism and humanitarian contexts, this article introduces a two-fold framework through which it analyzes biometric data-makings and flows in Afghanistan and Somalia. It combines Tilley's notion of "living laboratory" and Larkin's notion of infrastructure into a framework that attends to the conditions under which biometric data is made and to subsequent flows of such data through data-sharing agreements or unplanned access. Exploring such unintended consequences, attention needs to be paid to the variety of actors using biometrics for different purposes yet with data flows across such differences. Accordingly, the article introduces the notion of digital intervention infrastructures, with biometric databases as one dimension.

Keywords: biometric data, infrastructure, humanitarian actors, counterterrorism, unintended consequences, living laboratories, data-sharing.

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Digital intervention infrastructures: biometrics in counterterrorism and beyond

Biometric data – uniquely identifying biological characteristics like iris patterns or fingerprints¹ – are collected in several contexts. Particularly in the aftermath of 11 September 2001 (9/11), biometrics came to be viewed as an important counterterrorism technology. Illustrative of the imagined supremacy of biometrics as a counterterrorism technology, a former Central Intelligence Agency (CIA) officer noted, in November 2001, that “the use of biometric technologies might help make America a safer place,” by protecting US citizens from terrorist attacks.² Today, biometrics is still seen as central to counterterrorism. A recent US program, for example, aims to develop systems capable of performing “biometric identification at long-range,” in order to “recognize individuals under challenging scenarios,” including from unmanned aerial vehicles.³ Further illustrative of the imagined centrality of biometrics in US counterterrorism, a 2017 report from the Government Accountability Office (GAO) notes that between 2008 and 2017, U.S. Department of Defense (DoD) used biometrics “to capture or kill 1,700 individuals,”⁴ who would allegedly otherwise represent a threat to US security.⁵

After two decades of counterterrorism biometrics, challenges have surfaced. Scholars have shown how technology-derived “accuracy” in enemy identification is problematic when mistaken for accuracy in political decisions about “who comprise legitimate targets for the use of violent force.”⁶ Challenges related specifically to biometrics have also become visible. Following the withdrawal of coalition forces

- 1 Biometric data are “personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural persons, which allow or confirm the unique identification of that natural person”; see European Union (EU), *General Data Protection Regulation, Regulation (EU) 2016/679*, 27 April 2016, OJ L 119, 4.5.2016, pp. 1–88, Art. 4(14); and EU, *Directive (EU) 2016/680*, 27 April 2016, OJ L 119, 4.5.2016, pp. 89–131, Art. 3(13). See Els Kindt, “A First Attempt at Regulating Biometric Data in the European Union”, in Amba Kak (ed.), *Regulating Biometrics: Global Approaches and Urgent Questions*, AI Now Institute, September 2020, available at: <https://ainowinstitute.org/regulatingbiometrics.html> (all internet references were accessed in December 2021).
- 2 John D. Woodward, “Biometrics: Facing up to Terrorism”, Issue Paper IP-218, RAND Corporation, Santa Monica, CA, October 2001, available at: https://www.rand.org/pubs/issue_papers/IP218.html.
- 3 See the BRIAR Program: Intelligence Advanced Research Projects Activity (IARPA), “Biometric Recognition and Identification at Altitude and Range”, Office of the Director of National Intelligence, IARPA, available at: <https://www.iarpa.gov/research-programs/briar>.
- 4 GAO, “DOD Biometrics and Forensics: Progress Made in Establishing Long-term Deployable Capabilities, But Further Actions are Needed”, Washington, DC, 7 August 2017, available at: <https://www.gao.gov/products/gao-17-580>. See also Nina Toft Djanegara, *Biometrics and Counter-Terrorism. Case Study of Iraq and Afghanistan*, Privacy International, London, May 2021, available at: <https://privacyinternational.org/sites/default/files/2021-06/Biometrics%20for%20Counter-Terrorism-%20Case%20study%20of%20the%20U.S.%20military%20in%20Iraq%20and%20Afghanistan%20-%20Nina%20Toft%20Djanegara%20-%20v6.pdf>.
- 5 For a critical assessment of how the collection of biometrics data has “been touted as uniquely suited to twenty-first century threats,” see, for example, the detailed reports published by Privacy International, “Biometrics Collection Under The Pretext Of Counter-Terrorism”, 28 May 2021.
- 6 Lucy Suchman, Karolina Follis and Weber, “Tracking and Targeting: Sociotechnologies of (In)security,” *Science, Technology & Human Values*, Vol. 42, No. 6, 2017. See also Christine Agius, “Ordering Without

from Afghanistan in August 2021, the Taliban gained access to biometric devices left by US forces, giving them access to biometric data through which persons registered by coalition forces in relation to training, salary payments or other collaboration could be identified. In this case, biometric infrastructures—as will be explained in this article—came with new forms of insecurity, thus challenging imaginaries of biometrics as straightforwardly delivering superior security. While this example is unique in many ways, additional examples appear if we consider the use of biometrics in other contexts and by other actors, including not only military but also humanitarian.

Exploring the use of biometrics in two different intervention contexts—Afghanistan and Somalia—diverse challenges and cross-cutting dynamics, logics and effects come into view. Whether resulting from biometrics falling into enemy hands, from biometrics being shared deliberately, or from real-world testing of unproven biometric modalities, both contexts illustrate how the use of biometrics may generate new risks and insecurity. Both contexts also illustrate how isolated analyses of either military or humanitarian biometrics risk overlooking the issue of data flows. In Afghanistan, not only soldiers but also humanitarian actors produced large amounts of biometric data. Also, in some contexts, data-sharing agreements enable biometric data flows between humanitarian actors and State security actors. Starting our enquiry from a perspective that attends to flows, the analysis explores different ways in which non-military biometric data flows might—intentionally or unintentionally—interrelate with counterterrorism infrastructures, e.g. at the level of data-sharing agreements (such as that between the United Nations High Commissioner for Refugees (UNHCR) and the U.S. Department of Homeland Security (DHS)).

Further, in many contexts, different actors test biometrics in ways that generate “success stories” which in turn feed into imaginaries of the accuracy and centrality of biometric data gathering and sharing. If viewed in isolation, we fail to appreciate how military and non-military actors contribute in different ways to an emerging digital intervention infrastructure. This article will more specifically focus on biometric infrastructures—as part of digital intervention infrastructures—as referring to the makings and flows of biometric data that make up an infrastructure of databases used and produced by different intervention actors, for different purposes, though sometimes with flows that enable the same data to be used across such differences. These biometric databases constitute an often-overlooked dimension of contemporary intervention infrastructures, an “infrastructure collecting, archiving and identifying digital biometrics.”⁷

Bordering: Drones, The Unbordering of Late Modern Warfare and Ontological Insecurity”, *Postcolonial Studies*, Vol. 20, No. 6, 2017.

- 7 Following Jasanoff’s definition, sociotechnical imaginaries are “collectively held and performed visions of desirable futures” that are “animated by shared understandings of forms of social life and social order attainable through, and supportive of, advances in science and technology.” See Sheila Jasanoff, “Future Imperfection: Science, Technology, and the Imaginations of Modernity”, in Sheila Jasanoff and Sang-Hyun Kim, *Dreamscapes of Modernity: Sociotechnical Imaginaries and the Fabrication of Power*, The

Following Brian Larkin, this article understands infrastructures as platforms that carry “not just water or cars”—in our case biometric data—but also desires, dreams or imaginaries⁸—in our case success stories or fear. But how and under what conditions are biometric infrastructures produced in the first place? To appreciate this, the article combines Larkin’s notion of infrastructure with Helen Tilley’s notion of “living laboratory” to foreground the real-world trialing of biometrics by different actors in various intervention contexts. During such trials, biometric data is produced, and so are “success stories” that potentially animate imaginaries of the presumed value to various intervention actors of biometric data (bases), thus potentially propelling quests for expanded biometric data-making and -sharing. By combining these notions of infrastructure and laboratory, the article asks under what conditions biometric intervention infrastructures are produced, and what flows they are comprised of and enable, including both biometric data flows (intentional or not) and the more invisible flows of success stories or fear.

After this introduction, the concepts of infrastructure and living laboratory are explained. Next follows an analysis of the makings and flows of biometric data, in Afghanistan and Somalia. The article concludes with a set of reflections on the broader relevance of these two cases and on the significance of exploring the making of digital intervention infrastructures—specifically, biometric databases—in a manner that attends to power relations and inequalities, including during (varyingly experimental) practices of data-making.⁹

Methodological reflections

Diverse sources were used to explore these biometric intervention infrastructures. Eleven semi-structured interviews were conducted with individuals from the International Committee of the Red Cross (ICRC), Food and Agricultural Organization (FAO), United Nations Office for Project Services (UNOPS), UNHCR and the World Food Programme (WFP), all of whom had experience with the use of biometrics in Somalia, Afghanistan or humanitarian programs more broadly. Interviewees include staff at different levels and in different locations. Given the sensitive nature of data-sharing questions and other aspects, interviews were made under conditions of anonymity. In addition, news stories, industry websites, expert reports and official documents were examined for

University of Chicago Press, Chicago and London, 2015, p. 25. On biometric data-sharing in the context of counterterrorism, see, for example, Privacy International, *Briefing to the UN Counter-Terrorism Executive Directorate on the Responsible Use and Sharing of Biometric Data to Tackle Terrorism*, London, June 2019, available at: <https://privacyinternational.org/sites/default/files/2019-07/PI%20briefing%20on%20biometrics%20final.pdf>.

- 8 Brian Larkin, “The Politics and Poetics of Infrastructure”, *Annual Review of Anthropology*, Vol. 42, No. 1, October 2013. See also Jana Hönke and Ivan Cuesta-Fernandez, “Mobilising Security and Logistics Through an African Port: A Controversies Approach to Infrastructure”, *Mobilities*, Vol. 13, No. 2, January 2018.
- 9 Rocco Bellanova, Kristina Irion, Katja Lindskov Jacobsen, Francesco Ragazzi, Rune Saugmann and Lucy Suchman, “Toward a Critique of Algorithmic Violence”, *International Politics Sociology*, Vol. 15, No. 1, March 2021.

accounts of how biometric data is made and may subsequently flow. Sources cover the period from early uses in the aftermath of 9/11, to current examples from Afghanistan, recent data protection policies and data-sharing agreements. Neither Afghanistan nor Somalia are in-depth case studies. Rather, the article draws on examples from both contexts to illustrate trends of broader relevance, for example regarding how biometric data flows may generate insecurity.

Little information is available, and secrecy surrounds not just counterterrorism biometrics but also data-sharing agreements between donors and humanitarian agencies. In cases where the content of data-sharing agreements is not known, it is impossible to determine whether and what type of biometric data might be exchanged, which may not always be the case. For example, in Jordan biometric data is not shared with the UNHCR, whereas in the case of the U.S. DHS, such data is being shared.¹⁰ It is certainly difficult, and not the aim here, to irrefutably prove direct links between non-military biometric data and counterterrorism uses of such data. Yet, simply disregarding the possible place of non-military biometrics in ongoing counterterrorism efforts risks contributing to the continued invisibility of such potential interconnections and the risks and insecurities that may result. Adding to the invisibility relating to biometric data flows, is of course also the invisibility of many of the people who suffer harm from the unintended consequences of such biometric data flows and from other unintended consequences of contemporary uses of biometrics in various intervention contexts.¹¹ Importantly, in addition to unpacking biometric data-makings and flows, it is crucial to unpack and remedy this type of invisibility, as some have indeed begun to do.¹²

Analytical framework: infrastructures and living laboratories

Infrastructural makings and flows: data and dreams

In exploring biometrics as part of broader digital intervention infrastructures, the analysis operationalizes two elements of Larkin's notion of infrastructure. First is

¹⁰ Anonymous interview, November 2021.

¹¹ Keren Weitzberg, *Biometrics and Counter-Terrorism: Case Study of Somalia*, Report, Privacy International, 28 May 2021; Karen Fog Olwig, Kristina Grønenberg, Perle Møhl and Anja Simonsen, *The Biometric Border World: Technology, Bodies and Identities on the Move*, 1st ed., Routledge, Oxon and New York, 2020; Katja Lindskov Jacobsen and Larissa Fast, "Rethinking Access: How Humanitarian Technology Governance Blurs Control and Care", *Disasters*, Vol. 43, No. 2, 2019; Mirca Madianou, "The Biometric Assemblage: Surveillance, Experimentation, Profit, and the Measuring of Refugee Bodies", *Television & New Media*, Vol. 20, No. 6, 2021.

¹² Gus Hosein and Carly Nyst, *Aiding Surveillance: An Exploration of How Development and Humanitarian Aid Initiatives are Enabling Surveillance in Developing Countries*, Report, Privacy International, 2013; Human Rights Watch, "UN Shared Rohingya Data Without Informed Consent", 15 June 2021, available at: <https://international-review.icrc.org/sites/default/files/reviews-pdf/2021-08/2021-guidelines-for-authors-irrc.pdf>; Adam Moe Fejerskov, Maria-Louise Clausen and Sarah Seddig, *Risks of Technology Use in Humanitarian Settings. Avoiding Harm, Delivering Impact*, Policy Brief, Danish Institute for International Studies, 17 August 2021; Elise Thomas, "Tagged, Tracked and in Danger: How the Rohingya Got Caught in the UN's Risky Biometric Database", *WIRED*, 12 March 2018, available at: <https://www.wired.co.uk/article/united-nations-refugees-biometric-database-rohingya-myanmar-bangladesh>.

Larkin's focus on flows. A crucial element of Larkin's approach is his definition of infrastructure as "socio-technical platforms for mobility," not simply mobility of people but more broadly of material and immaterial flows like cars and dreams, data and rumours, for example. Indeed, Larkin's approach invites us to study infrastructures with attention to their functions in terms of flows. Infrastructure, understood in this way, is not only to be studied with attention to processes that go into the makings – e.g. of biometric databases – but also with attention to flows enabled by these infrastructures. Second, is Larkin's emphasis on immaterial elements like imaginaries and desires. As Larkin writes, infrastructures "emerge out of and store within them forms of desire."¹³ In our analysis, this for example translates into a focus on success stories as something, which dreams are made of, and thus as a type of "flow" which feeds into and animates broader biometrics accuracy imaginaries.

Accordingly, this article suggests a two-fold approach, attending to makings and flows of both biometric data and biometric success stories. Attending to flows encourages us to explore – rather than assume – how the emergence of biometric infrastructures affects relations between actors, e.g. by following how biometric data produced by one type of actor may flow into the realm of a very different type of actor. From this perspective, the article calls attention to various flows: between different humanitarian databases (with Somalia as the laboratory for interoperability¹⁴), between humanitarian and corporate actors, between humanitarian and counterterrorism actors, or unintended flows between coalition and "enemy" forces.

Living laboratory

Bringing Tilley's notion of "living laboratory" into the analysis of infrastructures enables us to pose questions that precede the focus on data flows, questions about the conditions under which biometric data was produced in the first place.¹⁵ "Living laboratory" foregrounds the varyingly experimental character of many biometric uses through which data has been made. It also foregrounds the

13 B. Larkin, above note 8. As opposed to a narrower focus on material dimensions only (roads, pipes, cables, etc.), Larkin suggests with his attention to dreams and imaginaries, that immaterial components are also important. In our case, success stories and imaginaries, that biometric infrastructures produce and carry, for example affect the future rollout (or not) of biometric databases.

14 "The SCC [Somalia Cash Consortium] piloted biometric interoperability with WFP's SCOPE in 2018"; see Boniface Owino, *Harmonizing Registrations and Identification in Emergencies in Somalia*, Development Initiatives, Nairobi, 29 August 2019, available at: https://devinit.org/documents/67/Report_Harmonising-registrations-and-identification-in-emergencies-in-Somalia.pdf.

15 Regarding the conditions under which biometric data is produced, several contexts deserve attention. Scholars have for example explored how force is experienced by Somali individuals in their encounters with biometrics in European asylum systems beyond Somalia: "Forced to have his fingerprints registered, Mukhtaar experienced first-hand what European humanitarian care could entail for asylum-seekers"; see Anja Simonsen, "Fleeting (Biometric) Encounters: Care and Control at Italian Border Sites", in Karen Fog Olwig, Kristina Grönborg, Perle Möhl and Anja Simonsen (eds), *The Biometric Border World: Technology, Bodies and Identities on the Move*, 1st ed., Routledge, Oxon and New York, 2019, p. 135.

significance of attending to wider implications of more or less explicitly experimental technology uses and underlying rationales, like the risk of implicitly making certain locations into temporary laboratories considering the seeming acceptance of biometric technology testing in various intervention contexts.¹⁶ Importantly, “living laboratories” are not spaces or conditions that simply exist in that capacity. Rather, Tilley invites us to explore how such spaces are created by external actors via particular assumptions and analogies that in turn legitimize specific practices.¹⁷ While Tilley developed her analysis with reference to colonial Africa, living laboratory foregrounds dynamics of relevance to contemporary biometric experiments. Tilley for example notes that, when shifting to settings in Africa, this often meant that informed consent was then “rarely an explicit concern”—a silencing, which contributed to making Africa a seemingly appealing “living laboratory.”¹⁸ The issue of consent—often the absence of genuine consent—and arguably of the subsequent international legal obligation is an important consideration in relation to the making of biometric data in contemporary intervention contexts.¹⁹ Thus, Tilley’s analysis highlights the importance of adding questions about the makings of laboratory conditions to our analysis of biometric data flows. As such, “living laboratory” becomes an analytical lens through which to explore questions about various tensions and misfortunes of temporary real-world laboratories.

Combining the two, Tilley invites important considerations, including questions that precede the Larkin-inspired focus on flows of biometric data and immaterial components like success stories or fear: prior to exploring such flows, we should ask how biometric data is made in the first place, by whom and under what conditions? Thus, combining Tilley and Larkin, a two-fold analytical framework is developed. Accordingly, the subsequent analysis first attends to questions about “data-makings” (before data flows) by asking (a) by whom and (b) under what conditions, and second, explores the issue of “data flows,” with attention to both (a) intended and (b) unintended biometric data flows.

16 Tilley focuses on colonial Africa and how global power inequalities are (re)made in non-Western laboratories. She unpacks the entanglements of “fact-gathering” (p. 8) research and colonial-time “intelligence” (p. 4) to show how scientific endeavours were linked to broader colonial aims: Helen Tilley, *Africa as a Living Laboratory: Empire, Development, and the Problem of Scientific Knowledge, 1870–1950*, The University of Chicago Press, Chicago and London, 2011.

17 H. Tilley, above note 16, p. 2.

18 *Ibid.*, pp. 1–2.

19 See, for example, Naomi Cohen, “‘Do No Digital Harm’: A Conversation on Handling Sensitive Data”, October 2018, *The New Humanitarian*, where panelists discuss this issue of consent noting for example how: (a) “We deal with people that sometimes have a very low level of education or data literacy. How can we pass all these messages about new technology or even more basic messages? And from a data protection point of view, it is, how can we say that consent is informed and valid?” (panelist Maria-Elena Ciccolini); and (b) “The humanitarian space is probably home to what must be the biggest power asymmetry between the people who are gathering the data versus the people from whom the data is being gathered ... I think the way in which we see the power asymmetry playing out is in ownership of the data.” (panelist Zara Rahman)

Afghanistan and Somalia: analyzing biometric data-makings and data flows

Data-makings: (a) by whom

Afghanistan

Several sources indicate that by November 2019, the US military had gathered biometric data from “7.4 million identities,” including several terror suspects.²⁰ During the first half of 2019, this data helped identify persons on the battlefield “thousands of times.”²¹ Indicative of the focus on biometric data collection, a US military document on *Employment of Biometrics in Support of Operations* has a section on “collectors,” which notes that: “Almost every operation provides the opportunity to collect biometrics.”²² Specifically in Afghanistan, already by 2011, biometric data of “about more than 1.5 million Afghans” had been collected and stored in “databases operated by American, NATO [North Atlantic Treaty Organization] and local forces.”²³ Considering the composition of this data, it becomes evident that this biometric data collection effort has a specific focus, namely on “males of fighting age, ages 15 to 64,” of which “roughly one of every six” had been registered biometrically in this database.²⁴ But how was biometric data produced in the first place? Who was collecting it and how? Given the connection to intelligence gathering, it should be noted that such biometric data collection constitutes only a small part of the data-gathering practices of a much larger US intelligence infrastructure.²⁵ That of course applies to humanitarian actors too as they collect large amounts of data, with digital biometric data being just one type of data – but a particularly sensitive one given for example that one cannot easily get a new iris pattern, voice or fingerprint, combined with the ease

20 Observers note that the DoD’s goal was to register 80% of the Afghan population: see Annie Jacobsen, *First Platoon A Story of Modern War in the Age of Identity Dominance*, Penguin, Dutton, 2021. Others note that the DoD “stores biometric data on more than seven million people, mostly from war zones”; see Matthias Monroy, “NATO Establishes Biometric Database, US Military has it Already”, *Matthias Monroy*, 8 November 2019, available at: <https://digit.site36.net/2019/11/08/nato-establishes-biometric-database-us-military-has-it-already/>; Thales, “Automated Fingerprint Identification System (AFIS) Overview – A Short History”, *Thales*, 18 June 2021, available at: <https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/biometrics/afis-history>; Delores M. Etter, Jennifer Webb and John Howard, “Collecting Large Biometric Datasets: A Case Study in Applying Software Best Practices”, *CrossTalk*, May/June 2014, available at: <http://jjhoward.org/pubs/collecting-large-biometric-datasets.pdf>. It remains unknown to what extent the DoD reached its 80% goal.

21 Dave Gershgorin, “Exclusive: This is How the U.S. Military’s Massive Facial Recognition System Works”, *OneZero Medium*, 6 November 2019, available at: <https://onezero.medium.com/exclusive-this-is-how-the-u-s-militarys-massive-facial-recognition-system-works-bb764291b96d>.

22 Army, Marine Corps, Navy and Air Force, “Biometrics: Multi-Service Tactics, Techniques, and Procedures for Tactical Employment of Biometrics in Support of Operations”, Air Land Sea Application (ALSA), April 2014, p. 7, available at: <https://www.marines.mil/Portals/1/MCRP%203-33.1J%20BIOMETRICS%201.pdf>.

23 Thom Shanker, “To Track Militants, U.S. has System that Never Forgets a Face”, *New York Times*, 13 July 2011, available at: <https://www.nytimes.com/2011/07/14/world/asia/14identity.html>.

24 *Ibid.*

25 Thanks to an anonymous reviewer for highlighting this important point.

with which large amounts of digital biometric data can be shared, which is not the case for paper files.

As alluded to above, US soldiers in Afghanistan have been collecting “fingerprints and iris patterns” from several individuals encountered in the field, assuming this would allow the US military to accurately “identify enemy combatants,”²⁶ for example by matching fingerprints of individuals in the field against templates stored in biometric databases including “watch lists of known or suspected terrorists.”²⁷ Besides field encounters, “soldiers and police officers” have also collected biometrics (notably fingerprint and iris scans) from detainees, or from “local residents who apply for a government job, in particular those with the security forces and the police and at American installations.”²⁸ At a more subtle level, biometrics have been collected by lifting off fingerprints “from a defused bomb or from remnants after a blast.” Such fingerprint data was then subsequently used when checking the fingerprints of individuals encountered in the field or persons applying for jobs. According to General Petraeus, this practice was “very helpful in identifying who was responsible for a particular device in a particular attack, enabling subsequent targeting.”²⁹ Biometrics was also used to control who was given access to US military bases.

Not only US soldiers but also various groups of Afghan officials have been collecting biometric data. At the Sarposa Prison in southern Afghanistan, for example, Afghan officials (using technology provided by the US) collected iris scans and fingerprints from militants and detainees.³⁰ Represented as displaying the usefulness of this data, the database was for example used to identify some of the 475 inmates who escaped this prison following an incident where the Taliban dug a tunnel system “right into the prison’s political section where hundreds of Taliban were held.”³¹ Now, according to various sources, biometric data was important in identifying these individuals and getting them back into the prison: “Within days of the breakout, about 35 escapees were recaptured at internal checkpoints and border crossings; they were returned to prison after their identities were confirmed by biometric files.”³² Various other Afghan officials

26 United States Government Accountability Office, “Defense Biometrics: Additional Training for Leaders and More Timely Transmission of Data Could Enhance the Use of Biometrics in Afghanistan”, GAO Report Number GAO-12-442, 23 April 2012, available at: <https://www.gao.gov/assets/600/590318.txt>; see also Noah Schactman, “Army Reveals Afghan Biometric ID Plan; Millions Scanned, Carded by May”, *WIRED*, 24 September 2010, available at: <https://www.wired.com/2010/09/afghan-biometric-drag-net-could-snap-millions/>.

27 U.S. DHS, “Enhancing Security Through Biometric Identification”, available at: https://www.dhs.gov/xlibrary/assets/usvisit/usvisit_edu_biometrics_brochure_english.pdf.

28 T. Shanker, above note 23.

29 *Ibid.*

30 Spencer Ackerman, “Biometrics Help Nab Afghan Prison Escapees”, *WIRED*, 14 July 2011, available at: <https://www.wired.com/2011/07/biometrics-help-nab-afghan-prison-escapees/>; T’ash Spenser, “Afghanistan Using Biometrics on Wide Scale for Security”, *BiometricUpdate*, 9 July 2012, available at: <https://www.biometricupdate.com/201207/afghanistan-using-biometrics-on-wide-scale-for-security>.

31 Jon Boone, “Afghanistan’s Great Escape: How 480 Taliban Prisoners Broke out of Jail”, *The Guardian*, 25 April 2011, available at: <https://www.theguardian.com/world/2011/apr/25/afghanistan-great-escape-taliban>.

32 T. Shanker, above note 23.

also collected biometric data. Indeed, two main biometric projects were active in Afghanistan: one focusing on collecting biometrics from detainees “and what NATO calls ‘other persons of interest,’”³³ another focused on collecting biometrics from army and police applicants. Developed by the U.S. DHS and NATO, the “Afghan Automated Biometric Identification System” (AABIS)³⁴ was “administered by about 50 Afghans at the Ministry of Interior in Kabul,”³⁵ who collected “biometric data from army and police applicants,”³⁶ in order to “keep Taliban infiltrators out of the Afghan army.”³⁷ Also focusing on army and police staff, the Afghan Personnel and Pay System (APPS), which was used by the Afghan Ministry of the Interior and the Ministry of Defense to pay the national army and police, also had a biometric component.³⁸

Biometric data was also collected by various other actors. For example, Afghanistan’s National Statistics and Information Authority collected fingerprints and iris scans when implementing the “e-Tazkira” ID-card system³⁹ with support from the World Bank.⁴⁰ The Independent Election Commission implemented biometrics in “an attempt to prevent voter fraud during the 2019 parliamentary elections.”⁴¹ Other actors also collected biometrics. In a 2019 report, the WFP notes that since initiating its biometric SCOPE system in Afghanistan, “more than 2.5 million beneficiaries have been registered.”⁴² Even earlier, the UNHCR started collecting biometrics from beneficiaries. In 2002, the UNHCR introduced mandatory iris recognition for millions of Afghans whom the refugee agency assisted in repatriating to Afghanistan from refugee camps in neighbouring

33 Steve Gold, “Military Biometrics on the Frontline”, *Biometric Technology Today*, Vol. 2010, No. 10, 2010.

34 According to NATO, the aim of AABIS is “to monitor movements of militants around Afghanistan, as well as keep Taliban infiltrators out of the Afghan army” (*ibid.*). “[T]he data captured in the field is collated and used in real time and in the field then batch processed and relayed to Kabul where it is stored centrally and replicated to other databases across Afghanistan and back in the U.S.” (*ibid.*).

35 The database is maintained at the Ministry of the Interior; see Afghan War News, “Afghan Automated Biometrics Information System (AABIS)”, available at: <https://afghanwarnews.info/intelligence/aabis.htm>.

36 Federal Bureau of Investigation (FBI), “Mission Afghanistan: Biometrics. A Measure of Progress”, 29 April 2011, available at: <https://www.fbi.gov/news/stories/mission-afghanistan-biometrics>.

37 S. Gold, above note 33.

38 Eileen Guo and Hikmat Noori, “This is the Real Story of the Afghan Biometric Databases Abandoned to the Taliban”, *MIT Technology Review*, 30 August 2021, available at: <https://www.technologyreview.com/2021/08/30/1033941/afghanistan-biometric-databases-us-military-40-data-points/>. Critics have argued that this biometric system was, however, not very successful: Zack Kopplin, “Afghanistan Collapsed Because Corruption had Hollowed Out the State”, *The Guardian*, 30 August 2021, available at: <https://www.theguardian.com/commentisfree/2021/aug/30/afghanistan-us-corruption-taliban>.

39 “Even the national digital ID, the tazkira, championed by the World Bank since 2018 and required to access public services and jobs and to vote, can expose vulnerable ethnic groups”; see Rina Chandran, “Analysis – Afghan Panic Over Digital Footprints Spurs Call for Data Collection Rethink”, *Reuters*, 20 August 2021, available at: <https://www.reuters.com/article/afghanistan-conflict-tech-idUSL5N2OI06Y>.

40 Frank Hersey, “25K Afghan Biometric Passports Ready to be Issued, 100K More to Follow”, *BiometricUpdate*, 7 October 2021, available at: <https://www.biometricupdate.com/202110/25k-afghan-biometric-passports-ready-to-be-issued-100k-more-to-follow>.

41 E. Guo and H. Noori, above note 38.

42 WFP, “Afghanistan Annual Country Report 2019. Country Strategic Plan 2018–2022”, July 2020, p. 19, available at: <https://docs.wfp.org/api/documents/WFP-0000113807/download/>.

Pakistan. Upon returning to Afghanistan, each returnee had to undergo iris registration with the UNHCR.⁴³

Though this list of actors who gather biometrics from various segments of the Afghan population is already long, it is not, however, an exhaustive list. Rather, the point is to illustrate the plethora of actors that for different purposes collect and store biometric data from Afghan individuals—whether from subjects that US soldiers suspect of being terrorists, or subjects who collaborate with US forces, whether in prison, or former UNHCR-registered refugees. Whilst these actors are indeed very different—sometimes opposed—what they share is a strong faith in biometrics as a tool to more effectively achieve diverse aims. But how does the collection and storing of biometric data potentially link these diverse actors in different ways? What happens when biometric data “travels” from one actor (with one purpose) to a different actor (and purpose)? When may such flows occur in contravention of data protection principles? What do biometric data exchanges or flows mean for the underlying contrasting security priorities—which one is eventually prioritized? How does biometric data collected by humanitarian actors flow once collected? Such questions were relevant even twenty years ago as the UNHCR was conducting biometric registration in the Afghan–Pakistan borderlands, which, for the UNHCR was a repatriation location, but for others, like the US military, a location of intense counterterrorism efforts with biometric identification as one of its central components. These are some of the questions that we return to later, after having explored another characteristic of these biometric data-makings, which is shared across various data-making actors: degrees of experimentation.

Somalia

In Somalia, US drone strikes intensified in 2019⁴⁴ and the US military remains focused on preventing “the use of Somalia as a safe haven for international terrorism.”⁴⁵ Yet, in contrast to Afghanistan, Somalia is a counterterrorism location with few—at times no—US ground troops.⁴⁶ Appreciating this,

43 The UNHCR sub-contracted the Pakistan National Database & Registration Authority (NADRA) to register the refugees, which means that the data was with the Pakistani Government and shared with the UNHCR. This is standard procedure until today. See UNHCR, “Government Delivered First New Proof of Registration Smartcards to Afghan Refugees”, *UNHCR*, 25 May 2021, available at: <https://www.unhcr.org/pk/12999-government-to-deliver-first-new-por-smartcards-to-afghan-refugees.html>.

44 Kim Helfrich, “Top Islamic State Official Dies in Airstrike”, *defenceWeb*, 15 April 2019, available at: <https://www.defenceweb.co.za/security/national-security/top-islamic-state-official-dies-in-airstrike/>.

45 Karl Wiest, “Commander of United States Africa Command Visits Somalia”, *United States Africa Command*, 27 November 2018, available at: <https://www.africom.mil/article/31366/commander-of-united-states-africa-command-visits-somalia>.

46 In 2017, US troops returned to Somalia for the first time since 1993, where eighteen US Special Forces died in a combat encounter. US troops were recently withdrawn, but US military engagements in Somalia continue by other means including drone strikes; see The Bureau of Investigative Journalism, “Drone Strikes in Somalia”, *The Bureau of Investigative Journalism*, available at: <https://www.thebureauinvestigates.com/projects/drone-war/somalia>; Amnesty International, “Somalia: US Must Not Abandon Civilian Victims of its Air Strikes After Troop Withdrawal”, *Amnesty International*,

important questions emerge concerning our analysis of biometrics in US counterterrorism interventions. Without soldiers on the ground in Somalia, how and by whom is biometric data then collected? Is biometrics even a significant component of US counterterrorism efforts in Somalia? Indeed, and again in contrast to Afghanistan, little information is available on how and to what extent the US military uses biometrics in Somalia. Yet, few accounts indicate that biometrics do play a role. For example, the practice of lifting off fingerprints from improvised explosive devices does not seem unique to Afghanistan. In May 2010, biometrics-enabled intelligence indicated: “a suspected member of a *Somali* Al Qaeda terrorist organization was trying to enter the US from Mexico.”⁴⁷ Border control agents apprehended a person whose fingerprints flagged him as being “of extreme interest to the U.S. government,”⁴⁸ given that his “live” fingerprints, presented to scanners at this border crossing, “matched those of a suspected Al Qaeda bomb-maker that had been lifted during an improvised explosives device investigation and entered into BEWL [DoD’s Biometric-Enabled Watchlist].”⁴⁹ Thus, even with no or very few US soldiers in Somalia, biometric data from members of Somalia-based Al Qaeda were still collected and stored in US databases. Examples like this indicate that biometrics may not be altogether unimportant to US targeting of terror suspects in/from Somalia.

Concerning US military actors, little information exists about their potential use of biometrics in Somalia. Yet, concerning Al Shabaab, a former US Navy SEAL noted, in 2017, “once militants are off the battlefield and in custody, program stakeholders collect defectors’ biometric data.”⁵⁰ It has also been noted how US military contractors biometrically register recruits.⁵¹ Such accounts tentatively suggest that military actors and contractors produce biometrics from individuals in Somalia. Yet, as for the case of Afghanistan, looking only at biometrics collected for military purposes neglects the diversity of actors who for different purposes produce biometric data. Somalia, for example, hosts numerous humanitarian and development agencies who gather biometrics from various beneficiaries. Indicative of the extent of biometric data-making in Somalia, the WFP conducted a European Union (EU)-funded study to map “Somalia Databases,” including biometric databases.⁵² Thus, not only do military actors

7 December 2020, available at: <https://www.amnesty.org/en/latest/news/2020/12/somalia-us-must-not-abandon-civilian-victims-of-its-air-strikes-after-troop-withdrawal/>.

47 Anthony Kimery, “Biometrics Play Significant Role in New US Army Intelligence Doctrine”, *BiometricUpdate*, 22 September 2018, available at: <https://www.biometricupdate.com/201809/biometrics-play-significant-role-in-new-us-army-intelligence-doctrine>.

48 *Ibid.*

49 *Ibid.*

50 Home Office, “Country Policy and Information Note. Somalia: Al Shabaab”, UK Home Office, November 2020, p. 35, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933800/Somalia_-_Al_Shabaab_-_CPIN_-_V3.0e.pdf.

51 Kyle Rempfer, “US Troops, Non-Profit Trainers and a ‘Lightning Brigade’ Battle for Somalia”, *Military Times*, 21 May 2019, available at: <https://www.militarytimes.com/news/your-army/2019/05/21/us-troops-nonprofit-trainers-and-a-lightning-brigade-battle-for-somalia/>.

52 WFP Somalia, “Somalia Databases and Beneficiary Registries for Cash Transfer Programming”, *World Food Programme*, October 2018, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/>

collect biometrics (in little-known ways), various humanitarian actors also produce (“ideally interoperable” – see below) databases with biometrics from different parts of the Somali population. The UNHCR collects and stores biometrics from Somali refugees that they assist. By 2018, the WFP had conducted biometric registration of 1.6 million Somali beneficiaries.⁵³

Other UN agencies also collect and store biometric data. The UN FAO runs “a biometrics-based fishermen database system in Puntland.”⁵⁴ The UNOPS has biometrically registered frontline soldiers of Somalia’s National Army. Interestingly, some UN agencies use contractors for the making of biometric data(bases) – notably to register populations in areas of Somalia that are difficult to access. As an interviewee noted, those carrying out biometric registration for a UNOPS program were contractors. This enabled them to bypass strict UN security regulations. In this sense, the making of biometric data simultaneously generated an implicit “risk-outsourcing.” Besides contractors, the making of non-military biometric databases also involved local Somali staff: “we were training Somalis to use the [biometric] equipment since in some locations it was too dangerous for UN staff to do the registration ourselves.”⁵⁵ Moreover, the African Union Mission to Somalia (AMISOM) has trained the Somali Police Force in biometric registration. The International Organization for Migration (IOM) has installed biometric scanners to collect fingerprints at eight border crossings in Somalia.⁵⁶ And in addition to – sometimes in collaboration with – various UN projects, researchers have produced biometric data, for example, whilst testing new biometric voter registration tools during the 2017 election in Somaliland. These examples are not an exhaustive list, but are meant to illustrate the breadth of military and non-military actors engaged in making databases with biometrics from individuals of Somali origin, including fishermen, border-crossers, refugees and frontline soldiers.

1555331373.Somalia%20Databases%20and%20Beneficiary%20Registries%20for%20Cash%20Transfer%20Programming.pdf.

53 More recent data is not easy to get. Even interview persons working on biometrics with the WFP did not have updated numbers ready to hand.

54 FAO of the UN, “Biometrics Information Transfer System”, *Food and Agriculture Organization of the United Nations*, available at: <https://www.itu.int/net4/wsis/archive/stocktaking/Project/Details?projectId=1386768611>. A UN Security Council Resolution (UNSCR) describes this “biometrics-based fishermen database system in Puntland” as one of many counter-piracy initiatives, alongside “support Kenyan prisons.” See UNSCR, Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia, UN Doc. S/2013/623, 21 October 2013, p. 8. Adding to this is INTERPOL’s database of Somali piracy suspects.

55 Anonymous interview, December 2019.

56 The IOM has deployed MIDAS “IOM Upgrades Biometric Fingerprint Scanners to Enhance Somalia’s Border Management”, *Reliefweb*, 6 June 2018, available at: <https://reliefweb.int/report/somalia/iom-upgrades-biometric-fingerprint-scanners-enhance-somalia-s-border-management>, which was developed for the Sahel. It has also supported for years the government in the issuance of ID cards; see Canada: Immigration and Refugee Board of Canada, “Somalia: Identification Documents, Including National Identity Cards, Passports, Driver’s Licenses, and Any Other Document Required to Access Government Services; Information on the Issuing Agencies and the Requirements to Obtain Documents (2013–July 2015)”, SOM105248.E, 17 March 2016, available at: <https://www.refworld.org/docid/571f16dc4.html>; FindBiometrics, “US-Backed NGO Project Enhances Biometric Border Screening in Mogadishu”, *FindBiometrics*, 13 June 2018, available at: <https://findbiometrics.com/us-backed-ngo-project-enhances-biometric-border-screening-mogadishu-506133/>.

Data-makings: (b) under what conditions

Afghanistan

The first real-world “laboratory” in which the US military was testing counterterrorism biometrics was in Iraq. Specifically, the idea of “expanding biometrics for wholesale application on the battlefield was first tested in 2004 by Marine Corps units in Falluja.”⁵⁷ Prior to that smaller trials had taken place, like testing biometric prototypes “in Iraqi detention centers in 2003.”⁵⁸ While Iraq is not the focus of this article, it is important since “success stories” coming out of these biometric trials circulated beyond Iraq in ways that affected the use of counterterrorism biometrics in Afghanistan. As General Petraeus noted: “based on our experience in Iraq, I pushed this hard here in Afghanistan, too.”⁵⁹ Though field tested before, various accounts suggest that also in Afghanistan, the use of biometrics was in some sense experimental, testing, for example, how biometric devices developed elsewhere would perform when used in the rough conditions of Afghanistan. It was, for instance, discovered that: “The hand-held [biometric] devices fail in the awesome heat of the Afghan summer.”⁶⁰ Another dimension being tested was interoperability: “military officials acknowledge that the new systems fielded by American, coalition and Afghan units do not all speak to one another.”⁶¹

Experimental dimensions underwriting these trials of biometric prototypes, application scale and other unproven aspects like interoperability were not exclusively conditions that characterized specific uses of biometrics by the US military. The World Bank, for example, provided “technical support to the [Afghan] Government on MSP [mobile salary payments] pilots”⁶² where “biometric and biographic information of MoE employees receiving salary payments” was being registered.⁶³ Further, the UNHCR was testing biometrics.⁶⁴ In 2002, the UNHCR initiated a “first-of-its-kind UNHCR biometrics program

57 Regarding this “trial”: “The insurgent safe haven was walled off, and only those who submitted to biometrics were allowed in and out”; see T. Shanker, above note 23.

58 N. Toft Djanegara, above note 4, p. 6.

59 T. Shanker, above note 23.

60 *Ibid.*

61 *Ibid.* Further, it was observed that “the US military has made some mistakes with its biometrics technology, such as in Iraq, where soldiers collated a vast amount of data on civilians they encountered, but then discovered that one data-base does not work with another”: S. Gold, above note 33.

62 Concerning this pilot, the World Bank notes: “The existing legal and regulatory framework would need to be strengthened to fill existing gaps in terms of data privacy and consumer protection.” The World Bank, “Combined Project Information Documents/Integrated Safeguards Datasheet (PID/ISDS)”, The World Bank, 18 February 2019, p. 8, available at: <https://documents1.worldbank.org/curated/en/591601550669552595/pdf/Project-Information-Documents-Integrated-Safeguards-Data-Sheet-Payments-Automation-and-Integration-of-Salaries-in-Afghanistan-PAISA-P168266.pdf>.

63 The World Bank, *ibid.*, p. 8.

64 Katja Lindskov Jacobsen and Karl Steinacker, “Contingency Planning in the Digital Age. Biometric Data of Afghans Must Be Reconsidered”, *PRIO Blogpost*, 26 August 2021, available at: <https://blogs.prio.org/2021/08/contingency-planning-in-the-digital-age-biometric-data-of-afghans-must-be-reconsidered/>.

for Afghan refugees in Pakistan.”⁶⁵ The system used anonymously stored iris scans to decide whether returning Afghan refugees had already received aid from the UNHCR once. Thus, “false positives”—where a person’s iris is mistakenly matched against existing templates in the UNHCR’s database—could mean that biometric failures would imply that the UNHCR erroneously denied aid to eligible but falsely matched returnees.⁶⁶ Beyond the case of Afghanistan, others have similarly noted with reference to biometrics how “deploying such sophisticated technologies in difficult environments has a high failure rate.”⁶⁷

Not only the UNHCR but also the WFP have been testing biometrics in Afghanistan: “WFP is currently trialing a ground-breaking initiative to take advantage of new technology in its food assistance efforts,” running “6 e-voucher pilots,” starting in May 2014.⁶⁸ Specifically, the WFP tested e-vouchers as “a new model of food assistance.”⁶⁹ This e-voucher model had an important biometric component: “Biometric registration captures the fingerprint of the beneficiary to ensure verification of the intended beneficiary. [...] which allows them to verify and accept payments for the food items purchased by the e-voucher recipient.”⁷⁰ One challenge that was discovered during this US-funded e-voucher pilot was that in a few cases, “involving about 5% of beneficiaries,” their “fingerprints could not be read by the biometric function of the POS [point of sale] machine because the recipients were elderly or had sent a representative who was not previously registered to redeem the e-voucher.”⁷¹ Despite—or rather alongside—discovering new knowledge about this and other challenges, the WFP pilot produced biometric data on approximately “70,000 food assistance recipients.” For the WFP, the advantages of this new system were described with reference to accountability and inclusion benefits. Yet, as an interviewee noted about informed consent in another context: “what can be guaranteed to these recipients about where their data may potentially end up once collected?” Yet, international legal frameworks of course exist that are meant to guide use of biometrics, namely, through international human rights law and requirements such as consent and collection for specific purposes. We get back to the issue of risks stemming from potential biometric data flows in the next section.

65 Irwin Loy, “Biometric Data and the Taliban: What are the Risks?” *The New Humanitarian*, 2 September 2021, available at: <https://www.thenewhumanitarian.org/interview/2021/2/9/the-risks-of-biometric-data-and-the-taliban>.

66 Katja Lindskov Jacobsen, “Experimentation in Humanitarian Locations: UNHCR and Biometric Registration of Afghan Refugees”, *Security Dialogue*, Vol. 46, No. 2, 2015.

67 G. Hosein and C. Nyst, above note 12, p. 81.

68 Katrin Fakiri, “Building a Gateway to Digital Payments in Afghanistan: The World Food Programme’s E-Voucher Initiative”, Case Study, Better Than Cash Alliance, New York, May 2016, available at: https://btca-production-site.s3.amazonaws.com/documents/185/english_attachments/Afghanistan_Case_Study_May2016.pdf?1463507198.

69 See also, WFP SCOPE, “WFP’s Beneficiary and Management System”, WFP SCOPE, 16 January 2018, available at: <https://www.globalinnovationexchange.org/innovation/scope-wfp-s-beneficiary-and-management-system>.

70 K. Fakiri, above note 68.

71 *Ibid.*

Not only do biometric technology trials produce data that may subsequently circulate via (un)intentional paths. Moreover, attending to the conditions under which biometric data-making takes place will render visible another set of risks, including risks of technology failures as well as a more subtle production of subjects whose exposure to biometric failures is made to seem more acceptable than for other subjects.⁷² Yet, despite accounts of risks and insecurity during two decades of biometric data production – and as others have also noted – there has, however, often been “minimal acknowledgement of the attendant risks,”⁷³ and limited attention to questions about how biometric data, once collected, can be deleted or otherwise secured from unwanted access, and to how meaningful consent can be obtained in the absence of answers to such questions. What are subjects consenting to when enrolled in humanitarian or other biometric databases? To indefinite retention of their data? To the sharing of their biometric data? As an interview explained (with reference to biometrics beyond Afghanistan): “we decided to remove the part about data deletion in our consent form. We cannot guarantee this.”⁷⁴ So once registered with humanitarian actors like the UNHCR or WFP, do refugees know and consent to having their data stored indefinitely? What does that “laboratory” condition mean – not only during trial phases but also in subsequent implementation?

Somalia

Of these multiple actors, many use biometrics in Somalia in more or less experimental programs. For example, iris recognition for biometric voter registration in Somaliland was tested in a setup involving experts from the University of Notre Dame.⁷⁵ In previous trials, fingerprint registration was unable to solve the problem of “double-registration” – which refers to the same individual using a “system” twice, in this case to cast more than one vote. One aim of this new iris recognition trial was to generate knowledge about this double-registration problem whilst collecting biometric data as part of this trial, including the aim of developing a fraud-free voter registration checklist.⁷⁶ Trials conducted in Somaliland and elsewhere in Somalia not “only” produced knowledge about the reliability of iris technology for voter registration. Implicitly, Somalia risks being turned into as a “living laboratory,” with increasingly larger parts of the Somali population produced as “test subjects.” Trialing biometrics

72 Katja Lindskov Jacobsen, “Making Design Safe for Citizens: A Hidden History of Humanitarian Experimentation”, *Citizenship Studies*, Vol. 14, No. 1, 2010.

73 Keren Weitzberg, Margie Cheesman, Aaron Martin and Emrys Schoemaker, “Between Surveillance and Recognition: Rethinking Digital Identity in Aid”, *Big Data & Society*, Vol. 8, No. 1, 2021.

74 Anonymous interview, September 2021.

75 ACE, “Iris Biometric Voter Registration in Somaliland”, *ACE Electoral Knowledge Network*, 3 December 2014, available at: <https://aceproject.org/electoral-advice/archive/questions/replies/413937370>.

76 Stephen Mayhew, “Notre Dame Researchers Using Iris Recognition to Improve Accuracy of Somaliland Election Process”, *BiometricUpdate*, 21 August 2014, available at: <https://www.biometricupdate.com/201408/notre-dame-researchers-using-iris-recognition-to-improve-accuracy-of-somaliland-election-process>.

under challenging conditions puts the technology “to test” but also poses challenges, for example, to ensuring informed consent. This challenge is not exclusive to the iris trial but applies to a broad range of varying experimental uses of biometrics in Somalia. As an interviewee noted with regard to non-military use of biometrics: “it’s like dangling a lollipop,” highlighting critical challenges to obtaining meaningful informed consent in contexts (refugee assistance, voting, etc.) where biometrics are trialed. Indeed, considering the position of vulnerability and lack of alternatives, one wonders whether consent in such circumstances can ever truly be genuine. As this interviewee explained: “giving consent is extremely complex: consent to having one’s data stored? Shared? For what purposes?” Thus, biometrics trials not only produce new knowledge. They also produce beneficiaries (aid recipients, fishers, etc.) and other enrolled subjects (infants, voters, etc.) as seemingly acceptable test subjects.

Another example is infant fingerprinting. “Despite years of effort, reliable biometric identification of newborns and young children has remained elusive.”⁷⁷ Yet, although critics note, among other things of concerns *vis-à-vis* infant biometrics, that they “would be surprised if the concept of toddler fingerprinting would be acceptable—or even attempted—in wealthy countries,”⁷⁸ infant biometrics trials were conducted in India: “This is the first time anybody has collected a longitudinal database of fingerprints for such a young population,” said biometric expert Jain, from Michigan State University. Following this trial, Jain talked to the UN “about trialing the system with the World Food Programme.”⁷⁹ Later, the WFP announced their decision to partner with experts from Michigan State University to set up a “proof of concept” trial to test whether child biometrics could solve what the WFP saw as a problem of different families “presenting the same children as their own, with the goal of getting more supplementary food rations.”⁸⁰ The trial involved “taking the thumbprints of 150 children in three locations in Somalia over seven months.”⁸¹ During this trial, “evidence” of the reliability of child biometrics was produced. According to the WFP, the trial had demonstrated the feasibility of using biometrics to identify children under 5 years old, thus producing a “proof of concept” that animates visions of ever-expanding enrolment populations, now including children down to 5 years. The WFP trial also produced a call for “more research” to test the

77 Steven Saggese, Yunting Zhao, Tom Kalisky, Courtney Avery, Deborah Forster, Lilia Edith Duarte-Vera, Lucila Alejandra Almada-Salazar, Daniel Perales-Gonzalez, Alexandra Hubenko, Michael Kleeman, Enrique Chacon-Cruz and Eliah Aronoff-Spencer, “Biometric Recognition of Newborns and Infants by Non-Contact Fingerprinting: Lessons Learned”, *Gates Open Research*, Vol. 3, 2019.

78 Ben Parker, “Betting on Biometrics to Boost Child Vaccination Rates”, *The New Humanitarian*, 18 July 2019, available at: <https://www.thenewhumanitarian.org/news-feature/2019/07/18/betting-biometrics-boost-child-vaccination-rates>.

79 Aviva Rutkin, “We Now Have the Tech to Fingerprint Babies – But Should We?”, *New Scientist*, 15 June 2016, available at: <https://www.newscientist.com/article/mg23030782-200-we-now-have-the-tech-to-fingerprint-babies-but-should-we/>.

80 The New Humanitarian, “Syria Cash Aid Freeze, Somali Biometrics, and Poverty Porn: The Cheat Sheet”, *The New Humanitarian*, 26 April 2019, available at: <https://www.thenewhumanitarian.org/cheat-sheet/2019/04/26/syria-cash-aid-freeze-somali-biometrics-and-poverty-porn-cheat-sheet>.

81 *Ibid.*

reliability of biometrics for children under 5 years: “while biometric technologies have some application in children above 5 years of age, solutions at younger ages are largely experimental and require more research.”⁸² This call for further research echoes a broader logic where failures and limitations are countered by adding more of the same: more biometrics trials, more biometric data collection, more interoperability, more data-sharing. Both the proof of concept and the call for further research echo the U.S. DoD’s vision of a future of ubiquitous biometrics, and in that way nourishes the vision of expanding biometrics as key to successful and presumably more ethical counterterrorism efforts.

As with “success stories” from Iraq feeding broader “dreams” and affecting the introduction of biometrics in Afghanistan, the case of Somalia is illustrative of somewhat similar dynamics. To explain how the idea of using biometrics in a specific UN project came about, an interviewee for example explained how UN Mine Action⁸³ had been using biometrics and that “success stories” from that had inspired other UN programs.⁸⁴ Various interviewees alluded to similar dynamics of biometric success stories circulating: “biometrics wasn’t so popular when I worked on it. However, because of the success of this project, many other UN agencies jumped onto the bandwagon so to speak,” adding that knowledge about the success of biometrics in a specific UN project “was for example shared during meeting amongst Heads of Programmes (FAO, UNODC [UN Office on Drugs and Crime], etc.), that is, within UN circles.”

As an example of immaterial aspect of biometrics infrastructures, attending to such “success stories” is important for several reasons. They have effects as they, for example, animate a sense of confidence, in different UN projects, about the value of using this technology and encourage the use of biometrics in an increasing number of programs. Moreover, such UN-labelled success stories not only animate expectations in other UN programs but also beyond. They travel to industry websites to display the value and reliability of biometrics. As an interviewee, for example, explains: “our automated biometric identification system (ABIS) has been deployed by UNSOM [UN Assistance Mission in Somalia],”⁸⁵ showing how the technology helped the Somali Federal Government. Such biometric success stories may also animate existing faith in biometrics for counterterrorism. This vendor not only deployed its systems with UNOPS, but has also “won a Home Office [prize] for its work on a project to help counter terrorism,” as a company with “close liaison” with the Ministry of Defence and NATO.⁸⁶ In these ways, “success stories” and other “knowledge” generated

82 Unicef, “Biometrics: UNICEF Guidance on the Use of Biometrics in Children-Focused Services”, *Unicef*, October 2019, available at: <https://data.unicef.org/resources/biometrics/>.

83 An anonymous interviewee described how UN Mine Action “came into Somalia very early due to the nature of their work.”

84 Interview, December 2019. See also U.S. Department of State, *Country Reports on Human Rights Practices for 2011*, Washington, DC, 2012, p. 538.

85 Human Recognition Systems, “Case Study UN Somalia”, available at: https://www.hrsid.com/case-study-un-somalia?_hstc=90097796.566aa022561b6cdf11fa359f1b3a830f.1579511311374.1579511311374.1579511311374.1&_hssc=90097796.1.1579511311374&_hsfp=2488122038.

86 S. Gold, above note 33.

during varying experimental uses of biometrics in Somalia animate visions of biometrics for counterterrorism. Yet, at the same time, critics have pointed out how “biometric initiatives in Somalia by various international actors have had dubious benefits and detrimental effects on local populations.”⁸⁷ One lens through which to unpack certain dimensions of such “detrimental effects” is to look at what happens to the biometric data once it has been collected.

Data flows and after

Once all of the concerned actors have collected biometrics, how is this biometric intervention infrastructure then being used? While these actors share a common faith in the importance of biometrics for advancing their specific aim (refugee protections, emergency aid, counterpiracy, counterterrorism, etc.), Larkin’s invitation to focus on flows—e.g. of biometric data—becomes an entry point for exploring what happens to the biometric data that these different actors have produced. Shifting from exploring the makings of biometric databases to exploring subsequent data flows, examples of intended and unintended data flows are presented below (with crucial difference in terms of the whom and how of such data-sharing).

Data flows and after: (a) intended – data-sharing agreements

Afghanistan

One example of deliberate exchanges of biometric data is the above-mentioned AABIS where data flows between the Federal Bureau of Investigation (FBI) and Afghanistan’s Ministry of the Interior was an intended part of the system set-up. As described by the FBI, information sharing with partners like the FBI, was a “key component of the program [AABIS],” enabling critical data flows.⁸⁸ As such, AABIS represents an example of biometric data-sharing by design: “AABIS ... is designed to be compatible with the U.S. DoD ABIS and the FBI Integrated Automated Fingerprint Identification System.”⁸⁹ With the withdrawal of US troops and other coalition forces from Afghanistan in August 2021, several questions emerge. For example, will this biometric database, which one source tentatively put at approximately “8.1 million records,” be retained or deleted?⁹⁰ If retained, what does this mean for the potential of biometric counterterrorism intervention infrastructures to alter frontiers by calling into question where

87 K. Weitzberg, above note 11.

88 FBI, “Mission Afghanistan: Biometrics. Part 4: A Measure of Progress”, *FBI*, 29 April 2011, available at: <https://www.fbi.gov/news/stories/mission-afghanistan-biometrics>.

89 AABIS: Afghan War News, above note 35. The centrality of such “data sharing with DoD and the Federal Bureau of Investigation” is also described by other sources, including a DoD report; see Office of the Secretary of Defense, “Justification for FY 2022 Afghanistan Security Forces Fund (ASFF)”, May 2021, p. 42, available at: https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2022/FY2022_ASFF_Justification_Book.pdf.

90 E. Guo and H. Noori, above note 38.

intervention ends, considering the potential for external actors' continued access to biometric data of millions of Afghan citizens. Crucially, this and other examples of biometric data-sharing in the context of counterterrorism must be understood against a wider backdrop of actors and initiatives that in different ways encourage biometric data-sharing, including UNSCR 2396 (2017), which requires States to "develop and implement systems to collect biometric data" in order to "responsibly and properly identify terrorists."⁹¹

Concerning Afghanistan specifically, highlighting the potentially fatal consequences of biometric data falling into the hands of the Taliban (see below) is important for several reasons. It may for example help accentuate the urgency of discussing how best to prevent further risks emerging for biometrically registered subjects in Afghanistan, including risks of retribution. However, at the same time, these discussions should not make us forget that intended data-sharing "by design" may also come with challenges, though sometimes more subtle. For example, the diverse actors who have collected and stored biometric data for different purposes may have a shared faith in the usefulness of biometrics. Yet, besides that shared faith are often crucial differences in logics and security priorities, for example (but not exclusively) between military and humanitarian actors. Acknowledging how logics, mandates and protection priorities of different biometric data-making actors do not always align, it becomes crucial to ask how their biometric data may flow—by intentional or unintentional paths. Importantly, how may such data flows affect these potentially un-align-able security priorities and, ultimately, the security of individuals whose biometric data may be accessed by agencies without the consent, let alone awareness, of the concerned individual? On that note it is interesting to observe how, in their annual country report on Afghanistan, the WFP notes about data-sharing agreements signed with four partners—the UNHCR,⁹² International Rescue Committee, Norwegian Refugee Council (NRC) and Shelter Now International—that these agreements on the sharing of beneficiaries' data do not include biometric data.⁹³ The sensitivity of this data as well as the difficulty of ensuring that it remains in safe hands, despite data-sharing agreements that deliberately exclude biometrics, become evident from the following examples of unintended flows.

91 Krisztina Huszti-Orbán and Fionnuala Ní Aoláin, *Use of Biometric Data to Identify Terrorists: Best Practice or Risky Business?*, Human Rights Center at the University of Minnesota, July 2020; UN S/RES/2396(2017), 21 December 2017.

92 Since 1985 the UNHCR has concluded and renewed memoranda of understanding (MoUs) at a global level; the last version is of 2018. See UNHCR and WFP, "Addendum on Data Sharing to the January 2011 Memorandum of Understanding between the Office of the United Nations High Commissioner for Refugees (UNHCR) and the World Food Programme (WFP)", 17 September 2018, available at: <https://www.refworld.org/docid/5bbcac014.html>. It includes, for the first time, provisions on data-sharing and states that both parties may give each other "access to biometric data of head of household and alternative assistance collector, and in exceptional cases, transfer of biometrics"; see UNHCR and WFP, "Annex 1: Matrix of Personal Data, Non-Personal Data and Information", 17 September 2018, available at: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5bbcac204>.

93 WFP, above note 42.

Somalia

Some biometric infrastructures are set up to enable data flows within the humanitarian sector, for example to enable various humanitarian actors in Somalia to share biometric data internally.⁹⁴ Indeed, improved interoperability between various databases of humanitarian actors in Somalia was the focus of a report, which also describes the piloting of “biometric interoperability” between the WFP and the Somalia Cash Consortium. A specific focus of the aforementioned mapping of “Somalia Databases,” including biometric ones, was to assess the “potential for data sharing and interoperability” and the making not just of biometric data, but on “making biometric collection standards.”⁹⁵

Another type of intended data flow occurs where data-sharing agreements are made. One example of data-sharing agreements enabling biometric data flows was the decision made by the EU in 2010 to share data on “suspected maritime pirates,” including fingerprint data collected by EU Naval Force Somalia, with INTERPOL, allowing that biometric data “to be checked against INTERPOL’s global databases.”⁹⁶ More specifically on data-sharing agreements that enable biometric data collected by humanitarian actors to flow beyond humanitarian databases, a Privacy Impact Assessment highlights how the U.S. DHS “has been discreetly gathering the biometric information of tens of thousands of refugees, many of whom may never make it to America.”⁹⁷ The biometric data was made available to the U.S. DHS “through a sharing arrangement with the United Nations High Commissioner for Refugees (UNHCR), which sends profiles to federal agencies when referring refugees for resettlement.”⁹⁸ However, out of the almost 85,000 UNHCR referrals in 2018, less than a quarter of these referrals were accepted for resettlement.⁹⁹ Through data-sharing agreements like these, biometric data from “tens of thousands of refugees who are not admitted to the country” flows into DHS databases, stored “on Homeland Security’s IDENT [Automated Biometric Identification System] database” and shared with various

94 B. Owino, above note 14.

95 K. Fakiri, above note 68.

96 K. Weitzberg, above note 11.

97 FindBiometrics, “The DHS and UNHCR are Sharing Biometric Data of Refugees”, *FindBiometrics*, 23 August 2019, available at: <https://findbiometrics.com/dhs-unhcr-sharing-biometric-data-refugees-082304/>. “Under the 2019 MOU, UNHCR is now directly sharing biometric and associated biographic information with DHS Office of Biometric Identity Management (OBIM) Automated Biometric Identification System (IDENT) (soon to be replaced by Homeland Advanced Recognition Technology (HART)).”; see U.S. DHS, *Privacy Impact Assessment for the United Nations High Commissioner for Refugees (UNHCR) Information Data Share DHS/USCIS/PIA-081*, 13 August 2019, p. 1, available at <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis081-unhcr-august2019.pdf>.

98 U.S. DHS, *Privacy Impact Assessment for the United Nations High Commissioner for Refugees (UNHCR) Information Data Share DHS/USCIS/PIA-081*, 13 August 2019, available at: <https://www.dhs.gov/publication/dhsuscis pia-081-united-nations-high-commissioner-refugees-unhcr-information-data-share>.

99 Eric Weiss, “DHS and UNHCR are Sharing Biometric Data of Refugees”, *Find Biometrics*, 23 August 2019, available at: <https://findbiometrics.com/dhs-unhcr-sharing-biometric-data-refugees-082304/>. Qualifying this, an interviewee noted that “The Trump years were somewhat different. During the Obama years, 90% or more of the referred cases were accepted.” (Interview, November 2021)

federal agencies.¹⁰⁰ IDENT is “a continually growing database that holds biometric information and other personal data on over 200 million people who have entered, attempted to enter, and exited the United States of America.”¹⁰¹ Also, critically, considering the aforementioned data-sharing agreement with the UNHCR, IDENT holds information of people who have never set a foot in the US.

Considering data flows in view of such data-sharing agreements invites a range of important questions, including questions about the reach of biometric counterterrorism infrastructures: to what extent might biometric counterterrorism infrastructures interconnect with biometric data stored by non-military agencies? Non-military biometric databases may not only be valued by donors who feel ensured that, with biometric registration, “assistance reaches the right people,”¹⁰² but possibly also by counterterrorism actors.¹⁰³ As the ICRC notes in their Biometric Processing Policy, the agency is “aware of the value of biometric data in locating and identifying persons of concern to States and security,” adding that the ICRC is conscious that State authorities have a significant interest in obtaining such data from organisations operating in humanitarian emergencies. This interest can extend to using biometric data for purposes that ... may be incompatible with the neutrality, impartiality and independence of the ICRC, [including] counter-terrorism activities.¹⁰⁴

Similarly, Privacy International argues that the value of biometrics gathered in aid programs “is not lost on intelligence agencies.”¹⁰⁵ Further to this point, McDonald argues: “international intelligence operations realise the uniqueness of the data that humanitarian organisations collect.”¹⁰⁶ While such concerns are not specific to Somalia but apply more broadly to humanitarian biometrics, the extent of non-military biometric data-making in Somalia, coupled with ongoing

¹⁰⁰ *Ibid.*

¹⁰¹ Thales Group, “DHS’s Automated Biometric Identification System IDENT – The Heart of Biometric Visitor Identification in the USA”, *Thales Group*, 19 January 2021, available at: <https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/customer-cases/ident-automated-biometric-identification-system>.

¹⁰² National Independent Electoral Commission, Federal Republic of Somalia. “Voter Registration Feasibility Study Report”, UNSOM, UNDP, Mogadishu, Somalia, November 2017, p. 31, available from: <https://www.ec-undp-electoralassistance.org/wp-content/uploads/sites/24/2019/03/VR-Feasibility-Study-Report-Eng.pdf>.

¹⁰³ The New Humanitarian, “Head to Head: Biometrics and Aid. One Timely Topic, Two Opinionated Views”, *The New Humanitarian*, 17 July 2019, available at: <https://www.thenewhumanitarian.org/opinion/2019/07/17/head-head-biometrics-and-aid>. In this opinion piece, for example, note the following: “In 2019 the WFP’s partnership with Palantir (a US company working with anti-terrorism efforts, the CIA, the police, and the US Immigration and Customs Enforcement) raised serious questions. Many believe that aid agencies are being naïve when entering into data partnerships with corporations and do not fully understand the implications.”

¹⁰⁴ ICRC, “Policy on the Processing of Biometric Data by the ICRC”, 28 August 2019, available at: https://www.icrc.org/en/download/file/106620/icrc_biometrics_policy_adopted_29_august_2019_.pdf.

¹⁰⁵ Kevin P. Donovan and Carly Nyst “Privacy for the Other 5 Billion: Western-Backed Biometrics Programs for the Developing World Could Put Data in the Wrong Hands”, *Slate*, 17 May 2013, available at: <https://slate.com/technology/2013/05/aadhaar-and-other-developing-world-biometrics-programs-must-protect-users-privacy.html>.

¹⁰⁶ Sean McDonald, “From Space to Supply Chains: A Plan for Humanitarian Data Governance”, *SSRN*, 12 August 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436179.

US counterterrorism efforts in Somalia, makes Somalia a particularly interesting context to explore not only the makings of biometric data, but also subsequent flows – and implications thereof. Indeed, other scholars have also, in analyses of humanitarian actors' use of biometric registration, highlighted various "concerns regarding data-sharing practices with states."¹⁰⁷

Though difficult to prove, the significance of enquiring about potential infrastructural interconnections emerge when considering not only the role of donors (e.g. data-sharing agreements and requests) but also the role of corporations like Palantir.¹⁰⁸ Palantir is widely known for its role in US counterterrorism: its software has been "used by the CIA to identify terrorist and insurgent threats."¹⁰⁹ As Palantir explains, their technology "allows the military to have a more targeted response to threats."¹¹⁰ Meanwhile, Palantir notes in a philanthropy report, how in three trial projects – one in Somalia – its data-analyzing tool "Foundry" helped the WFP automate data flows and "make precise, data-driven decisions to ensure its beneficiaries are reached."¹¹¹ Correspondingly, the WFP announced, in February 2019, that they had entered into a five-year partnership with Palantir.¹¹² Thus, not only warfighting but also humanitarian data in Somalia is on the radar of Palantir's top-level leadership. Besides criticism that this WFP–Palantir partnership could lead to "exploitation of the data in WFP's 'data lake'," including "beneficiary biometric data,"¹¹³ the partnership also illustrates the significance of exploring the potential role of non-military biometrics in military counterterrorism. The WFP is the only humanitarian actor in Somalia with known partnerships with Palantir. Yet, the WFP is not the only non-military actor collecting biometrics from various parts of the Somali population.

Though the case of Palantir is exceptional (the WFP being the only humanitarian actor with known partnerships with corporations working with the US military on counterterrorism), the role of corporations in relation to the issue of control over biometric data is relevant beyond the WFP–Palantir partnership.

107 Mirca Madianou, "The Biometric Assemblage: Surveillance, Experimentation, Profit, and the Measuring of Refugee Bodies", *Television & New Media*, Vol. 20, No. 6, 2019, available at: <https://journals.sagepub.com/doi/full/10.1177/1527476419857682>.

108 Privacy International, "One of the UN's Largest Aid Programmes Just Signed a Deal with the CIA-Backed Data Monolith Palantir", *Privacy International*, 12 February 2019, available at: <https://privacyinternational.org/news-analysis/2712/one-uns-largest-aid-programmes-just-signed-deal-cia-backed-data-monolith>.

109 Charles W. Mahoney, "United States Defence Contractors and the Future of Military Operations", *Defense & Security Analysis*, Vol. 36, No. 2, 2020, p. 192.

110 Steven Overly, "Peter Thiel's Company Palantir Defense Could Win Contracts Under Donald Trump", *Financial Review*, 9 November 2016, available at: <https://www.afr.com/technology/peter-thiels-company-palantir-defense-could-win-contracts-under-donald-trump-20161109-gskz92>.

111 For the Palantir project in Somalia, see <https://www.palantir.com/philanthropy-engineering/learn-more/wfp.html>. The other two projects were in South Sudan and Uganda.

112 WFP, "Palantir and WFP Partner to Help Transform Global Humanitarian Delivery", *World Food Programme*, 5 February 2019, available at: <https://www.wfp.org/news/palantir-and-wfp-partner-help-transform-global-humanitarian-delivery>.

113 Linda Raftree, "A Discussion on WFP-Palantir and the Ethics of Humanitarian Data Sharing", *Medium*, 5 March 2019, available at: <https://medium.com/data-stewards-network/a-discussion-on-wfp-palantir-and-the-ethics-of-humanitarian-data-sharing-4fc1499f81d8>.

For example, the other issue is the data used through commercial service providers – cash programmes in particular. Were they cash programmes for very specific vulnerable groups who might be targeted by the Taliban, because they were war veterans, or sexual minorities – whatever it is.¹¹⁴

As a more general point, an interviewee from the aid sector raises the following question: “How to effectively implement data deletion when shared with so many different actors?” Importantly, even if large amounts of data may not have “flowed,” the potential for such flows may have had negative implications. Besides data, immaterial things like rumours and fear (rather than dreams) also emerged and circulated, potentially affecting personnel on the ground who risk being “seen as collaborating with a CIA contractor,” when gathering biometrics from beneficiaries, and to individuals in Somalia for whom “knowledge of this partnership” may deter them from seeking WFP assistance.¹¹⁵

If we consider flows of biometric data not just among aid agencies but within Afghanistan and Somalia more broadly, an additional type of potential flow emerges – the possibility, and the associated risk, of involuntary flows of humanitarian biometric data falling into the hands of armed groups.

Data flows and after: (b) unintended – in enemy hands

Afghanistan

A particularly noteworthy case of unintentional biometric data flows emerged as coalition forces left Afghanistan, in August 2021. Following their withdrawal, “the Taliban seized US military biometric devices that might help uncover people who worked with international forces, The Intercept [reported](#).”¹¹⁶ “On August 27th, the Taliban boasted of using US digital identity technology to hunt down Afghans who had worked with the international coalition,”¹¹⁷ specifically, the US military’s Handheld Interagency Identity Detection Equipment (biometrics devices). This scenario entails significant risks to the many Afghan individuals who have had their biometrics data captured and stored in these biometric identification systems. For these Afghans, it means that “the Taliban have sensitive personally identifiable information that they have said they will use to target those they deem enemies or threats.”¹¹⁸ According to various sources, the Taliban regime “mobilized a special unit, called Al Isha, to hunt down Afghans who helped US and allied forces,” and following the revelation of biometric

114 I. Loy, above note 65.

115 Andrew Young, “A Discussion on WFP-Palantir and the Ethics of Humanitarian Data Sharing”, *MEDIUM*, 5 March 2019, available at: <https://medium.com/data-stewards-network/a-discussion-on-wfp-palantir-and-the-ethics-of-humanitarian-data-sharing-4fc1499f81d8>.

116 I. Loy, above note 65.

117 Emrys Schoemaker, “Digital Identity for Development – and Protection”, *Global Policy*, 14 September 2021, available at: <https://www.globalpolicyjournal.com/blog/14/09/2021/digital-identity-development-and-protection>.

118 *Ibid.*

devices left behind by coalition forces having fallen into the hands of the Taliban, one of the commanders of that unit emphasized in an interview “that his unit is using US-made hand-held scanners to tap into a massive US-built biometric database and positively identify any person who helped the NATO allies.”¹¹⁹

Others have highlighted the dangers confronting Afghans whose biometric data may have become accessible to the Taliban regime in whose eyes they are traitors, for which they may be punished. With biometrics, “erasing” such traits in order to remain safe in a Taliban-ruled Afghanistan is impossible: you cannot change the pattern of your iris. It remains to be seen what the Taliban will do with this data and with these devices. How and where, if at all, might they for example “use it to check whether an individual has collaborated with coalition forces?”¹²⁰ While this story first broke in the August of 2021, concerns had been raised ten years earlier: “Some Afghans are concerned that in the future the growing biometric database could be abused as a weapon.”¹²¹ Importantly, concerns about unintended consequences of data flows on civilians have been highlighted in a report by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Professor Fionnuala Ní Aoláin. Specifically the report mentions how “Aside from the threat of misuse, in particular by oppressive and/or authoritative governments, concerns have also been raised regarding the collection of biometric data on vulnerable populations and persons in vulnerable situations, in diverse contexts.” Specifically concerning Afghanistan, the Special Rapporteur noted not only how “the United States and some of its allies proceeded to collect biometric data of populations in conflict zones, such as Iraq and Afghanistan,” but also that since 2007, human rights organizations have cautioned that these biometric databases “could become a ‘hit list’ in the wrong hands,”¹²² posing risks to “millions of Afghan and Iraqi citizens who have never been accused of any wrongdoing.”¹²³

As Larkin reminds us, we should not only attend to material flows but also to immaterial elements. Even if massive amounts of biometric data may not have been flowing to, let alone actively used by the Taliban, the potential infrastructural interconnection that became visible with stories circulating of the Taliban having access to coalition biometrics may indeed have generated immaterial “flows,” notably in the form of “rumours” and “fear” (rather than desires and dreams).¹²⁴ Indeed, it is crucial to take seriously how not only data

119 Siddhartha Roy and Richard Miniter, “Exclusive: First-Ever Interview With Terror Leader who’s Hunting Americans and Allies in Afghanistan”, *Zenger News*, 28 August 2021, available at: <https://www.zenger.news/2021/08/28/taliban-team-is-using-us-made-biometric-database-and-scanners-to-hunt-american-and-afghan-enemies/>.

120 K. L. Jacobsen and K. Steinacker, above note 64.

121 T. Shanker, above note 23.

122 K. Huszti-Orbán and F. Ní Aoláin, above note 91, pp. 6–7.

123 K. Huszti-Orbán and F. Ní Aoláin, above note 91.

124 Thomas Macaulay, “Fears Grow Over Taliban Using Biometric Systems to Identify US Collaborators”, *TNW News*, 18 August 2021, available at: <https://thenextweb.com/news/fears-taliban-has-seized-us-biometric-systems-will-target-vulnerable-people-afghanistan>.

flows but also fear can have potentially negative consequences, like if a person decides not to go to hospital out of fear that the Taliban may require that person to undergo biometric screening. In such cases, even if potential biometric data flows and subsequent uses may not all materialize, the emergence and flow of fear need to be taken seriously as potentially affecting biometrically registered persons' security negatively. Such questions are relevant for all actors who collect biometrics in Afghanistan (and elsewhere). Once collected, can it be guaranteed that this sensitive data (you can never get a new iris) will not fall into "enemy hands" or otherwise into the hands of actors who may use it for other purposes than originally intended?

Summarizing these examples from Afghanistan, looking across military, humanitarian and other actors—as an infrastructure perspective invites us to do—highlights important challenges. For example, how neither storing of identifiable biometric data by coalition forces, nor anonymized data in UNHCR databases, offer an easy solution to difficult questions about what "safe" biometrics may look like. For the UNHCR, anonymized data generated different risks (of failures translating into humanitarian failures to assist). Asking new questions like how do (intentional or unintentional) biometric data flows alter the security aims guiding the use of such data? Interoperability is not simply a technical issue, not just a matter of infrastructural platforms that enable data flows, but also a question of how such flows carry and constitute imaginaries, including hierarchies of whose lives are important/unimportant from different security perspectives. What diverse, sometimes diametrically opposed, security perspectives does the flow of biometrics "erase" or what hierarchies do these flows reinforce or constitute or reshape? Moreover, how do success stories travel, and with what implications for the rollout of biometrics in new contexts or expansion of biometrics in existing contexts?

Somalia

Concerning flows of biometric data within Somalia there are also risks of involuntary flows of humanitarian biometric data falling into the hands of actors who may use this data not to enhance but to jeopardize the security of the individuals whose links to Western actors may be perceived negatively. As an interviewee, working for a UN agency in Somalia, notes: "Al Shabaab could misuse it if they were able to identify someone e.g. as a beneficiary of aid from western organizations (whom they see as their enemy)." A risk, which meant that this UN agency decided to reconsider the kind of biometric device that they were using: "We had these big bulky registration machines. But they looked too suspicious, so we found another type of registration device that looks more low-key and less suspicious, if our staff got stopped by Al Shabaab when carrying one of these devices."

Besides data-sharing and partnership agreements, data flows from humanitarian to State security actors may emerge from a very different type of involuntary interconnection. Though impossible to verify, interviewees and

news stories claim that defense agents may be among those who carry out cyber-attacks against UN database to enable involuntary flows of data. According to McDonald, humanitarian organizations are not only limited in their ability to safeguard the biometric data they store. They are also “a target for a range of digitally savvy groups,” including “international intelligence services.”¹²⁵ As noted by an interviewee, highly placed within a central humanitarian organization: “it would not surprise me if those involved in doing counter-terror were the same people as those involved in hacking into our [humanitarian] database. Attacks on our database is an ongoing challenge, and we are really struggling to have some minimum cybersecurity.”¹²⁶ Accentuating this, a journalist revealed how, in 2019, UN networks in Geneva experienced a “major hacking attack.”¹²⁷ According to a cybersecurity expert, the attack had “the hallmark of a sophisticated threat actor,” adding that “nation-states are frequently the most sophisticated threat actors.”¹²⁸ This incident illustrates how humanitarian actors’ biometric databases are vulnerable to unauthorized access,¹²⁹ with hacking incidents resulting in unintended data flows. Whilst cases of unauthorized access to humanitarian databases are not unfamiliar to technology providers or to humanitarian actors,¹³⁰ the extent of this vulnerability remains elusive. Aid agencies, “like any business with a reputation to protect, have the incentive not to admit when they have been hacked.”¹³¹ These different data flows—to Al Shabaab, the DHS, or hackers—remain largely invisible for various reasons, like the nature of these being confidential programs, the embarrassment associated with acknowledging to have been hacked, and possible difficulties in contradicting a widespread imaginary of biometrics as valued in counterterrorism, refugee assistance and many other intervention contexts.

Importantly, several actors have highlighted how these challenges and crucial unintended consequences are not unique to Afghanistan and Somalia, but indicative of much wider challenges. A UN Special Rapporteur thus stresses how “sharing data with governments that have lower rule of law or human rights standards would risk contributing to human rights violations, going against States’ obligations under international human rights [and domestic] law.”¹³²

125 Sean McDonald, “From Space to Supply Chains: A Plan for Humanitarian Data Governance,” SSRN, 12 August 2019, available at <https://ssrn.com/abstract=3436179>.

126 Anonymous interview, August 2020.

127 Ben Parker, “Exclusive: The Cyber-Attack the UN Tried to Keep Under Wraps”, *The New Humanitarian*, 29 January 2020, available at: <https://www.thenewhumanitarian.org/investigation/2020/01/29/united-nations-cyber-attack>.

128 *Ibid.*

129 Katja Lindskov Jacobsen and Larissa Fast, “Rethinking Access: How Humanitarian Technology Governance Blurs Control and Care,” *Disasters*, Vol. 43, No. 2, 2019.

130 Ben Parker, “Security Lapses at Aid Agency Leave Beneficiary Data at Risk”, *The New Humanitarian*, 27 November 2017, available at: <https://www.thenewhumanitarian.org/investigations/2017/11/27/security-lapses-aid-agency-leave-beneficiary-data-risk>.

131 Anja Kaspersen and Charlotte Lindsey-Curtet, “The Digital Transformation of the Humanitarian Sector,” *Humanitarian Law & Policy*, 5 December 2016, available at: <https://blogs.icrc.org/law-and-policy/2016/12/05/digital-transformation-humanitarian-sector/>.

132 K. Huszti-Orbán and F. Ni Aoláin, above note 91, p. 11, footnote 67.

Also, other critics have for example stressed how “gathering digital ID and biometric data carries particular risks for vulnerable groups who face conflict or oppression: their data could be shared or leaked to hostile parties who could use it to target them.”¹³³ Thus, whilst Afghanistan and Somalia are important contexts in which to explore unintended consequences of biometric data-makings and flows, the concerns that emerge are illustrative of far broader challenges.

Afghanistan, Somalia and beyond

While Afghanistan and Somalia are unique in many ways, exploring biometric data-makings and flows with reference to examples from these two contexts can generate insights of broader relevance.¹³⁴ One example of this is the paradox that although several challenges relating to biometric experimentation, data-making and intended/unintended data flows have surfaced—particularly risks related to the security and confidentiality of civilians—faith in the presumed centrality of biometrics as a counterterrorism and wider intervention technology seems largely intact. Several actors in diverse intervention contexts still collect, store and share biometric data, often on a large scale. Looking ahead, what does this sustained faith in biometrics, amidst growing examples (from Afghanistan, Somalia, and elsewhere) of how biometric data may cause risks and insecurity, imply for actors engaged in the making of biometric intervention infrastructures? On the one hand, we have seen the emergence of new biometric policies that explicitly move away from biometric data collection. Oxfam’s Biometric Policy, for example, specifies that when deciding whether biometric data processing is appropriate, it is imperative to ensure that “the likely flow of data is knowable and known,” meaning that it is necessary to understand “who will have access to data throughout its life.”¹³⁵ The ICRC’s Biometrics Policy (2019) “requires the ICRC

133 B. Parker, above note 78.

134 Indicative of how the use of biometrics may come with new forms of insecurity in other contexts too is, for example, the case of biometric data flows producing risks to Rohingya refugees. Looking beyond Afghanistan and Somalia, flows of biometric data produced by humanitarian actors have been documented in other contexts and shown to have negative implications. As argued in a Human Rights Watch report, the UNHCR has put Rohingya refugees “at risk of forced return” by sharing biometric data with authorities in Myanmar, the State from which these refugees had fled: Human Rights Watch, “UN Refugee Agency Data Sharing Puts Rohingya at Risk of Forced Return”, 2021, available at <https://www.hrw.org/news/2021/06/15/un-shared-rohingya-data-without-informed-consent>. Though the contexts differ, the case still illustrates how the UNHCR data-sharing agreements (here with Bangladesh, who subsequently signed a data-sharing agreement with Myanmar) entails risks to individuals who the UNHCR is mandated to protect. On how “biometric data UNHCR collected from Rohingya refugees was shared with the country they fled, Myanmar”, see also Zara Rahman, “The UN’s Refugee Data Shame”, *The New Humanitarian*, 21 June 2021, available at: <https://www.thenewhumanitarian.org/opinion/2021/6/21/rohingya-data-protection-and-UN-betrayal>; and Kate Hodal, “UN put Rohingya ‘at Risk’ by Sharing Data Without Consent, Says Rights Group”, *The Guardian*, 15 June 2021, available at: <https://www.theguardian.com/global-development/2021/jun/15/un-put-rohingya-at-risk-by-sharing-data-without-consent-says-rights-group>.

135 Oxfam, “Oxfam Biometric & Foundational Identity Policy”, 2021, available at: <https://oxfam.app.box.com/v/OxfamBiometricPolicy>.

to limit the use of biometric data to specific use cases,”¹³⁶ which, for example, contrasts with how, for the UNHCR, biometric registration is considered a “routine feature”¹³⁷ and strategic decision.¹³⁸ Along similar lines, is the recent intensification of debates about data deletion and the right to be forgotten,¹³⁹ with “growing calls from a number of organisations for a greater focus on the risks of new digital technologies.”¹⁴⁰ However, not only is biometric data still collected and stored by numerous actors, but deletion may not always be an easy option: “For those in official databases, particularly the APPS [the U.S. funded ‘Afghan Personnel and Pay System’ database], user deletion is not an option.”¹⁴¹ Another interviewee similarly noted: “By design, UNHCR’s registration systems do not allow the deletion of IC files. An IC can be ‘deactivated’ but not be deleted.”¹⁴²

Biometric intervention infrastructures: ambiguity rather than accuracy

Looking ahead, another issue in relation to expanding biometric intervention infrastructures is the question of how this still somewhat elusive infrastructure affects several important distinctions and boundaries like wartime/peacetime, friend/enemy and sovereign/intervention.¹⁴³ Whilst in some cases biometric data flows may lead to increased accuracy, it is crucial, however, to emphasize how flows of biometric data (via formal agreements or involuntary paths) may in other cases produce increased ambiguity. Ambiguity may come about at two levels. First, pertaining to processes through which individuals are categorized by different authorities as legitimate refugee, legitimate counterterrorism target and/or subject of experimentation, the analysis showed the importance of foregrounding questions about how and by whom biometric data is gathered, shared and processed to establish such categories. Attending to data flows encourages analysis of how ostensible biometric accuracy does not always translate into unambiguity in data flows, with biometric data sometimes obtained via shadowy data-sharing practices. Put differently, biometric data-sharing agreements or cases of hacking represent different infrastructural

136 ICRC, above note 104.

137 See, for example, UNHCR, “Planning and Preparing Registration and Identity Management Systems: 3.6. Registration Tools”, available at: <https://www.unhcr.org/registration-guidance/chapter3/registration-tools/>.

138 Katja Lindskov Jacobsen, “On Humanitarian Refugee Biometrics and New Forms of Intervention”, *Journal of Intervention and Statebuilding*, Vol. 11, No. 4, 2017.

139 I. Loy, above note 65. It has also been argued that biometric data should be “deleted once it has served its purpose”; see Kerrie Holloway, Reem Al Masri and Afnan Abu Yahia, “Digital Identity, Biometrics and Inclusion in Humanitarian Responses to Refugee Crises”, Humanitarian Policy Group (HPG) Working Paper, ODI, London, October 2021, pp. 34–5, available at: https://cdn.odi.org/media/documents/Digital_IP_Biometrics_case_study_web.pdf.

140 E. Schoemaker, above note 117.

141 This point was also made by an anonymous interviewee: Anonymous interview, September 2021.

142 Anonymous interview, November 2021.

143 Arguably, another commonplace distinction that biometric system may also challenge is that of individual/relationships, given that many new biometric systems on the market enable identification not only of individuals but of lineages.

interconnections of military and non-military biometrics, the effects of which are best understood not simply through an imaginary of accuracy, but rather as potentially engendering increased indeterminacy for biometrically registered individuals left unsure of how their biometric data is being processed, by whom and to what effects. By tentatively illuminating emerging ambiguities and insecurities at the level of biometric infrastructures, the article added to the existing literature on the fallacy of accuracy in contemporary counterterrorism.¹⁴⁴

Second, exploring data-makings and data flows highlighted how an expanding biometric intervention infrastructure may breed another critical ambiguity, namely fluidity in the distinction between war and peace when it comes to the collection and use of biometric data. What happens to the distinction between armed conflict and peacetime when biometric data gathered during armed conflict is passed over to or retained by a State, including its intelligence services, and potentially used for peacetime operations? If biometric data gathered by US soldiers during military intervention in Afghanistan is retained indefinitely, i.e. also after warfighting has officially ended, what do such data flows and retention practice imply for the security of these individuals? Such practices of retaining biometrics beyond “war’s end” expand the possible space of counterterrorism action into “peacetime” as illustrated in the following quote from a biometric expert: “we need to take a federated approach to our biometric databases, since they are a powerful weapon that can be used in peacetime, as well as on the battlefield.”¹⁴⁵ Such expectations about the value of biometrics for counterterrorism purposes feed a practice of data retention which in turn generates another sense of ambiguity that highlights the limits to how biometric accuracy “translates” into more accurate and presumably more legitimate form of counterterrorism. Insofar as the above analysis offers additional nuances to existing debates about the tensions and fallacies of current counterterrorism, the argument also illustrates how looking at biometric infrastructures, with attention to both military and non-military actors, offers an entry point through which to illuminate broader tensions and contradictions.

Concluding reflections

As the above analysis demonstrates, we have seen how besides risks of new instances of unintended sharing of biometrics data (potentially with actors whose friend/enemy distinctions are diametrically opposed to those of institutions that beneficiaries and other subjects originally trusted their sensitive data with), it is necessary to expand our appreciation of how biometrics may generate insecurity. Moving forward it is of course crucial to look at actual data flows, but certainly also at the makings and flows of various immaterial elements, be they success

144 Lucy Suchman, “Algorithmic Warfare and the Reinvention of Accuracy”, *Critical Studies on Security*, Vol. 8, No. 2, 2020.

145 S. Gold, above note 33.

stories or fear, both of which may in very different ways affect the safety of beneficiaries or other biometrically registered subjects. For example, where biometric registration remains mandatory with no changes to retention and sharing policies, there is a risk that potential beneficiaries may decide not to register with the WFP, UNHCR or other humanitarian agencies, out of fear of what could happen to their biometric data. Could it end up in the hands of actors who would use it in ways that would create additional insecurity for these already vulnerable individuals? Indeed, as shown in this article, this is a very real risk considering recent examples as well as the extent to which several intervention actors – military and otherwise – produce biometric databases vulnerable to exposure and unintended data flows. Moreover, with stories about unintended access circulating, what also gets produced is fear. And with stories about new real-world proof of biometric reliability or scalability, what also gets produced are success stories. While intangible, both success stories and fear affect the contours of the future of biometric data collection, though potentially in opposed directions. Success stories buttress a broader imaginary of “more biometrics, more safety,” and of the centrality of biometrics in current and future counterterrorism, as “a powerful weapon in peacetime and on the battlefield.”¹⁴⁶ Fear and anxiety, on the other hand, may more indirectly generate insecurity – be it for refugees who decide not to register with the WFP whereas they would be entitled to do so, or for biometrically registered Afghans who fear that their iris scans are on the databases that the Taliban claims to have access to.¹⁴⁷ We have seen in other contexts how biometric registration may “create security concerns that could prevent some refugees from registering with UNHCR. This has been the case with Syrian refugees in Lebanon.”¹⁴⁸ More specifically, the use of biometrics may affect the mobility of refugee in ways that can in turn give rise to unintended negative implications for refugee safety. For example, for refugees who “due to security considerations [have] not entered Lebanon through an official border crossing,”¹⁴⁹ the use of biometrics may “increase an already prevalent fear that they may be arrested when crossing an internal checkpoint.”¹⁵⁰

A widening abyss between the imaginary of biometric security and the (silenced) emergence of insecurity is critical. Also importantly regarding silenced insecurity, it must of course be said that besides the focus in this article on certain types of consequences there is a plethora of other largely untold stories about unintended consequences from biometrics encountered by people in various marginalized settings. For example, the UNHCR and WFP note in a joint

146 *Ibid.*

147 There have always been numerous refugees who decided not to register with aid agencies, also before the advent of biometrics. Thus, biometrics is one of many factors affecting whether refugees seek registration or not; there are indeed other factors which might encourage refugees not to register.

148 Katja Lindskov Jacobsen, “UNHCR, Accountability and Refugee Biometrics”, in Kristin Bergtora Sandvik and Katja Lindskov Jacobsen (eds), *UNHCR and the Struggle for Accountability*, Routledge, London and New York, 2016.

149 NRC, “The Consequences of Limited Legal Status for Syrian Refugees in Lebanon”, NRC Lebanon Field Assessment, NRC Lebanon, March 2014, p. 6.

150 K. L. Jacobsen, above note 148.

assessment of their “Kenya Refugee Operations” how “school-going children or child-headed families” were forced to “skive school in order to comply with the requirements of the biometric food distribution system.”¹⁵¹ Examples of how humanitarian uses of biometrics may unintentionally generate negative implications for refugees have also been noted in several other contexts. For urban Syrian refugees in Lebanon, “who ‘due to *security considerations* [have] not entered Lebanon through an official border crossing’,¹⁵² the use of biometric identification may increase an already prevalent fear that they may be arrested when crossing an internal checkpoint.”¹⁵³ Indeed, the likelihood that biometric data collection and sharing may unintentionally have negative implications on refugee mobility and safety is a concern that has been voiced for several years. An unpublished study highlighted several risks, including that “data falling into the wrong hands could result in persecution, discrimination or even imminent threat to liberty and life” and that data “acquired by host governments” may be used “to assist efforts to imprison or persecute populations.”¹⁵⁴ Many more examples and voices deserve attention if we are to understand the myriad of ways in which biometric data-makings and flows may generate unintended effects, including the risk that incorrect data is replicated across different systems, may preclude individuals from applying for resettlement or from registering a child’s birth.¹⁵⁵ Assembling existing accounts alongside adding additional examples of the impact of biometric data-making and flows on people whose data is being processed and shared would in important ways contribute to giving voice to individuals whose encounters may indeed make even more apparent why we need to pay attention to the risk of unintended consequences of expanding biometric intervention infrastructures.

Drawing on Tilley’s notion of “living laboratory,” that analysis also unpacked how an important dimension of the imaginary of biometrics as central to counterterrorism is a quest for relentless real-world testing of new biometric systems, including new modes of collecting and connecting biometrics. Like in the case of the WFP, framing the limits of biometrics for infants as a call for more research, so too are other limitations framed as an invitation to add more: new trials, new capture devices, more biometric data. In this sense, the analysis alluded to another expansion, an inbuilt logic of continuity where failures are “offset” by adding more of the same. Failing to prove the reliability of biometrics

151 WFP/UNHCR, “Joint Assessment Mission – Kenya Refugee Operation: Dadaab (23–27 June 2014) and Kakuma (30 June–1 July 2014) Refugee Camps”, 2014, p. 18, available at: <https://www.unhcr.org/54d3762d3.pdf>. Many other examples, including more recent ones, deserve attention. See, for example, Belkis Willie, “A Cautionary Tale: When Humanitarian Data Collection/Transfer Harms Beneficiaries”, NetHope 20th Anniversary Summit, 15–19 November 2021, available at: nethopeglobalsummit.org.

152 NRC, above note 149.

153 K. L. Jacobsen, above note 148.

154 Simon Davies, “How a United Nations Agency Buried a Security Report that Warned of Potential Genocide”, *The Privacy Surgeon*, 2012, available at: <http://www.privacysurgeon.org/blog/incision/how-a-united-nations-agency-buried-a-security-report-that-warned-of-potentialgenocide/>.

155 I am very grateful to the two anonymous reviewers who stressed the importance of accentuating the impact on people whose biometric data is being processed and shared, and of the need for more attention to the perspective of those affected, particularly since their voices are often ignored.

for children under 5 years was formulated as an opportunity for more real-world trialing of infant biometrics. Failing to make biometric databases “interoperable” in Iraq and elsewhere has not genuinely challenged the imaginary of ubiquitous biometrics and accurate identification of enemies globally, but instead propelled new interoperability trials. With reference to “limited interoperability and sharing of data between humanitarian agencies” working in Somalia, a recent report points to efforts to explore “ways to establish interoperable databases.”¹⁵⁶ Again, this is not exclusive to counterterrorism biometrics but a tendency observed in relation to other counterterrorism engagements as well. Exploring French counterterrorism in the Sahel, Guichaoua argues: “This is a maximalist logic: failure does not lead to the withdrawal of an initiative but to the design of a new one.”¹⁵⁷

Attending to such logics, another interconnection becomes visible: for humanitarian and for counterterrorism purposes the use of biometrics involves “self-sustaining dynamics” whereby limitations and failures do not lead to questioning of devices or imaginaries but to calls for additional real-world trialing. For example, when the IOM replaced one-digit fingerprint readers with ten-digit readers, at eight Somali border crossings,¹⁵⁸ this was simply presented as a technical “upgrade” of existing systems, invisibilizing the politics of implementing new systems capable of checking “data records against national and international alert lists for suspected criminals.” Insofar as “failures” become productive, the implication is that biometric trials never fail in the sense of highlighting lack of evidence of biometrics as a counterterrorism panacea. They are only failures in a different sense: as productive of a quest for new trials, more biometric data and further interoperability.¹⁵⁹ To what extent may this logic impel infrastructural expansions that the analysis of this article presents a critical reading of? Attending to questions about data-makings, flows and infrastructural interconnections of counterterrorism biometrics and biometrics used by non-military actors, this article highlighted critical ambiguities and opaque distinction makings that challenge imaginaries of biometric accuracy and the often-unabated assumption that biometric data gathered by various actors is central to the design of counterterrorism operations.

Finally, can we fully appreciate the continuous expansion of biometric databases without asking questions about the role of donors and their influence on humanitarian actors’ practices of collecting and sharing biometric data? As the above-mentioned report from the UN Special Rapporteur notes: “donors have

156 B. Owino, above note 14.

157 Yvan Guichaoua, “The Bitter Harvest of French Interventionism in the Sahel”, *International Affairs*, Vol. 96, No. 4, 2020.

158 Chris Burt, “IOM Installing 10-Digit Fingerprint Readers at Somalian Ports of Entry”, *BiometricUpdate.com*, 7 June 2018, available at: <https://www.biometricupdate.com/201806/iom-installing-10-digit-fingerprint-readers-at-somalian-ports-of-entry>.

159 Thanks to Marijn Hooijink for hosting a workshop that facilitated these discussions. Thanks to Debbie Lisle, for highlighting this during fruitful workshop discussions.

repeatedly pushed for the integration of biometrics in aid delivery.”¹⁶⁰ To what extent may biometric data-making confront humanitarian actors as a condition for receiving funding, defined by donors? Moving forward, we need to add such consideration to questions about the conditions under which biometric data is produced in order to appreciate how humanitarian actors confront difficult choices insofar as “no to biometrics” might mean no funding and thus, no assistance to the people whose exposure to risks from biometrics is thus entangled with their vulnerabilities without assistance in the first place. Yet, such consideration should certainly not downplay the critical importance of revisiting humanitarian and other actors’ biometric data-making and data-sharing practices.

160 K. Huszti-Orbán and F. Ni Aoláin, above note 91, p. 7; The Engine Room and Oxfam, “Biometrics in the Humanitarian Sector”, March 2018, available at: <https://www.theengineroom.org/wp-content/uploads/2018/03/Engine-Room-Oxfam-Biometrics-Review.pdf>; Kristin Bergtora Sandvik, Katja Lindskov Jacobsen and Sean Martin McDonald, “Do No Harm: A Taxonomy of the Challenges of Humanitarian Experimentation”, *International Review of the Red Cross*, Vol. 99, No. 904, 2017.

Counterterrorism policies in the Middle East and North Africa: A regional perspective

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Abstract

The 9/11 attacks and the “War on Terror” brought terrorism and counterterrorism to the forefront of politics. Today, terrorism remains one of the most serious threats to national and international security. Yet, amid the surge of scholarly and policy interest in terrorism and counterterrorism, the literature on counterterrorism policies and strategies in the Middle East at the local and regional levels is sparse, limited and predominantly Western.

The experience of political terrorism and violence in the Middle East throughout the 1980s and 1990s, which led to the introduction of a securitization process and the adoption of counterterrorism measures in the region long before the 9/11 attacks, offers important lessons. This paper takes its point of departure from the definitional conundrum of the concepts of “terrorism” and “(national) security” within the Middle East context. It examines the evolution of the securitization process in the Middle East in response to terrorism, with reference to the experiences of countries in the region. As it analyzes the different counterterrorism models and methods employed, it argues that counterterrorism strategies in much of the Middle East have not been effective and have at times been counterproductive.

Keywords: terrorism, counterterrorism, MENA, securitization.

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Introduction

According to the 2020 Global Terrorism Index, the Middle East and North Africa (MENA) region recorded the most significant decrease in terrorism-related deaths for a second year in a row, with such deaths falling by 87% since 2016 – the lowest recorded levels since 2003.¹ In 2019, Algeria was among the countries to record “no deaths for the first time since at least 2011”.² While the primary driver of these improvements can be attributed to the reduction in attacks perpetrated by the Islamic State of Iraq and the Levant (ISIL) in MENA, Algeria’s counterterrorism operations in border regions over the past decade, as well as government-run deradicalization programmes, could have contributed to the recent decline in terrorism-related deaths.³

Terrorism remains one of the most serious and widespread threats to national and international security. The 9/11 attacks and the “War on Terror” brought terrorism and counterterrorism to the forefront of politics. The securitization of policies at the national, regional and international levels in response to the threat of terrorism has been a prominent feature in the literature on terrorism in recent years. A direct consequence of the coordinated 9/11 attacks, in terms of public perception, scholarly interest and policy discourse, has been the indelible connection between terrorism and the Middle East.⁴ Governments in the United States and Europe have adopted counterterrorism strategies that have alternated between a coercive, “direct action” approach and more defensive and preventative measures through collaborative initiatives between States and foreign partners.⁵ Amid an expanding scholarly interest in terrorism and violent extremism in the post-9/11 world in general and in the MENA region in particular,⁶ the literature on counterterrorism policies and strategies in the region at the local and regional levels is both limited⁷ and predominantly Western.⁸ In fact, the literature tends to focus mainly on post-9/11 US–MENA or EU–MENA bilateral or

1 Institute for Economics and Peace, *Global Terrorism Index 2020: Measuring the Impact of Terrorism*, Sydney, November 2020, p. 4.

2 *Ibid.*, p. 12.

3 Congressional Research Service, *Algeria: In Focus*, 6 July 2021, pp. 1–2, available at: <https://sgp.fas.org/crs/row/IF111116.pdf> (all internet references were accessed in November 2021).

4 Nancy A. Morris, Gary LaFree and Eray Karlidag, “Counter-Terrorism Policies in the Middle East: Why Democracy Has Failed to Reduce Terrorism in the Middle East and Why Protecting Human Rights Might Be More Successful”, *Criminology & Public Policy*, Vol. 20, No. 1, 2020.

5 Isaiah Corbin and Bret Billet, “An Empirical Analysis of Terrorism in the Middle East and Africa”, Wartburg College, 2014, available at: <http://public.wartburg.edu/mpsurc/images/Corbin.pdf>; Ann M. Wainscott, *Bureaucratizing Islam: Morocco and the War on Terror*, Cambridge University Press, Cambridge, 2017.

6 Gawdat Bahgat, “Terrorism in the Middle East”, *Journal of Social, Political and Economic Studies*, Vol. 32, No. 2, 2007; Bill Fletcher, “‘Terrorism’ in the Middle East”, *New York Beacon*, Vol. 13, No. 29, 2006; Paul Thomas, *Responding to the Threat of Violent Extremism: Failing to Prevent*, Bloomsbury Academic, London, 2012; Sadegh Piri and Ali Yavar Piri, “The Role of the US in Terrorism in the Middle East”, *Journal of Politics and Law*, Vol. 9, No. 3, 2016; Ihab Hanna Sawalha, “A Context-Centered Root Cause Analysis of Contemporary Terrorism”, *Disaster Prevention and Management*, Vol. 26, No. 2, 2017.

7 A. M. Wainscott, above note 5.

8 Zuzana Buronova, “An Analysis of Counter-Terrorism Strategies in Indonesia and Saudi Arabia”, master’s thesis, Charles University, Faculty of Social Sciences, Czech Republic, 2018.

multilateral collaborations as part of the global “War on Terror”. While some of the literature examines local and regional counterterrorism strategies in the region,⁹ only a handful offer a critical and policy-informed analysis of these models,¹⁰ and even fewer are based on empirical research and evidence.

The experience of political terrorism and violence in the Middle East throughout the 1980s and 1990s, which led to the introduction of a securitization process and the adoption of counterterrorism measures in the region, especially in the post-9/11 era, offer important lessons. Based on a review of the wider literature on counterterrorism strategies and models within the MENA region, this paper takes its point of departure from the definitional conundrum of the concepts of “terrorism” and “(national) security” within the Middle East context. It examines the evolution of the securitization process in the Middle East in response to terrorism, with reference to the experiences of countries in the region. As it analyses the different counterterrorism models and methods in the region, it argues that counterterrorism strategies in much of the Middle East have not been effective and have at times been counterproductive. The paper concludes with recommendations on how to render these strategies more effective in response to the domestic and global threat of terrorism.

Defining terrorism in the Middle East context: A legal and political conundrum

Contextualizing the costs of terrorism

The MENA region has a long history of violence and conflict. From the Mashriq to the Maghreb and for more than three decades, countries across the region have been struggling with domestic violent extremism, which has contributed either directly or indirectly to the perpetuation of conflicts in the region. The withdrawal of the Soviet Union from Afghanistan in the late 1980s, coupled with the Pakistani-induced explosion of Arab mujahideen, stimulated a wave of radical dissidence, established the basis for anti-regime violence in countries like Algeria and Libya,¹¹ and led to a surge in the region’s military spending.¹² Furthermore, wars

9 See, for example, Christopher Boucek, *Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare*, Carnegie Papers, 2008, available at: www.jstor.org/stable/resrep13021?seq=1#metadata_info_tab_contents; Lotfi Sour, “The Algerian Domestic Strategy of Counter-Terrorism from Confrontation to National Reconciliation”, *Romanian Review of Political Sciences and International Relations*, Vol. 12, No. 2, 2015.

10 See, for example, Eman Ragab, “Counter-Terrorism Policies in Egypt: Effectiveness and Challenges”, European Institute of the Mediterranean, 2016, available at: www.euromesco.net/publication/counter-terrorism-policies-in-egypt-effectiveness-and-challenges/.

11 Francesca Galli, “The Legal and Political Implications of the Securitisation of Counter-Terrorism Measures across the Mediterranean”, European Institute of the Mediterranean, 2008, available at: www.euromesco.net/publication/the-legal-and-political-implications-of-the-securitisation-of-counter-terrorism-measures-across-the-mediterranean/.

12 Wukki Kim and Todd Sandler, “Middle East and North Africa: Terrorism and Conflicts”, *Global Policy*, Vol. 11, No. 4, 2020, p. 424, available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/1758-5899>.

and foreign intervention, poverty and economic disparities, tribalism, sectarianism and lack of education continue to contribute to the growth and further spread of terrorism in the MENA region.¹³ Between 2002 and 2018, the region accounted for close to half of the world's terrorism-related casualties, while the number of terrorist attacks in the region accounted for 36.1% of the world's terrorist incidents compared to 9.8% between 1970 and 1989.¹⁴ In fact, according to the 2020 Global Terrorism Index, the largest number of deaths in the world as a result of terrorism was recorded in the MENA region between 2002 and 2019, at more than 96,000 deaths.¹⁵ Over the last two decades, the overall economic and social cost of terrorism in the region has been substantial. The overall economic cost of terrorism includes both direct material costs, caused by physical damage to property, factories, equipment and infrastructure, and indirect costs, which are far more difficult to measure. These include the value of human lives lost, the social and psychological impact of terrorism, and forgone opportunities and income resulting from terrorism-related injuries or deaths. Counterterrorism, on the other hand, includes the costs of measures and policies adopted to counter, prevent and tackle the root causes of terrorism.¹⁶

Countries or regions where terrorism or the threat of terrorism persists for a prolonged period of time suffer from other indirect, yet significant, economic losses, such as a reduction in foreign direct investments, tourism, business activity, production, and income in the services and hospitality sectors, which impact economic growth. This is particularly significant in the MENA region, where most countries depend heavily on tourism, services and foreign direct investments.¹⁷ Several factors affect the impact that terrorism has on a country's economy, including the nature and extent of each terrorist attack, the duration and persistence of such attacks, the economic resilience of the economy, and the country's existing security, economic and social structures.

The economic cost of terrorism in the MENA region has been steadily rising since 2001, reaching a peak of over \$62 billion in 2016,¹⁸ followed by a sharp decrease to \$4.7 billion in 2019 (see Figure 1). In 2019, 86% of the global economic impact of terrorism was recorded in three regions: Sub-Saharan Africa (\$12.5 billion), South Asia (\$5.6 billion) and MENA (\$4.7 billion). In the MENA region, while Syria had the second-highest economic costs of terrorism as a

12829; Todd Sandler and Justin George, "Military Expenditure Trends for 1960–2014 and What They Reveal", *Global Policy*, Vol. 7, No. 2, 2016, available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/1758-5899.12328>.

13 Alexander R. Dawoody, *Eradicating Terrorism from the Middle East: Policy and Administrative Approaches*, Springer International, Cham, 2016.

14 W. Kim and T. Sandler, above note 12, p. 424.

15 Institute for Economics and Peace, above note 1, p. 43.

16 Walter Enders and Eric Olson, "Measuring the Economic Costs of Terrorism", *The Oxford Handbook of the Economics of Peace and Conflict*, Oxford University Press, Oxford and New York, 2012, available at: www.economics.uci.edu/~mrgarfin/OUP/papers/Enders.pdf.

17 David Gold, *Economics of Terrorism*, New School University Working Paper, available at: www.files.ethz.ch/isn/10698/doc_10729_290_en.pdf.

18 Harrison Bardwell and Mohib Iqbal, "The Economic Impact of Terrorism from 2000 to 2018", *Peace Economics, Peace Science and Public Policy*, Vol. 27, No. 2, 2021.

Fig. 1 - Colour online, B/W in print

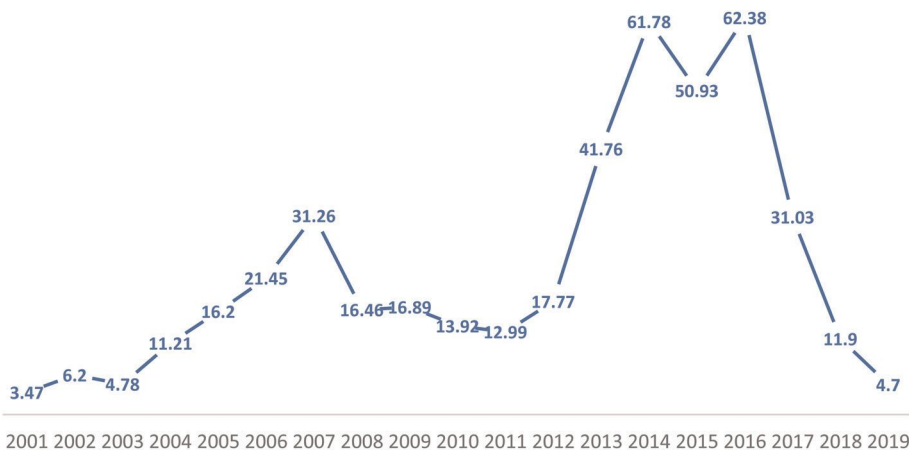


Figure 1. The economic cost of terrorism in the MENA region, 2001–2019. Source: author-generated graph based on data in H. Bardwell and M. Iqbal, above note 18, and Institute for Economics and Peace, above note 1.

percentage of its GDP (3.4%) in 2019, Iraq had the largest decline in economic costs from 2018 (a 71% decline, equal to \$6.7 billion).¹⁹

The largest economic effect of terrorism on the economy is increased spending on defence, law enforcement and security. More recently, cyber terrorism has started to contribute more significantly to the negative economic consequences of terrorism, imposing an added layer of costs as governments and the private sector invest more in security measures to protect strategic information systems.²⁰ In 2019, the Middle East had the world's second-highest costs in data breaches (after the United States), at \$5.97 million per breach, and the world's highest average number of breached records, at 38,000 per incident.²¹ It is not clear, however, how many of these cyber crimes could be classed as acts of cyber terrorism.

At the same time, data on the overall costs of counterterrorism programmes and measures in the region are largely unavailable, as most MENA countries do not openly report on these costs; this makes it impossible to accurately determine the total costs of counterterrorism efforts directly tied to other expenditures, such as law enforcement or the military.²²

19 Institute for Economics and Peace, above note 1, p. 32.

20 Human Rights Council, *Negative Effects of Terrorism on the Enjoyment of Human Rights: Study of the Human Rights Council Advisory Committee*, UN Doc. A/HRC/AC/24/CRP.1, 22 January 2020.

21 Gavin Gibbon, "Middle East Data Breaches Cost \$6m Each, Says New Report", *Arabian Business*, 27 October 2019, available at: www.arabianbusiness.com/technology/431560-middle-east-data-breaches-cost-6m-each-says-new-report.

22 Anthony H. Cordesman and Abdullah Toukan, *The National Security Economics of the Middle East: Comparative Spending, Burden Sharing, and Modernization*, Center for Strategic and International Studies, 22 March 2017, available at: <https://tinyurl.com/mc5kstx8>.

Defining terrorism

While MENA governments have adopted domestic policies and tactics aimed at neutralizing violent groups, especially in the wake of the 9/11 attacks,²³ at the heart of such policies has been the definitional conundrum of terrorism. Terrorism as a concept has been fraught with definitional challenges that go beyond the context of the MENA region. Corbin and Billet note that there is no universal and widely accepted definition of terrorism, and that most definitions are controversial due to ideological and political biases motivating the labelling of certain actions and actors based on subjective and temporal perceptions of the “enemy”.²⁴ This definitional conundrum has been equally observed in Western countries, such as the United States, the United Kingdom and countries of the European Union (EU).

The Global Terrorism Database adopts a broad perspective and defines terrorism as “the threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious, or social goal through fear, coercion, or intimidation”.²⁵ At the same time, while United Nations (UN) Security Council Resolution 1373 (2001) calls for all member States to take necessary measures to prevent and suppress the financing of terrorist activities, to refrain from providing any form of assistance to persons or entities involved in terrorist activities, and to enhance cooperation among States in order to control and impede the movement of terrorists, it also leaves the task of defining “terrorism” to each country.²⁶ In fact, as a result of the controversy and disagreement among States on a common definition of terrorism, the UN has been unable to adopt a convention against terrorism.²⁷ Instead, the UN General Assembly tends to rely on the following definition from the 1994 Declaration on Measures to Eliminate International 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.²⁸

US federal law differentiates between international and domestic terrorism and defines terrorism as any crime that is dangerous to human life and appears “to be intended to intimidate or coerce a civilian population; to influence the policy of a

23 F. Galli, above note 11.

24 I. Corbin and B. Billet, above note 5; see also Z. Buronova, above note 8.

25 I. Corbin and B. Billet, above note 5.

26 Law Library of Congress, *Algeria, Morocco, Saudi Arabia: Response to Terrorism*, Global Legal Research Directorate, 2015, available at: <https://tile.loc.gov/storage-services/service/l1/l1glrd/2016295702/2016295702.pdf>.

27 Council of Europe, “War and Terrorism”, 2017, available at: www.coe.int/en/web/compass/war-and-terrorism.

28 UN General Assembly, “Declaration on Measures to Eliminate International Terrorism”, 1994, available at: <https://legal.un.org/avl/ha/dot/dot.html>.

government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping”.²⁹ The UK Terrorism Act of 2000, on the other hand, defines terrorism as the use or threat of a specified action³⁰ “designed to influence the government or to intimidate the public or a section of the public, and [which] is made for the purpose of advancing a political, religious or ideological cause”.³¹ Despite the lack of a common definition of terrorism, there are commonalities in the various approaches used to define terrorism.³² These can be summarized as:

1. having either a political, religious or generally an ideological motive;
2. committing acts aimed at causing serious psychological and/or physical damage to a group of people (who are usually not the primary target of the acts); and
3. committing these premeditated crimes with the underlying motive of influencing or pressuring governments and/or spreading a message of fear.³³

Hutchison identified four core elements in defining a terrorist act: (1) the act causes emotional or physical “destructive harm”; (2) the act is committed deliberately and with the intent to cause a psychological effect; (3) the act is particularly atrocious, shocking or unpredictable; and (4) the act is often anonymous.³⁴ “This arbitrariness of terrorist violence makes it unacceptable and abnormal.”³⁵

Equally, across the different MENA countries, the definition of “terrorism” has been contentious and the subject of criticism in the literature.³⁶ While the 1998 Arab Convention for the Suppression of Terrorism³⁷ was the model upon which

29 Legal Information Institute, “18 U.S. Code § 2331 – Definitions”, Cornell Law School, available at: www.law.cornell.edu/uscode/text/18/2331; see also Law Library of Congress, above note 26.

30 A specified action is one that involves serious violence against a person or persons or endangers the life of others, causes serious damage to property, causes serious risk to the health or safety of the public or a section of the public, or interferes with or seriously disrupts basic infrastructures. See Council of Europe, *Profiles on Counter-Terrorist Capacity: United Kingdom*, Committee of Experts on Terrorism (CODEXTER), 2007, available at: www.legislationline.org/download/id/3145/file/UK_CODEXTER_Profile_2007.pdf.

31 *Ibid.*

32 Z. Buronova, above note 8.

33 International Social Science Council, *Hazards Information Profile on Violence*, Paris (in press); Z. Buronova, above note 8.

34 Marta Crenshaw Hutchinson, “The Concept of Revolutionary Terrorism”, *Journal of Conflict Resolution*, Vol. 16, No. 3, 1972, available at: www.jstor.org/stable/173583; see also Kelsey Lilley, “A Policy of Violence: The Case of Algeria”, Davidson College, E-International Relations, 2012, available at: www.e-ir.info/2012/09/12/a-policy-of-violence-the-case-of-algeria/.

35 M. Crenshaw Hutchinson, above note 34.

36 See, for example, Human Rights Watch, “Saudi Arabia: New Counterterrorism Law Enables Abuse”, 23 November 2017, available at: <https://www.hrw.org/news/2017/11/23/saudi-arabia-new-counterterrorism-law-enables-abuse#>; Francesco Tamburini, “Anti-Terrorism Laws in the Maghreb Countries: The Mirror of a Democratic Transition that Never Was”, *Journal of Asian and African Studies*, Vol. 53, No. 8, 2018; Amnesty International, “Turkey: Measures to Prevent Terrorism Financing Abusively Target Civil Society and Set Dangerous International Precedent”, 17 June 2021, available at: www.amnesty.org/en/latest/press-release/2021/06/turkey-measures-to-prevent-terrorism-financing-abusively-target-civil-society-and-set-dangerous-international-precedent/.

37 The Arab Convention for the Suppression of Terrorism defines terrorism as “[a]ny act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to

many terrorism laws were drawn in the region, in defining terrorism it is widely agreed that the law in most, if not all, countries relies on broad and overly vague definitions. Human Rights Watch argues that a broad definition can potentially be abused to silence political opponents, dissidents or peaceful critics of the State or the political elite, based on spurious charges.³⁸ When it comes to definitions which are broad and overly vague, the commonly used concepts and jargon to define the legal parameters of what constitutes a terrorist act can be summed up as any act that:

1. targets national unity, State security and stability;
2. disturbs public order and the safety of society;
3. targets territorial integrity and the normal functioning of State institutions;
4. may harm the reputation of the State and obstruct the implementation of the law; and/or
5. seizes or causes damage to public or private property, or damages the environment.

For example, the Algerian Penal Code defines terrorism as any act that targets “state security”, “national unity”, “territorial integrity”, and the “stability and normal functioning of institutions”.³⁹ Determining which acts fall under these broad terminologies and concepts is largely left to the discretion of the State. The Algerian Penal Code further includes any action whose objective is to create a climate of insecurity through moral or physical assaults on people; obstruct traffic or freedom of movement on the roads; assault the symbols of the nation and the republic; unearth or desecrate graves; assault the means of transportation and transport, public and private property, or the environment; obstruct the work of public authorities, freedom of worship or the exercise of public liberties; or disrupt the functioning of public institutions.⁴⁰

The overreliance on terminology such as “public order”, “national unity” and “State security” in defining a highly controversial concept like terrorism is not limited to Algeria. In fact, these are terms that have frequently been used across the MENA region.

While Saudi Arabia does not have a written and comprehensive penal code, it refers back to and applies Islamic Sharia law. In relation to crimes of terrorism, it asserts that they are part of what is referred to in Sharia as crimes of *hirabah*, which include “the killing and terrorization of innocent people, spreading evil on earth

public or private installations or property or to [occupy] or seiz[e] them, or seeking to jeopardise a national resource”. Arab Convention on the Suppression of Terrorism, 22 April 1998, Art. 1(2), available at: www.refworld.org/docid/3de5e4984.html. The Convention was adopted within the framework of the League of Arab States and was signed by the ministers of justice and interior of all the Arab member States. As of 2004, seventeen countries have deposited instruments of ratification with the General Secretariat of the League of Arab States. A full list of these countries is available at: www.un.org/unispal/document/auto-insert-186442/.

38 Human Rights Watch, above note 36.

39 Law Library of Congress, above note 26.

40 *Ibid.*

[*al-ifsad fi al-ard*], theft, looting and highway robbery”.⁴¹ At the same time, Article 1 (a) of the 2013 Law Concerning Offenses of Terrorism and Its Financing refers, in defining terrorism, to acts committed with the intention to

disturb the public order, destabilize the security of society or the stability of the state, expose its national unity to danger, obstruct the implementation of the organic law or some of its provisions, harm the reputation of the state or its standing, endanger any of the state facilities or its natural resources, [or] force any of its authorities to do or abstain from doing something.⁴²

A report by the UN Rapporteur on Counter-Terrorism and Human Rights criticized Saudi Arabia’s anti-terrorism law for relying on an “objectionably broad” definition and misusing it to silence all forms of peaceful dissent, justify torture, deny freedom of expression, and imprison critics and human rights defenders.⁴³

In a similar vein, Turkey relies on voluntarily ill-defined jargon such as “public order”, “the indivisible unity of the State” and “the attributes of the Republic” in defining terrorism. As per Article 1 of its Anti-Terror Law, terrorism is defined as:

Any criminal action conducted by one or more persons belonging to an organisation with the aim of changing the attributes of the Republic as specified in the Constitution, [or of] the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, [or] damaging the internal and external security of the State, the public order or general health.⁴⁴

Articles 6 and 7 of the same law refer to the publication of periodicals “involving public incitement of crimes within the framework of activities of a terrorist organisation” and the use of “propaganda for a terrorist organisation”.⁴⁵ According to Amnesty International, these references have been used to silence political dissidents, academics, journalists, activists and those working in the civil

41 *Ibid.*

42 *Ibid.*

43 Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on his Mission to Saudi Arabia*, UN Doc. A/HRC/40/XX/Add.2, 6 June 2018, pp. 5–6, available at: www.ohchr.org/Documents/Issues/Terrorism/SR/A.HRC.40.%20XX.Add.2SaudiArabiaMission.pdf; see also Patrick Wintour, “UN Accuses Saudi Arabia of Using Anti-Terror Laws to Justify Torture”, *The Guardian*, 6 June 2018, available at: www.theguardian.com/world/2018/jun/06/un-accuses-saudi-arabia-of-using-anti-terror-laws-to-justify-torture.

44 Turkey, Law to Fight Terrorism, Act No. 3713, 12 April 1991 (amended 1995, 1999, 2003, 2006, 2010) (Anti-Terror Law), available at: www.legislationline.org/download/id/3727/file/Turkey_anti_terr_1991_am2010_en.pdf.

45 *Ibid.*

society sector.⁴⁶ In 2019, Amnesty International wrote that Article 7(2) of Turkey's Anti-Terror Law has been used to try 691 academics on charges of "making propaganda for a terrorist organization" just because they expressed their political opinions or views through peaceful means.⁴⁷ This includes signing petitions, publishing academic articles, or giving lectures, talks or interviews.

Similarly, Morocco's Penal Code relies on the vague and broad concept of "public order" in defining terrorism and lists under Article 218*bis* an extensive list of acts that would "gravely undermine public order", such as intentionally inflicting harm on the life or liberties of people; committing fraud or falsifying money; destroying, altering or damaging planes, ships or any other forms of public transport; engaging in theft or the extortion of goods; obstructing or degrading air, sea and land navigation or means of communication; the manufacture, possession, transport or circulation of illegal weapons, explosives or ammunition; engaging in offences related to automated processing systems data; participating in an association or agreement aiming to engage in acts of terrorism or intending to commit a terrorist crime; or knowingly receiving proceeds of terrorism offences.⁴⁸ As in the case of Turkey, Saudi Arabia and Algeria, the reliance on a vague and broad definition of terrorist acts has also been criticized in Morocco, including by the UN Working Group for Arbitrary Detention, for enabling the "systematic criminalization of activities not related to terrorism, for example in journalism, where publishing and expressing opinions, that maybe don't correspond with those of the regime, or as free speech that denounces authorities' abuses, can suffer scrutiny".⁴⁹

Securitization theory and countering terrorism

At the heart of the definitional conundrum of terrorism is the securitization of policies at the national, regional and international levels in response to the threat of terrorism in the post-9/11 world—a prominent feature in the literature on terrorism across Western and non-Western countries alike in recent years.

46 See, for example, Amnesty International, *Turkey: Deepening Backslide in Human Rights*, Submission for the UN Universal Periodic Review, 35th Session of the UPR Working Group, 7 August 2019, available at: www.amnesty.org/en/documents/eur44/0834/2019/en/.

47 Amnesty International, "Turkey: First Academic to Go to Prison for Signing Peace Petition in a Flagrant Breach of Freedom of Expression", 29 April 2019, available at: www.amnesty.org/en/documents/eur44/0290/2019/en/.

48 Morocco, Code Pénal, 26 November 1962, available at: www.refworld.org/docid/54294d164.html; Albert Caramés Boada (ed.) and Júlia Fernández Molina, *No Security without Rights: Human Rights Violations in the Euro-Mediterranean Region as Consequence of the Anti-Terrorist Legislations*, International Institute for Nonviolent Action, 2017.

49 A. Caramés Boada (ed.) and J. Fernández Molina, above note 48. See also Human Rights Council, *Report of the Working Group on Arbitrary Detention: Mission to Morocco*, UN Doc. A/HRC/27/48/Add.5, 4 August 2014, available at: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A-HRC-31-51-Add-2.doc.

Modern terrorism can be traced back to the French anarchist movement in the mid-nineteenth century. In today's "era of securitization",⁵⁰ terrorism has become one of the most serious threats to national and international security. "Securitization" as a concept, however, pre-dates the emergence of terrorism as a policy priority, which emerged as a result of the "'widening-deepening' debate in security studies [that] had begun in the 1980s and intensified with the end of the Cold War".⁵¹ Primarily developed by Barry Buzan, Ole Wæver and Jaap de Wilde, as part of what would be later known as the "Copenhagen School" of international relations theory, securitization as a concept and theory refers to the construction of an "existential threat, point of no return, and a possible way out".⁵² It describes a process whereby political actors reclassify certain matters and bring them into the realm of security while employing rhetoric to ensure that the public appreciates the importance of instating exceptional measures and dedicating asymmetric resources to handle the security threat.⁵³ Once a subject has been successfully securitized, the employment of extraordinary means (such as declaring a state of emergency or martial law, or calling in or mobilizing the military) will become widely accepted and even supported.⁵⁴ It is a "move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics".⁵⁵

There is considerable debate, however, over the distinction between the "normal" and the "exception", with the exception generally being assumed to be "a departure from the norm of deliberative liberal-democratic politics".⁵⁶ This has raised questions in the literature over whether and how securitization theory is applicable in non-democratic contexts. In the case of the MENA region, for example, "the post-independence state has enjoyed widespread powers of control"⁵⁷ and emergency laws have been prevalent for decades. Within this context, the "rules of the game" are complex and need to be understood in relative terms and within the context of the region. Pratt and Rezk argue that rather than viewing "special politics" as a break from democratic politics, "special politics" should be

50 Uzzi Ohana, "The Securitisation of Others: Fear, Terror, Identity", Sixth Pan-European Conference of International Relations: Making Sense of a Pluralist World, University of Turin, 12–15 September 2007.

51 Christian Kaunert and Sarah Leonard, "The Collective Securitisation of Terrorism in the European Union", UWE Bristol Research Repository, 2018, p. 3, available at: <https://uwe-repository.worktribe.com/OutputFile/856849>.

52 Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis*, Lynne Rienner, Boulder, CO, 1998, p. 21.

53 Saud Al-Sharafat, "Securitization of the Coronavirus Crisis in Jordan: Successes and Limitations", Washington Institute, Fikra Forum, 11 May 2020, available at: www.washingtoninstitute.org/policy-analysis/securitization-coronavirus-crisis-jordan-successes-and-limitations.

54 *Ibid.*

55 F. Galli, above note 11, p. 5; see also Simon Mabon, "Existential Threats and Regulating Life: Securitization in the Contemporary Middle East", *Global Discourse*, Vol. 8, No. 1, 2018, available at: https://eprints.lancs.ac.uk/id/eprint/89177/1/Existential_Threats_and_Regulating_Life.pdf.

56 Nicola Pratt and Dina Rezk, "Securitizing the Muslim Brotherhood: State Violence and Authoritarianism in Egypt after the Arab Spring", *Security Dialogue*, Vol. 50, No. 3, 2019, p. 241; see also Juha A. Vuori, "Illocutionary Logic and Strands of Securitization: Applying the Theory of Securitization to the Study of Non-Democratic Political Orders", *European Journal of International Relations*, Vol. 14, No. 1, 2008.

57 N. Pratt and D. Rezk, above note 56, p. 241.

understood as a break from the rules that non-democratic regimes depend upon to govern.⁵⁸ As such, while “normal politics” may refer to the non-democratic means employed by the State to enforce and maintain its authority, “special politics” refers to the employment of even more stringent and repressive policies.

As in other regions of the world, security strategies in the MENA region follow a “top-down” approach, where the understanding and framing of security threats from internal and external actors are determined by the State apparatus and political elite.⁵⁹ Security within the Middle East context is more concerned with “regime survival, societal security, and ideological power”⁶⁰ than with other, more “conventional” security concerns. In the UK context, for example, conventional security concerns mainly focus on protecting the UK, its citizens and its national and international interests, which the government claims to be grounded on a set of core values: “human rights, the rule of law, legitimate and accountable government, justice, freedom, tolerance, and opportunity for all”.⁶¹

Security in the MENA region, on the other hand, is often framed around identity, religion, sectarianism and consociationalism, nationalism and citizenship – issues that are innate to State–society relations in the region, particularly religion, which “takes on an existential importance, as a prominent feature of securitization discourse”.⁶² Within this context, sectarian divides have often been securitized and used as a tool to eliminate opponents, dissidents and protest groups, on the one hand, and to maintain the support of local and regional political allies, on the other.

In the wake of the Arab Uprisings, “the collapse of key long-standing regimes led to a reconstruction of the security *status quo*”, characterized by a radical shift in the traditional national and regional framing of security.⁶³ While State actors remain central to how security is framed and understood both locally and regionally, inter-State dynamics and confessional/ethics discourses have changed, leading to the creation of new security actors and threats at the national level as well as new coalitions and rivalries at the regional level. Fawcett argues that on a more regional level, the Arab Uprisings contributed to “a notable resurgence in the long-standing rivalry between monarchies and republics”, a renewed Sunni–Shia confrontation and “a rising antagonism against the Muslim Brothers in the region”.⁶⁴ On the local level, the region has witnessed a serious surge in tensions between “regime and society” – some of which have been promoted by external or regional actors.⁶⁵ Opposition groups deemed to pose a threat to the survival of the regime have been targeted with varied strategies

58 *Ibid.*

59 S. Mabon, above note 55, p. 3.

60 *Ibid.*

61 UK Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an Interdependent World*, March 2008, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228539/7291.pdf.

62 S. Mabon, above note 55, p. 3.

63 Louise Fawcett, *International Relations of the Middle East*, Oxford University Press, Oxford, 2019, p. 219.

64 *Ibid.*

65 S. Mabon, above note 55, p. 5.

ranging from political reform to the use of coercive and repressive measures, often under the guise of security.⁶⁶ Moreover, securitizing actors have served as a tool of solidification for the regime, as well as causing frictions and divisions between and within opposition groups, thereby changing the nature of dissent and protest movements within broader regional dynamics.⁶⁷

Today, the wider literature demonstrates that both terrorism and migration have become highly securitized, receiving disproportionate resources and exceptional attention compared to other subjects on the policy agenda worldwide. The MENA region is no exception. Within the MENA context, defining, countering and preventing terrorism is confined to the realm of security, and in the aftermath of the Arab Uprisings, counterterrorism strategies have become more stringent and have frequently been targeted towards marginalizing particular opposition groups, including civil society, and eliminating opposition. This is not only contributing to a shift in the geopolitical environment across the region⁶⁸ but is also changing the nature of bilateral and multilateral cooperation with the EU and the United States. Within the wider context of the changing theoretical discourse on security post-9/11, the EU and the United States have been progressively securitizing Islam, as well as their relations with Arab and Muslim countries.⁶⁹ This has contributed to the prominence of counterterrorism cooperation and a rhetoric that has centralized counterterrorism in bilateral and multilateral cooperation with both the EU and the United States. Yet, such rhetoric and prominence has not translated into effective, consistent and concrete results in the field.⁷⁰ If anything, it has “provided a sort of constant external legitimisation” of the securitization agenda while potentially undermining the credibility and impact of policies and programmes officially aimed at promoting democracy and human rights in the region.⁷¹ In fact, before and after the Arab Uprisings, such policies have seemed to generally prioritize short-term stability over democracy – a priority that has often failed to tackle the root causes of radicalization and violent extremism.⁷²

A regional perspective on counterterrorism strategies

As noted at the beginning of this article, the 9/11 attacks and the “War on Terror” brought terrorism and counterterrorism to the forefront of politics, which pushed countries worldwide to adopt various counterterrorism tactics and strategies. Counterterrorism is composed of complex and varied strategies and tactics aimed

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ F. Galli, above note 11.

⁷⁰ Stefano M. Torelli, “European Union and the External Dimension of Security: Supporting Tunisia as a Model in Counter-Terrorism Cooperation”, European Institute of the Mediterranean, 2017, available at: www.euromesco.net/publication/the-european-union-and-the-external-dimension-of-security-supporting-tunisia-as-a-model-in-counter-terrorism-cooperation/.

⁷¹ *Ibid.*, p. 21.

⁷² *Ibid.*

at devising a holistic response to the threat of terrorism, including the adoption of anti-terror legislations, employing intelligence and countering terrorist financing tactics, as well as cooperating with other countries.⁷³ It involves taking either a direct-action approach, such as the freezing of assets, mass arrests, destroying training camps, gathering intelligence and retaliating against a State sponsor, or taking defensive/preventative measures, such as securing borders or enforcing technological barriers.⁷⁴ Although preventative measures involve actions “targeted effectively at the root cause of terrorism”, Corbin and Billet argue that most counterterrorism measures are based on a direct-action approach.⁷⁵

The literature generally differentiates between “soft” and “hard” counterterrorism strategies, and these vary widely across the MENA region. Hasan *et al.* argue that the nature of the State significantly influences the history of violence and the policy measures and tactics adopted in response to such violence.⁷⁶ In the case of Algeria, for example, where the military exercises ultimate control, counterterrorism strategies differ significantly from those adopted by a State under civilian rule, such as Turkey, or a monarchy, such as Saudi Arabia or Morocco. While all countries adopt a mix of soft and hard measures in countering or preventing terrorism, some countries adopt harder, significantly more coercive measures than others. The broad definition of terrorism widely adopted as part of the anti-terrorism legislative instruments in the MENA region facilitates the implementation of more coercive, defensive and repressive approaches, and the securitization of policies in the name of counterterrorism.

When evaluating counterterrorism policies and strategies in the region, one challenge and limitation holds true for all countries: the data are often sparse, vague or too broad.⁷⁷ Statistics and qualitative data and analyses are limited, “unreliable, [and] often contradicted by the authorities themselves”.⁷⁸ Moreover, a significant majority of the literature focuses on evaluating bilateral or multilateral counterterrorism cooperation between countries in the region and the EU or United States, with only a few studies adopting an in-depth analytical approach towards these policies within their local context.

The following sections evaluate the different counterterrorism measures adopted in the region in terms of their nature, legislative basis and effectiveness. They also shed light on collaborative State strategies with foreign partners, such as the United States and the EU.

73 Z. Buronova, above note 8.

74 I. Corbin and B. Billet, above note 5.

75 *Ibid.*, p. 3.

76 Noorhaidi Hasan, Bertus Hendriks, Floor Janssen and Roel Meijer, *Counter-Terrorism Strategies in Indonesia, Algeria and Saudi Arabia*, ed. Roel Meijer, Netherlands Institute of International Relations Clingendael, 2012, available at: www.ojp.gov/ncjrs/virtual-library/abstracts/counter-terrorism-strategies-indonesia-algeria-and-saudi-arabia.

77 *Ibid.*

78 *Ibid.*, p. 6.

Soft and hard approaches

The distinction between “soft” (non-coercive) and “hard” (coercive) approaches is important for distinguishing between coercive measures and political non-violent measures (such as rehabilitation programmes and counter-narratives) adopted by the respective governments in the region. This distinction is significant for measuring shifts that occur through time as a result of national, regional or international crises or conflicts, as well as evaluating how countries are responding to these crises. Within the MENA context, the form of government seems to play role in whether a government opts for harder or softer measures. In the case of Algeria, for example, where the military is more dominant, counterterrorism measures are generally harder than those adopted by monarchies like Saudi Arabia and Morocco, with Turkey being somewhere in the middle. Furthermore, Algeria has had a more challenging history with violent extremism and jihadism, which culminated in a civil war in 1991.

The case of Morocco is particularly noteworthy in this regard. Neefjes notes that compared to other countries in the region, Morocco stands out due to its relative “openness” and “moderate interpretation of Islam”, which creates a sense of immunity to violent extremism.⁷⁹ Morocco has “a comprehensive counterterrorism strategy” that includes a mix of tactics, including “vigilant security measures, regional and international cooperation, and counter-radicalization policies”.⁸⁰ The 2003 Casablanca terrorist attacks were the impetus for change in Morocco’s counterterrorism policy and led to the first step towards a comprehensive strategy.⁸¹ Morocco’s comprehensive counterterrorism strategy consists of three main pillars: (1) strengthening internal security, (2) fighting poverty and marginalization, and (3) controlling the religious sector and narrative in order to promote a more moderate interpretation of Islam.⁸²

The first pillar in Morocco’s counterterrorism strategy is composed of security-focused and “hard” tactics that are aimed, *inter alia*, at improving the performance of the country’s security forces in countering terrorism, including training in cyber and crime-scene forensics, technical investigative training for the police and prosecutors, multilateral training and operational exercises to improve border security and capabilities to counter illicit traffic and terrorism,

79 Ricardo Neefjes, “Counterterrorism Policy in Morocco”, master’s thesis, Utrecht University, Faculty of Humanities, 2017, available at: <http://dspace.library.uu.nl/handle/1874/353663>; Benjamin Aziza, “Morocco’s Unique Approach to Countering Violent Extremism and Terrorism”, *Small Wars Journal*, 21 December 2018, available at: <https://smallwarsjournal.com/jrnl/art/moroccos-unique-approach-countering-violent-extremism-and-terrorism>.

80 Law Library of Congress, above note 26, p. 12; see also Mohamed El Dahshan and Mohammed Masbah, *Synergy in North Africa: Furthering Cooperation*, Chatham House, January 2020, available at: www.chathamhouse.org/sites/default/files/2020-01-2020-Synergy-North-Africa.pdf.

81 R. Neefjes, above note 79. See also Mohammed Masbah, “The Limits of Morocco’s Attempt to Comprehensively Counter Violent Extremism”, *Middle East Brief*, No. 118, Brandeis University, May 2018, available at: www.brandeis.edu/crown/publications/middle-east-briefs/pdfs/101-200/meb118.pdf.

82 R. Neefjes, above note 79; Clive Williams, “Counterterrorism Cooperation in the Maghreb: Morocco Looks Beyond Marrakech”, *The Strategist*, Australian Strategic Policy Institute, 12 December 2018, available at: www.aspistrategist.org.au/counterterrorism-cooperation-in-the-maghreb-morocco-looks-beyond-marrakech/.

and collaborations in giving training to partners in North and West Africa.⁸³ Morocco's "soft" counterterrorism policy focuses on the two pillars of fighting poverty and controlling the religious sector with the aim of tackling the root causes of radicalization and violent extremism. Its emphasis on education, aiding the youth in finding employment, and helping the disadvantaged and marginalized in society, as well as on adhering to the Islamic precepts of the Maliki school of thought, sets it apart from other counterterrorism policies in the region.

This differs from Algeria's approach in dealing with the religious element of terrorism, which falls under the country's hard approach to countering terrorism. As part of this approach, the Algerian government does not allow anyone other than those approved by the government to preach in mosques and prohibits the use of mosques outside of prayer hours for public meetings.⁸⁴ Yet, Algeria's soft approach focuses on deradicalization and preventing young people, "a potential reservoir for guerrilla fighters", from joining terrorist groups by putting them at the centre of the regime's economic policy and assisting them with housing and securing jobs in the public sector, among other initiatives.⁸⁵ While analysts have criticized Algeria for not having a comprehensive approach to counterterrorism, it is said to be moving towards a more holistic, whole-of-government approach – one that combines hard (military) tactics for combating terrorist cells and soft (preventative) measures for tackling recruitment by jihadi Salafists and other violent groups.⁸⁶ At the same time, however, given Algeria's long and gruelling experience with terrorism, the country has adopted a unique approach that recognizes its national reconciliation effort as the "backbone" of its (soft) counterterrorism strategy.⁸⁷ From the outset, Algeria has adopted a community-based approach that relies heavily on the community for delegitimizing extremism and for integrating the national strategy for combating terrorism.⁸⁸ Although some critics have argued that the Charter for Peace and National Reconciliation granted amnesty to recidivist terrorists, failed to provide accountability for the disappeared and victims of the civil war, and failed to

83 Law Library of Congress, above note 26; Assia Bensalah Alaoui, "Morocco's Security Strategy: Preventing Terrorism and Countering Terrorism", *European View*, Vol. 16, 2017, available at: <https://link.springer.com/article/10.1007/s12290-017-0449-3>.

84 Law Library of Congress, above note 26.

85 Lotfi Sour, "The Algerian Domestic Strategy of Counter-Terrorism from Confrontation to National Reconciliation", *Romanian Review of Political Sciences and International Relations*, Vol. 12, No. 2, 2015; Michael Greco, "Algeria's Strategy to Overcome Regional Terrorism", *The National Interest*, 27 February 2019, available at: <https://nationalinterest.org/feature/algerias-strategy-overcome-regional-terrorism-45742>.

86 Law Library of Congress, above note 26; Anna Louise Strachan, *The Security Sector and Stability in Algeria*, K4D Helpdesk Report, UKAid, 29 May 2018, available at: https://assets.publishing.service.gov.uk/media/5b4874e5ed915d48048316ae/Algeria_security_sector.pdf. See also US Department of State, "Country Reports on Terrorism 2019: Algeria", Bureau of Counterterrorism, 2019, available at: www.state.gov/reports/country-reports-on-terrorism-2019/algeria/.

87 L. Sour, above note 85; see also Ellie B. Hearne and Nur Laiq, "A New Approach? Deradicalization Programs and Counterterrorism", *International Peace Institute*, June 2010, pp. 3–4, available at: www.ipinst.org/wp-content/uploads/publications/a_new_approach_epub.pdf.

88 L. Sour, above note 85.

examine the role of the security forces in the war, during the 2000s Algeria played a major role both economically and militarily and took the lead on a regional approach to countering terrorism in the Maghreb region.⁸⁹

Saudi Arabia, on the other hand, arguably follows a holistic approach to tackling the threat of terrorism – one that addresses not only “the security aspects of the problem, but also its economic, social, cultural, educational and development dimensions, as well as its ideological and intellectual root causes”.⁹⁰ Though not necessarily a comprehensive strategy, Saudi Arabia’s hard approach includes programmes and actions aimed at improving the performance of security agencies by restructuring the operations of the Ministry of Interior to prevent terrorist attacks, promoting continuous training and participation in joint programmes with other countries (including European countries and the United States), exchanging intelligence information, using new technologies, and engaging community members to work with the police.⁹¹ Its soft approach includes counter-radicalization, de-radicalization and other preventative strategies, which highlights the government’s conviction that terrorism cannot be defeated only by the use of force.⁹² Initiatives in this regard include running a prison-based programme, providing support to detainees’ families, and running an aftercare programme for released detainees, as part of the government’s Prevention, Rehabilitation and Aftercare (PRAC) strategy.⁹³

The success of the PRAC strategy led other nations to establish similar programmes modelled after Saudi Arabia’s. Rehabilitation and counter-radicalization programmes that were established in Algeria, Egypt, Jordan, Yemen, Singapore, Indonesia and Malaysia in the years that followed have all been influenced, either directly or indirectly, by Saudi’s leadership with such programmes.⁹⁴ This success enabled Saudi Arabia to gain regional and international diplomatic leverage in the context of counterterrorism. This leverage has been demonstrated in the recent Qatar crisis, where Saudi Arabia, as part of a coalition of four Arab countries, spearheaded the imposition of an economic and diplomatic embargo on Qatar between June 2017 and January 2021. The four States accused Qatar of supporting and fuelling terrorism, supporting Shia proxies of Iran and funding extremist groups, including Hamas, the Muslim Brotherhood and the Al-Nusra Front.⁹⁵ Though the Qatar crisis represented the

89 Alexis Arief, *Algeria: Current Issues*, Congressional Research Service, 22 February 2011, available at: <https://tinyurl.com/tmnbwjc6>; US Department of State, *Integrated Country Strategy: Algeria*, 18 September 2018, p. 2, available at: www.state.gov/wp-content/uploads/2019/01/ICS-Algeria_UNCLASS-508.pdf. See also Rasheed Oyewole Olaniyi, “Algeria: The Struggle against Al-Qaeda in the Maghreb”, in Usman A. Tar (ed.), *Routledge Handbook of Counterterrorism and Counterinsurgency in Africa*, Routledge, Abingdon, 2021.

90 Human Rights Council, above note 20, p. 1.

91 Law Library of Congress, above note 26.

92 Z. Buronova, above note 8.

93 *Ibid.*

94 *Ibid.*, p. 1.

95 Patrick Wintour, “Gulf Plunged into Diplomatic Crisis as Countries Cut Ties with Qatar”, *The Guardian*, 5 June 2017, available at: www.theguardian.com/world/2017/jun/05/saudi-arabia-and-bahrain-break-diplomatic-ties-with-qatar-over-terrorism.

culmination of a deteriorating relationship between Qatar and its Arab neighbours in the years following the Arab Uprisings, the embargo was mainly fuelled by these States' interest in gaining diplomatic leverage by demonstrating their commitment to countering terrorism and combating terrorist and violent extremist groups and organizations in the region.

Anti-terrorism legislations

Anti-terrorism and counterterrorism laws across the MENA region are the legal enablers of counterterrorism policies. At the core of these legislations is the definition of terrorism adopted in the country in question. As argued in the first section of this paper, countries across the region have adopted broad and vague definitions of terrorism that are often used to intimidate and silence the opposition and "further the interests of the state, even in domains unrelated to terrorism".⁹⁶ While some States in the MENA region already had their own anti-terrorism legislation prior to the 9/11 attacks (e.g. Egypt and Algeria), MENA countries either codified or expanded their existing anti-terror laws or adopted new laws in response to the "War on Terror".⁹⁷ Significantly, since the "War on Terror", governments in the region have frequently responded to major domestic terrorist attacks by adopting new laws or introducing amendments to their existing anti-terror legislature (see Table 1). This is a general pattern that is by no means unique to the MENA region. For example, the UK's 2006 Terrorism Act was adopted in the wake of the 2005 London bombings; this law introduced a number of new offences, including encouragement to terrorism, dissemination of terrorist publications, acts preparatory to terrorism, terrorist training offences, and making, misusing or possessing radioactive devices or material.⁹⁸ In some countries, however, legislative amendments are not necessarily directly associated with a response to domestic terrorist attacks.⁹⁹

New and amended anti-terror laws during and since the "War on Terror" have frequently been criticized for being subject to misuse and abuse. Most anti-terrorism laws in the MENA region, it is argued, have "strayed away" from their initial and primary purpose: fighting terrorism. Instead, for the most part, they are concerned with "other issues such as the maintenance of public order or indirectly the control of dissidence and political opposition, with no or scarce legal checks and balances that could restrict possible police or judiciary abuses towards civil and political rights".¹⁰⁰

In recent years, with the then expanding threat of the so-called Islamic State (IS), MENA countries adopted legislatures that generally strengthened existing counterterrorism provisions, broadened the definition of terrorism and terrorist

96 A. M. Wainscott, above note 5, p. 32.

97 *Ibid.*

98 Council of Europe, *Profiles on Counter-Terrorist Capacity: United Kingdom*, CODEXTER, April 2017, available at: www.legislationline.org/download/id/3145/file/UK_CODEXTER_Profile_2007.pdf.

99 A. M. Wainscott, above note 5.

100 F. Tamburini, above note 36, p. 1.

Table 1. *Timing of domestic terrorist attacks compared to anti-terror legislation in the MENA region*

| Country | Date of major domestic terrorist attack(s) | Date of anti-terror legislation (amendments) |
|---------|--|--|
| Morocco | 16 May 2003, 2007, 2011 | 29 May 2003 (2015) |
| Tunisia | 2002, 2015 | 2003, 2015 |
| Egypt | 1980s, 1997, 2004 | 1992, 2000, 2007 (2015) |
| Syria | 10 May 2012 | July 2012 |
| Jordan | 2005 | 2001, 2006 (2011, 2014) |

Source: A. M. Wainscott, above note 5, p. 35.

offences, increased penalties for terrorism offences, expanded criminal liability to address the threat of foreign terrorist fighters, extended the jurisdiction of national courts, strengthened criminal justice institutions, and promoted regional and international legal assistance in the investigation and prosecution of terrorists, among other measures.¹⁰¹ For example, both Algeria and Morocco expanded their counterterrorism laws, mainly in response to the increasing threat of foreign terrorist fighters. While Morocco enacted its comprehensive counterterrorism legislation in 2003, it further broadened its definition of terrorist offences in 2015 to include joining or attempting to join terrorist organizations or groups and being involved in recruitment, activities or training for these organizations.¹⁰² It also “extended the jurisdiction of national courts to allow the prosecution of foreign nationals who commit terrorist crimes outside Morocco if they are present on Moroccan soil”.¹⁰³ Similarly, Algeria added to its penal code in order to expand criminal liability in relation to foreign terrorist fighters, including for those supporting and/or financing their activities, and the use of information technology for the recruitment of terrorists, among other measures.¹⁰⁴ These amendments are in line with UN Security Council Resolutions 2178 (2014) and 2199 (2015), and the UN Security Council ISIL and Al-Qaeda sanctions regime.¹⁰⁵

Overall, anti-terrorism and counterterrorism laws in the MENA region are important tools for countering terrorism and deterring terrorists from committing any future terrorist crimes or offences. Yet, given the nature and frequency of

101 US Department of State, *Country Reports on Terrorism 2016*, Bureau of Counterterrorism, July 2017, available at: www.state.gov/wp-content/uploads/2019/04/crt_2016.pdf.

102 Morocco, Law to Combat Terror, Law No. 03-03, *Official Bulletin of the Kingdom of Morocco*, No. 5112, 29 May 2003; Morocco, Bill to Amend Counterterrorism Law, Law No. 86.14, *Official Bulletin of the Kingdom of Morocco*, No. 6365, June 2015.

103 US Department of State, above note 101, p. 210.

104 A. Arief, above note 89.

105 *Ibid.*

terrorist attacks in the region, anti-/counterterrorism legislations in MENA countries have taken on a more restrictive and harder approach to responding to terrorism. At the core of this approach is the definitional conundrum of terrorism, where governments across the region continue to rely on vague and broad definitions that facilitate extending the remit of anti-terror laws to acts and activities unrelated to terrorism. This continues to be a major shortcoming, compounded by a failure to concentrate efforts on more preventative measures to tackle radicalization in general.

Effectiveness

The question of effectiveness is more subjective and depends on how governments and other stakeholders view and evaluate the results achieved by the different strategies adopted throughout the MENA region. Effectiveness could potentially be evaluated based on the number of potential terrorists that have been apprehended, terrorist crimes and offences that have been prevented and terrorist attacks that have been averted. In practice, however, these factors are increasingly challenging to measure and assess, both individually and collectively, in relation to a particular policy or strategy. Frequently, regimes across the region have employed mass and targeted arrests and releases as a reaction to domestic terrorist attacks, a practice which has often been criticized by human rights organizations as being retaliatory in nature. It has further been observed that there is a strong correlation between the timing of a domestic terrorist attack and mass arrests as a countermeasure, or potentially a deterrence, by regimes in the region. For example, in Morocco, in the few months after the Casablanca bombings, no less than 2,112 suspects were charged with terrorism offences.¹⁰⁶ According to Neeffjes, the fact that “an overwhelming number of suspects was apprehended ... makes it almost impossible for the measures to have been strictly targeted”.¹⁰⁷

Another potentially important measure of effectiveness is the number and nature of terrorist attacks occurring in MENA countries through time compared to the adopted legislations and policies (see [Table 2](#), which compares terrorists attacks in different MENA countries from 1980 to 2016). Although this could indicate that a particular policy or strategy is achieving its intended results (i.e., combating terrorism), it could potentially also allude to changing national, regional or international dynamics, players and other externalities that are causing a surge or decline in domestic terrorist attacks. On the other hand, the number of attacks could also help in understanding why some MENA regimes adopt harder approaches than others – for example, why Algeria adopts a harder counterterrorism strategy compared to Morocco and Saudi Arabia.

The case of Turkey is particularly noteworthy when it comes to the question of effectiveness. While the total number of terrorist attacks in Turkey in the period

¹⁰⁶ R. Neeffjes, above note 79, p. 21.

¹⁰⁷ *Ibid.*

Table 2: *Total, fatal, domestic and international attacks by country in eighteen MENA countries, 1980–2016*

| | Total attacks | Fatal Attacks | Domestic attacks | International attacks |
|------------------------------------|----------------------|----------------------|-------------------------|------------------------------|
| Algeria | 2,725 | 1,941 | 1,125 | 117 |
| Bahrain | 185 | 25 | 18 | 24 |
| Egypt | 2,248 | 979 | 389 | 449 |
| Iran | 496 | 212 | 24 | 170 |
| Iraq | 22,164 | 14,787 | 991 | 4,327 |
| Israel and Palestinian Territories | 4,075 | 1,308 | 1,379 | 1,314 |
| Israel | 1,959 | 446 | 153 | 1,085 |
| Jordan | 82 | 24 | 1 | 51 |
| Kuwait | 71 | 17 | 2 | 43 |
| Lebanon | 2,355 | 849 | 107 | 1,359 |
| Libya | 2,056 | 807 | 638 | 200 |
| Morocco | 30 | 22 | 4 | 19 |
| Qatar | 7 | 4 | 1 | 5 |
| Saudi Arabia | 315 | 169 | 22 | 193 |
| Syria | 1,918 | 1,183 | 466 | 746 |
| Tunisia | 104 | 57 | 30 | 29 |
| Turkey | 3,627 | 1,738 | 2,314 | 284 |
| United Arab Emirates | 17 | 5 | 0 | 11 |
| Yemen | 3,121 | 1,495 | 949 | 1,175 |
| Palestinian Territories | 2,116 | 862 | 1,226 | 229 |

Source: N. A. Morris, G. LaFree and E. Karlidag, above note 4, p. 160.

between 1980 and 2016 is among the highest in the region, the country's counterterrorism strategy has been critical in responding to and containing a multitude of terrorist threats—whether politically, ethnically or religiously motivated—both at the national and regional levels. As a result of its decades-long “intense first-hand experience”, Turkey's security structure has been particularly adaptive and its counterterrorism strategy and initiatives effectively

responsive to emerging terrorist threats,¹⁰⁸ especially by IS and other jihadist groups along the border with Iraq and Syria.

Finally, in terms of effective preventative measures, Saudi Arabia's indirect, soft counterterrorism policy, which aims at addressing factors contributing to radicalization and radical violent Islamism, provides a good example in this regard. The aforementioned Saudi PRAC strategy is composed of three interrelated programmes aimed at prevention, rehabilitation and post-release care, with the rehabilitation phase playing a major role. Launched in the aftermath of a wave of terrorist attacks in 2003, PRAC started with an impressive success rate and demonstrated a high level of effectiveness: for the first few years, the majority of those released as part of the counselling programme were not implicated in or arrested for security offences. Official statistics indicate a success rate of 80–90%, although there has been a rise in recidivism among “de-radicalised extremists” of 10–20% in recent years.¹⁰⁹ According to Rasheed, “[o]ne of [PRAC's] salient aspects is that the programme is not punitive in nature but is rather rehabilitative for the ‘victims’ of radicalisation”.¹¹⁰ PRAC has been widely considered to be “the most expansive, best funded and longest continuously running counter-radicalization program in existence”, although similar programmes in the Middle East, Europe and Asia are slowly starting to emerge.¹¹¹ The success of such a programme and the fact that other countries are beginning to emulate it demonstrate that a hard security response to extremism is unlikely to be effective on its own.¹¹²

Country counterterrorism cooperation

When it comes to country counterterrorism cooperation, the main international partners in the MENA region are the EU and the United States. The EU has mainly been focused on cooperating with its Southern Mediterranean partners, while the United States has directed its efforts towards the Arab Gulf – Bahrain, Iraq, Kuwait, Qatar, Oman, Saudi Arabia and the United Arab Emirates – in responding to security threats from Al-Qaeda and IS. While it is beyond the scope of this paper to examine the details of these partnerships, it is important to acknowledge some of the most prominent achievements, failures and gaps in the collaborative relationships between these actors.

The aftermath of the 9/11 attacks saw a sudden surge in international cooperation aimed at countering terrorism, where the United States has been a

108 John T. Nugent, “The Defeat of Turkish Hizballah as a Model for Counter-Terrorism Strategy”, Calhoun: The NPS Institutional Archive, 2004, available at: <https://core.ac.uk/download/pdf/36729892.pdf>.

109 Adil Rasheed, “Countering the Threat of Radicalisation: Theories, Programmes and Challenges”, *Journal of Defence Studies*, Vol. 10, No. 2, 2016, pp. 57–58, available at: https://idsa.in/system/files/jds/jds_10_2_2016_countering-the-threat-of-radicalisation.pdf; Sara Brzuskiewicz, “Saudi Arabia: The De-Radicalization Program Seen from Within”, Italian Institute for International Political Studies, 28 April 2017, available at: www.ispionline.it/en/publicazione/saudi-arabia-de-radicalization-program-seen-within-16484.

110 A. Rasheed, above note 109, p. 58.

111 C. Boucek, above note 9, pp. 22–23.

112 *Ibid.*

major player. The aim has been to build and expand on the capabilities of allies, implement stronger border protection, share intelligence, and accumulate information on terrorist fighters and cells that pose a significant danger.¹¹³ The United States has predominantly focused on kinetic efforts aimed at preventing new terrorist attacks, and hasn't dedicated the same attention and focus to building the non-kinetic capabilities of its partners, which is critical to preventing radicalization and violent extremism.¹¹⁴

Warrick and Paleyo argue that, given that IS is most likely working towards a comeback, it is a matter of urgency to work on expanding the United States' civilian, non-military and non-intelligence cooperation with its MENA partners in the next few years.¹¹⁵ Military and intelligence cooperation between the United States and MENA countries in general, and the Arab Gulf in particular, is already well advanced. Recently, the United States and the Gulf countries have adopted a number of successful models for enhancing their counterterrorism strategies, especially in relation to terrorist financing and preventing and countering radicalization.¹¹⁶ A noteworthy example in this regard is the capacity-building programme under the US–Saudi Office of Program Management–Ministry of Interior.¹¹⁷ The programme, which is considered to be a model for other Gulf countries, “facilitates the transfer of technical knowledge, advice, skills and resources from the United States to the Kingdom of Saudi Arabia in the areas [of] critical infrastructure protection and public security, including border protection, civil defense capabilities, and coast guard and maritime capabilities”.¹¹⁸

The EU, on the other hand, has progressively developed its own counterterrorism strategy and architecture, particularly since the 9/11 attacks. Its initial understanding of terrorism as an essentially external threat slowly changed to capture the home-grown terrorist phenomenon as it took the first steps to develop and build its own strategy that aims to foster cooperation, adopt a proactive and cooperative approach with third countries, and enhance a common strategic vision.¹¹⁹ In February 2015, the European Council declared that it “needs to engage more ... on counter-terrorism, particularly in the Middle East and North Africa”,¹²⁰ and following a series of terrorist attacks in 2015, the EU has adopted a number of measures to combat terrorism in various key areas, including:

113 Matthew Levitt et al., “The Future of Regional Cooperation in the War on Terror”, Washington Institute for Near East Policy, PolicyWatch 3019, 19 September 2018, available at: www.washingtoninstitute.org/policy-analysis/future-regional-cooperation-war-terror.

114 *Ibid.*

115 Thomas Warrick and Joze Paleyo, *Improving Counterterrorism and Law Enforcement Cooperation between the United States and the Arab Gulf States*, Atlantic Council. Scowcroft Middle East Security Initiative, 2020, p. 1, available at: www.atlanticcouncil.org/wp-content/uploads/2020/10/CTLE-Task-Force-Report-2020-FINAL.pdf.

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*, p. 26.

119 S. M. Torelli, above note 70, p. 13.

120 European Parliament, “Question for Written Answer E-003442-15”, 3 March 2015, available at: www.europarl.europa.eu/doceo/document/E-8-2015-003442_EN.html.

- prevention of radicalisation
- the terrorist list
- information exchange
- the EU counter-terrorism coordinator
- cutting terrorist financing
- firearms controls
- digital justice
- stopping foreign fighters
- cooperation with non-EU countries.¹²¹

Furthermore, within this framework, “the EU has constantly sought to develop the international dimension of counterterrorism, with an increasing emphasis on the need to provide aid to specific targeted countries from which major concerns stem”.¹²² This has raised questions over the effectiveness of EU aid policy when framed within the context of securitization and counterterrorism. Within the context of the EU counterterrorism strategy, Tunisia “represents one of the most sensitive cases when facing the issue of the EU’s action in cooperation with third countries in the field of counter-terrorism”.¹²³ As the country in which “radicalisation and terrorism have spread most clearly”, Tunisia was one of the key partners in the region for the EU, especially in the aftermath of the Arab Uprisings and Tunisia’s relative success in transitioning to democracy.¹²⁴ In response to the threat of terrorism, Tunisia and the EU committed to intensifying their cooperation in security and counterterrorism, with a focus on migration and mobility,¹²⁵ reflecting the EU’s perception of terrorism as being a traditionally external threat and of migration and mobility as being serious security concerns.

Overall, these international partnerships have significantly contributed to the international response to the threat of terrorism. Yet, despite the obvious advantages of building strong and robust international partnerships for combating terrorism, it is important also to acknowledge the competing national security interests of different countries when seeking such collaborative partnerships. Countries pursue their own national interests in every other aspect of international affairs, and these international partnerships – despite an intention to respond to a common security threat – are no different. Essentially, despite some human rights, development and democratization initiatives, counterterrorism cooperation initiatives with MENA countries by both the United States and the EU have ultimately prioritized “State resilience” over “societal resilience”.¹²⁶ At the core of these initiatives is the main interest of

121 European Council, “The EU’s Response to Terrorism”, General Secretariat of the Council, available at: www.consilium.europa.eu/en/policies/fight-against-terrorism/.

122 S. M. Torelli, above note 70, p. 11.

123 *Ibid.*, p. 27.

124 *Ibid.*

125 European Commission, *Joint Proposal for a Council Decision*, JOIN(2018) 9 Final 2018/0120(NLE), Brussels, 2019, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018JC0009&from=DE>.

126 See, for example, C. Kaunert and S. Leonard, above note 51.

neutralizing, containing and potentially eliminating a terrorist threat “at its source” before it ever becomes a national security concern. This inadvertently turns these initiatives into the drivers for MENA regimes to develop and adopt harder and potentially more repressive counterterrorism strategies supported by draconian anti-terror laws. The fact that these international partners do not take strong positions against repression in the name of terrorism indirectly legitimizes these approaches.

Countries across the region have also been cooperating under multiple bilateral and multilateral frameworks. Examples of multilateral regional frameworks in the region include the Arab Maghreb Union, the League of Arab States, the Gulf Cooperation Council, the Organization for Islamic Cooperation, the African Union and its African Centre for Studies and Research on Terrorism, the Organization for Security and Cooperation in Europe, and the Middle East and North Africa Financial Action Task Force.¹²⁷ The Maghreb region, in particular, has established strong collaborative partnerships when it comes to preventing and countering terrorism in the region, especially in relation to foreign terrorist fighters. For example, since 2013, Algeria has been cooperating quite extensively with Tunisia on customs, counterterrorism and border security.¹²⁸ Official reports show that security cooperation between Algeria and Tunisia along the border has averted a number of terrorist attacks, with Tunisia representing an important buffer from the instability in Libya.¹²⁹ Continued border security and cooperation between Algeria and Tunisia remains a top priority, “including a joint Algerian-Tunisian terrestrial and aerial force military operation against ISIS strongholds in the border area, resulting in the destruction of terrorist hideouts and homemade bombs”.¹³⁰

Conclusion

Based on a review of the literature, this paper has examined the different counterterrorism strategies and models in the MENA region with the aim of highlighting the different successes and shortcomings of these policies. While the literature is both sparse and limited, especially in relation to evidence-based research on local and regional counterterrorism strategies in the region, the evidence found suggests that counterterrorism strategies in much of the region have not been effective and have at times been counterproductive.

One of the major shortcomings of counterterrorism strategies in the region is the systematic reliance on vague concepts and broad definitions in defining

127 UN Office on Drugs and Crime, *Supporting Legal Responses and Criminal Justice Capacity to Prevent and Counter Terrorism*, Vienna, 2018, available at: www.unodc.org/documents/terrorism/Menu%20of%20Services/18-05646_Terrorism_Prev_Branch_Services_Ebook_NEW.pdf.

128 Kal Ben Khalid, “Evolving Approaches in Algerian Security Cooperation”, *CTC Sentinel*, Vol. 8, No. 6, 2015, available at: <https://ctc.usma.edu/wp-content/uploads/2015/06/CTCSentinel-Vol8Issue69.pdf>.

129 See *ibid.*; US Department of State, above note 101.

130 US Department of State, above note 86.

terrorist acts and offences. Concepts such as “national unity”, “State security”, “stability”, “public order” and the “safety of society” have enabled certain MENA regimes to extend the definition of terrorism to acts and offences that may not necessarily be related to terrorism. As a result, activists, dissidents, journalists, lawyers and those working in civil society or belonging to the political opposition have frequently been targeted and silenced through the introduction of draconian anti-terror laws. In order for counterterrorism strategies to effectively target terrorism and violent extremism, MENA regimes need to rely on clear and well-defined definitions of terrorism. Moreover, governments should refrain from enacting repressive anti-terror laws and using them as tools to further political interests and silence opposition groups. The evidence shows that while repression may be a form of deterrence in the short term, it is counterproductive in the long term, as it facilitates recruitment in violent groups and contributes to the radicalization of the youth and of marginalized people.

Secondly, the securitization of terrorism in the aftermath of the 9/11 attacks has facilitated and legitimized the use of extraordinary measures, such as declaring a state of emergency or martial law, and has shaped the nature of international partnerships, particularly with the EU and the United States. Within the MENA context, securitization follows a “top-down” approach that is mostly dictated by concerns for regime survival, State and elite interests, and controlling power dynamics and structures. As a result, efforts to prevent and counter terrorism at the national, regional and international levels employ measures that prioritize State stability and resilience over societal resilience. To effectively tackle the threat of terrorism, however, governments need to dedicate more effort and resources to preventative and deradicalization measures that focus on the potential root causes of terrorism, such as poverty, marginalization and unemployment. Despite some measures in this regard, success has been limited. Both the United States and the EU also need to enhance their efforts in developing partnerships aimed at building societal resilience, and to slowly move away from a securitized approach and towards forming partnerships in the region in order to make the most of democratization, human rights and development initiatives.

Overall, MENA regimes adopt a mix of hard and soft counterterrorism strategies. Research shows, however, that more effort is dedicated to improving the security response to terrorism, even though the evidence does not necessarily support the effectiveness of such measures. Emulating preventative, rehabilitation and aftercare programmes, as with Saudi Arabia’s PRAC strategy, might prove to be more effective than adopting hard security-focused approaches. Moreover, as part of their security response, MENA regimes would benefit from improving information exchanges between the different security apparatuses and forging stronger partnerships with other countries in the region.

Lastly, in order to improve the effectiveness of counterterrorism strategies in the region, MENA regimes need to develop indicators of effectiveness in order to better understand the impact of the different policies and strategies on national efforts to prevent and counter terrorism. Adopting new anti-terror laws and introducing more amendments to existing legislature is unlikely to prevent or

combat terrorism, and might even prove to be counterproductive. In fact, given the definitional conundrum of terrorism, a surge in the number of arrests (whether mass or targeted) on the back of newly introduced legislature or amendments is not necessarily an indicator of the success or effectiveness of a counterterrorism strategy. Aligning policies and strategies to measurable indicators and relying on holistic and comprehensive strategies for combating terrorism would enable MENA regimes to rely less on draconian approaches and to improve their preventative and responsive tactics with regard to terrorism.

Unfolding the case of returnees: How the European Union and its member States are addressing the return of foreign fighters and their families

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* Both authors contributed equally to the Introduction and Conclusion, as well as the section entitled “The Case of Repatriation”. The section “The EU Case of Returnees: A Counterterrorism Perspective on Foreign Fighters” is attributed to Carlotta Rigotti, while the section “The EU Member States’ Response to Foreign Fighters and Returnees” is attributed to Júlia Zomignani Barboza, with the exception of the subsection on “Exit Interventions”.

university research projects such as the Brussels Privacy Hub's Data Protection in Humanitarian Action project, together with the International Committee of the Red Cross.

Abstract

The return of foreign fighters and their families to the European Union has mostly been considered a security threat by member States, which consequently adopt repressive measures aimed at providing an immediate, short-term response to this perceived threat. In addition to this strong-arm approach, reintegration strategies have also been used to prevent returnees from falling back into terrorism and to break down barriers of hostility between citizens in the long term. Amidst these different strategies, this paper seeks to identify which methods are most desirable for handling returnees.

Keywords: foreign fighters, returnees, counterterrorism, international humanitarian law, prosecution, reintegration, deradicalization.

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Introduction

The phenomenon of foreign fighters is far from being a novelty. Throughout history, there have been many cases of individuals and groups that, for various reasons and with divergent backgrounds, have joined conflict overseas. In the European scene, the English poet Lord Byron and the American writer Ernest Hemingway are well-known examples, given their respective involvement in the Greek War of Independence (1821–32) and the Spanish Civil War (1936–39). More recently, several European citizens and residents have travelled to Iraq and Syria in order to join jihadist groups, such as Da'esh (also known as the so-called Islamic State (IS)) and the Islamist Al-Nusra Front.

Unlike in the past, however, the current travel of foreign fighters to the Middle East has raised several concerns in Western countries. More specifically, the member States of the European Union (EU) have been worried about the threat that some returnees may pose to their internal security, inasmuch as they can be fully fledged fighters, often radicalized and with relationships to terrorist networks. In response to this menace, these States have adopted divergent strategies concerning the potential repatriation of foreign fighters, as well as the consequences of their (even voluntary) return. These action plans go beyond the male returnees, also including the so-called “jihadist wives” and their children, whose involvement in the conflict might differ and so require a different legal treatment upon return.

Against this background, this paper aims to identify a tailor-made approach to handling these returning fighters and their family members that addresses not only EU member States' concerns over national security but also the reintegration of those who have travelled to (or were even born in) conflict zones, depending on the individual's identity, experiences and needs. To identify which

methods are most desirable from a security and human rights angle, we will examine how the EU and its member States are framing and facing this issue, while critically assessing it. This article will not cover the numerous definitions and legal qualifications of foreign fighters that have been proposed within the legal realm of counterterrorism and international humanitarian law (IHL), nor will it discuss the nebulous notion of terrorism. These matters are addressed in other articles in this issue of the *Review*. Instead, the article will begin with an overview of the EU framework dealing with foreign fighters. The article will then examine how EU member States regulate the return of foreign fighters and their families onto their soil; in particular, national responses are seen in the context of repatriation, prosecution and reintegration. Later, the article will discuss exit interventions and transitional justice as an alternative and/or complementary member States' policy to mitigate the perceived security threat posed by returnees. In this context, special emphasis will be put on the best interests of the child. Conclusions will be provided in the final section of the article.

The EU case of returnees: A counterterrorism perspective on foreign fighters

Back in 2013, the EU counterterrorism coordinator started emphasizing the security threat posed by the unprecedented numbers of foreign fighters travelling from the Union to Syria and other hotspots.¹ Considering that Da'esh was allegedly “the Islamist-extremist export[er] of terrorism”,² returnees were deemed to constitute a menace to the internal security of the Union, inasmuch as they were often radicalized (or, at the very least, had been exposed to extremist ideas) and trained to fight and, upon return, had links with an international jihadist network.³ This perceived threat was soon exemplified by the terrorist attacks that were committed by male returnees, such as the Charlie Hebdo and Bataclan shootings in France in 2015;⁴ these attacks paved the way for a whole range of EU policies that aim to ensure the security of EU citizens, prevent radicalization and foster cooperation with third countries to curb terrorism.⁵ Although these cases relate

- 1 EU Counterterrorism Coordinator, in close consultation with the services of the European Commission and the EEAS, *Foreign Fighters and Returnees from a Counter-Terrorism Perspective, in Particular with Regard to Syria: Stocktaking*, EU Doc. 16768/13, 2013.
- 2 European Council, *Special Meeting of the European Council: Conclusions*, EUCO 163/14, 30 August 2014, p. 6.
- 3 Gilles de Kerchove and Christiane Höhn, *The Regional Answers and Governance Structure for Dealing with Foreign Fighters: The Case of the EU*, in Andrea De Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond*, Springer, Berlin, 2016, p. 304.
- 4 Wim Wensink et al., *The European Union's Policies on Counter-Terrorism: Relevance, Coherence and Effectiveness*, European Parliament, Directorate-General for Internal Policies, 2017, p. 35, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU\(2017\)583124_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf) (all internet references were accessed in July 2021).
- 5 European Council, “Informal Meeting of the Heads of State or Government Brussels, 12 February 2015 – Statement by the Members of the European Council”, 12 February 2015, available at: www.consilium.europa.eu/en/press/press-releases/2015/02/12/european-council-statement-fight-against-terrorism/.

to male adult foreign fighters, the idea that returnees present a menace is often extended to their family members, including children. In this regard, the European Parliament noted in 2018 that

[i]t is widely claimed that children recruited into groups like IS in Iraq and Syria may perpetrate criminal acts, including serious violent offences. This stems from longstanding insights into the use of children by armed groups, but also the understanding that IS recruits boys into combat roles from the age of nine and the emergence of IS video footage that appears to show children being used in the commission of violence. As a result, the counter-terrorism lens through which adult returnees are viewed is often extended to children, with minors being classed as “foreign [terrorist] fighters” as young as 9 (Netherlands) or 12 (Belgium).⁶

While children’s role as victims of terrorist groups is also recognized and a case-by-case approach is often called for (as every child’s experiences are different), the security concern is always present.⁷

In view of the above and in order to guarantee the security of its citizens, the EU legislator first developed a policy based on reinforced checks at the Union’s external borders and enhanced information exchange amongst member States. The enactment of two pieces of legislation at the EU level inserts itself in this context, namely Directive (EU) 2016/681 on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crimes, and Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017, amending Regulation (EU) 2016/399 as regards the reinforcement of or checks against relevant databases at external borders.

Furthermore, in the same context of favouring repressive measures and strong-arm approaches and so providing an immediate policy response to foreign fighters and returnees, the European Commission adopted Directive (EU) 2017/541 on combating terrorism (EU Counterterrorism Directive), thereby including the act of travelling (or attempting to travel) for the purpose of terrorism as a new criminal offence (Article 9). More generally, this legal instrument outlaws several conducts ranging from attacks upon the physical integrity of a person (Article 3(1)(b)) to the manufacture, possession, acquisition, transport, supply or use of explosives or weapons; such conducts also include research into, and development of, chemical, biological, radiological or nuclear weapons (Article 3(1)(f)), public provocation to commit a terrorist offence (Article 5), providing and

6 Amandine Scherrer (ed.), *The Return of Foreign Fighters to EU Soil: Ex-Post Evaluation*, European Parliament Research Service, May 2018, p. 58, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU\(2018\)621811_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf).

7 For example, in a report of the Dutch National Coordinator for Security and Counterterrorism (Nationaal Coördinator Terrorismebestrijding en Veiligheid, NCTV) and General Intelligence and Security Service (Algemene Inlichtingen- en Veiligheidsdienst, AIVD), the conclusion stated that “[i]t should be clearly kept in mind that minors are chiefly victims of ISIS, without ignoring the potential risks for society”. NCTV and AIVD, *The Children of ISIS: The Indoctrination of Minors in ISIS-Held Territory*, The Hague, 2017, p. 18.

receiving training for terrorism (Articles 7–8), and the financing of terrorism (Article 10). Additionally, Article 13 provides that “it shall not be necessary that a terrorist offence be actually committed” for these acts to be punished, clearly showing the preventive nature underpinning the EU response to terrorism; in other words, the EU legislator intends to criminalize conducts relating to terrorism prior to the causation of any tangible and direct harm. Yet, although criminalization used for preventive purposes is far from being a novelty across the Union, such use has been adversely considered by scholars concerned about the change in purpose of this branch of law, and the potential breach of human rights and due process;⁸ similar concerns will be raised in this article with regard to the prosecution of foreign fighters.

Considering that not all returnees (meaning both foreign fighters and their families) pose a security threat and acknowledging that the root causes of terrorist radicalization range from socio-economic conditions to religious or political ideologies, also including identification and cultural processes,⁹ the EU legal framework on counterterrorism has also been based on preventive measures,¹⁰ outside the realm of criminal law. In this context, the EU has promoted good governance, democracy, education and economic prosperity across the Union; has addressed incitement and recruitment in key environments (such as prisons and places of worship); has developed inter-cultural dialogues and a non-emotive lexicon for discussing the issue; and has advanced a communication strategy to better explain existing policies. Furthermore, it has tried to foster the sharing and dissemination of knowledge and experiences, while establishing a High-Level Commission Expert Group on Radicalisation, several EU Cooperation Mechanisms (including the Steering Board on Union Actions on Radicalisation), and countless networks for collaboration and exchange (such as the Radicalisation Awareness Network (RAN)). Ultimately, it has financed projects and initiatives aimed at comprehending and curbing radicalization by identifying key influencing factors, extremist ideologies, and recruitment mechanisms, as well as by developing good practices and concrete guidance.

Lastly, the Union has expressed the need “to engage more with third countries on security issues and counter-terrorism, particularly in the Middle East and North Africa and in the Sahel, but also in the Western Balkans”.¹¹ Similar to the aforementioned approaches to internal security, the EU cooperation approach puts emphasis on areas such as law enforcement and criminalization, the prevention of radicalization, and the development of systems for information exchange and border security.¹²

8 See, for instance, Andrew Ashworth, Lucia Zedner and Patrick Tomlin, *Prevention and the Limits of Criminal Law*, Oxford University Press, Oxford, 2013.

9 Edwin Bakker, “EU Counter-Radicalisation Policies: A Comprehensive and Consistent Approach?”, *Intelligence and National Security*, Vol. 20, No. 2, 2015, pp. 298–302.

10 See, for instance, European Commission, “Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions Supporting the Prevention of Radicalisation Leading to Violent Extremism”, COM(2016)379 final, 2016.

11 European Council, above note 5.

12 G. de Kerchove and C. Höhn, above note 3, pp. 325–326.

In summary, the EU has mostly conflated the return of foreign fighters and their families with the security threat they are considered to pose, and thus has adopted multiple counterterrorism measures. As will emerge below, the EU approach risks overshadowing the subjecthood of such individuals within IHL and therefore unfairly prosecuting people for acts that are legal in times of war in compliance with IHL, as well as for their association with fighters alone. Given that counterterrorism falls within the shared competence of the Union and member States on the basis of Article 4 of the Treaty on the Functioning of the European Union, the next section of this article will focus on how the latter have responded to the repatriation and voluntary return of foreign fighters and their families in their territory. The divergent approaches derive from the legal gap in the EU Counterterrorism Directive, which requires member States to criminalize terrorism-related activities and, more specifically, the phenomenon of foreign fighters, without harmonizing the practicalities of their return and possible prosecution. This leeway given to States may also be explained by the understanding that counterterrorism relates to the security of citizens, which since the emergence of the modern State has been inherently linked to the national interest.¹³ In this regard, the transfer of this competence to the EU has remained sensitive and to some extent minimal, as shown by the crisis-driven nature of the Union's counterterrorism policy.¹⁴

The EU member States' response to foreign fighters and returnees

Although precise data on the phenomenon of foreign fighters in Europe are scarce, a study by the European Parliament shows that the majority of returnees came back from Syria and Iraq in two waves: one in 2013–14, prior to the June 2014 self-declaration of a Da'esh caliphate, and one in early 2015. Since 2016, and albeit the collapse of the caliphate, the number of voluntary returns of foreign fighters has significantly decreased, and major concerns have arisen from their potential repatriation.¹⁵ The reason behind the decrease remains unsettled in the literature. For instance, Amandine Scherrer *et al.* suggest that “[v]ast numbers of Europe's departees are adjudged to have died in Iraq and Syria ... [,] while many are thought to have been arrested or may relocate to neighbouring countries”.¹⁶

In any event, far from being a homogeneous group, the profile of foreign fighters and returnees varies according to gender, age, background, experiences in

13 Jörg Monar, “EU Internal Security Governance: The Case of Counter-Terrorism”, *European Security*, Vol. 23, No. 2, 2014, p. 195.

14 See, *inter alia*, Christian Kaunert and Sarah Léonard, “The Collective Securitisation of Terrorism in the European Union”, *Western European Politics*, Vol. 42, No. 2, 2019; Javier Argomaniz, “Post-9/11 Institutionalisation of European Union Counter-Terrorism: Emergence, Acceleration and Inertia”, *European Security*, Vol. 18, No. 2, 2009.

15 A. Scherrer (ed.), above note 6, p. 31.

16 *Ibid.*

hostilities and motivations,¹⁷ with the consequence of posing diverse challenges to policy-makers. At first glance, returnees (be they foreign fighters or their family members) are perceived as a security threat, inasmuch as they are likely to have acquainted themselves with extremist ideologies, to have become radicalized, to have received training for terrorism and/or to have gained experience in conflict. Consequently, they may come back to their own country to commit terrorist attacks themselves, as well as to facilitate logistical, financial and recruitment activities at home.¹⁸ For children, more specifically, although their role as victims of violations by terrorist groups is not questioned, States such as the Netherlands also deem that they may have received combat training and weapons from a young age¹⁹ and are potentially susceptible to radicalization and recruitment due to negative experiences in camps in Syria.²⁰ Yet, considering that motivations for returning can also derive from disillusionment with Da'esh or other armed groups they may have joined, as well as from the psychological and physical trauma caused by involvement in warfare, many returnees will also need assistance in reintegrating into society, returning to normal life and dealing with potential mental illnesses (such as post-traumatic stress disorder).²¹ For example, regarding the reintegration of children who have been recruited and exploited by extremist violent groups, it has been claimed that a multidimensional process is needed, which should include measures related to health and psychosocial recovery and support, educational and vocational opportunities, and return to family and community life.²² Similarly, family members who have not engaged in hostilities but have been exposed to and have potentially been victims of violence may also require special assistance from multiple sectors in their reintegration. As a result, EU member States have adopted a multidisciplinary and cross-sector approach, ranging from repressive to rehabilitative and socio-preventive policies, and involving law enforcement and civil society-based organizations. Added salience, however, has always been given to repressive measures, as these are considered able to provide immediate and short-term policy solutions to the issue under scrutiny.

On such premises, the next subsections will examine policy trends in regulating the repatriation of foreign fighters and their families, namely prosecution and reintegration on EU soil. Before proceeding to specifically examine the legal responses to the phenomenon of returnees, however, we will critically assess to what extent member States are likely to accept the repatriation of foreign fighters, and whether they seek instead to hinder their return.

17 *Ibid.*, pp. 33–38.

18 Alastair Reed and Johanna Pohl, “Disentangling the EU Foreign Fighter Threat: The Case for a Comprehensive Approach”, *RUSI Newsbrief*, Vol. 37, No. 1, 2017, pp. 1–2.

19 AIVD, *Focus on Returnees*, The Hague, 2017.

20 NCTV, *Terrorist Threat Assessment for the Netherlands 53: October 2020*, The Hague, 2020.

21 A. Reed and J. Pohl, above note 18, p. 3.

22 United Nations (UN) Office on Drugs and Crime, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, Vienna, 2017, p. 106.

The case of repatriation

In response to counterterrorism measures taken at the international and regional level (such as United Nations (UN) Security Council Resolution 2178 (2014) and the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism), EU member States have deployed a preventive strategy aimed at hindering the travel of foreign fighters. Nevertheless, the reported waves of returnees and the apparent fall of the Da'esh caliphate lead us to primarily focus on how member States have responded to the return of foreign fighters and their families, by either rejecting, restricting or favouring this scenario. Following Tanya Mehra and Christophe Paulussen's classification,²³ we identify four policy trends: locally prosecuting foreign fighters in Syria and Iraq; establishing either an international or a hybrid tribunal to conduct criminal proceedings against them; preventing foreign fighters from coming back to Europe; and repatriating foreign fighters and prosecuting them within the Union's borders. An overview of these approaches is provided below.

Locally prosecuting foreign fighters

Considering that it is likely that alleged crimes committed by foreign fighters take place in the conflict areas to which they travel, investigation and prosecution by national courts of the countries where the conflict takes place is apparently the most obvious option for dealing with foreign fighters, as long as criminal proceedings are conducted in accordance with the rule of law and human rights. In this regard, EU member States such as France²⁴ have asked the national authorities of such countries to bring foreign fighters before their courts and prosecute them locally for the crimes they have committed during hostilities. However, research points to a frequent lack of transparency in judicial proceedings, the use of the death penalty, the extensive practice of torture, limited or non-existent access to defence counsel in courts, and sentencing in lack of proper evidence, as well as the collapse of a properly functioning judiciary system in both Syria and Iraq.²⁵ Consequently, since in these circumstances it is unlikely that foreign fighters and their families would receive a fair trial in compliance with the fundamental right of due process, local prosecution in these countries should be avoided.

23 Tanya Mehra and Christophe Paulussen, "The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking", International Centre for Counter-Terrorism (ICCT), 2019, available at: <https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/>.

24 Matteo Pugliese, "France and Foreign Fighters: The Controversial Outsourcing of Prosecution", Italian Institute for International Political Studies, 2020, available at: www.ispionline.it/it/publicazione/france-and-foreign-fighters-controversial-outsourcing-prosecution-24666.

25 Tanya Mehra, "Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape. Part I: Prosecution by Iraqi and Syrian Courts", ICCT, 2017, available at: <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/>; Anthony Dworkin, *Beyond Good and Evil: Why Europe Should Bring ISIS Foreign Fighters Home*, European Council on Foreign Relations Policy Brief, 2019, available at: www.ecfr.eu/publications/summary/beyond_good_and_evil_why_europe_should_bring_isis_foreign_fighters_home.

Prosecuting foreign fighters in international or hybrid tribunals

The second approach proposes that foreign fighters could be prosecuted by an international or hybrid tribunal established under Chapter VII of the UN Charter.²⁶ Several EU member States, including Sweden and the Netherlands, have supported this policy option because it would avoid some of the difficulties deriving from locally prosecuting foreign fighters in Syria and Iraq (as outlined above), and it would address the security threat currently affecting countries of origin and transit; additionally, it would accommodate the need to prosecute foreign fighters for atrocities that may have been committed on a massive scale under IHL.²⁷ The establishment of such a court, however, is generally recognized as having political and legal complexities, considering also the time, resources and cooperation required.²⁸ In particular, in order to establish an international or hybrid tribunal, a UN Security Council resolution must be accepted without a veto from the Council's permanent members, namely the United States, the United Kingdom, France, China and Russia; yet, the latter two governments are known to be strong allies of the Assad regime that rules in Syria and are therefore expected to dismiss such a vote.²⁹ The state of affairs has so far been limited to UN Security Council Resolution 2379 (2017) requesting the creation of an investigative team to collect and preserve evidence for use in national courts of international crimes carried out by IS;³⁰ and UN General Assembly Resolution 71/248 (2016) establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.

Preventing the return of foreign fighters

As a third alternative, some member States, such as Austria, the Netherlands and Belgium, as well as the United Kingdom,³¹ have devised counterterrorism

26 Briefly, Chapter VII of the UN Charter provides the framework within which the Security Council may identify threats to the peace, breaches of the peace and acts of aggression, and therefore take military and non-military actions (such as establishing international tribunals) aimed at peace and security restoration. For further reading, see UN Security Council, "Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression", available at: www.un.org/securitycouncil/content/repertoire/actions.

27 Anthony Dworkin, "A Tribunal for ISIS Fighters?", European Council on Foreign Relations, 31 May 2019, available at: www.ecfr.eu/article/commentary_a_tribunal_for_isis_fighters.

28 T. Mehra and C. Paulussen, above note 23, p. 2.

29 This outcome, after all, already occurred when the Security Council sought to refer the Syrian case to the International Criminal Court, which has jurisdiction to prosecute individuals for international crimes, including war crimes and crimes against humanity. With regard to the Russia and Chinese veto, see Ian Black, "Russia and China Veto UN Move to Refer Syria to International Criminal Court", *The Guardian*, 22 May 2014, available at: www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court.

30 UNSC Res. 2379 (2017), UN Doc. S/RES/2379 (2017), 21 September 2017.

31 Section 33 of the Austrian Citizenship Act (1985) provides for the deprivation of citizenship whenever the individual has voluntarily joined an armed group as partaking in hostilities and such deprivation would

measures to hinder the return of foreign fighters from conflict zones. In this context, the deprivation of citizenship and the refusal to provide the necessary travel documentation to their citizens have been used as the main policy instrument. This policy choice is justified as having a punitive nature: foreign fighters could be regarded as enemies of the State, by virtue of their having worked against its vital interests and having potentially committed acts of terrorism and other atrocities.³² Simultaneously, the deprivation of citizenship is also a preventive measure able to accommodate the above-mentioned security concerns.

Although various nationality laws provide rules on the loss and deprivation of nationality,³³ the measure under scrutiny may have consequences under international law. While Article 8 of the 1961 UN Convention on the Reduction of Statelessness prohibits Contracting Parties from depriving individuals of their nationality if such a decision would render them stateless, Article 15 of the Universal Declaration of Human Rights bans the arbitrary deprivation of nationality. As laid down by the 2013 UN Secretary-General's report on *Human Rights and Arbitrary Deprivation of Nationality*, any deprivation of nationality is not arbitrary if it is provided by law, respects the due process principle, pursues a legitimate aim and is both necessary and proportionate to achieve that aim.³⁴ At present, the deprivation of nationality is regulated by each country's domestic law. However, concerns may arise whenever member States enact or amend national laws to create general clauses to justify removal of nationality, granting decision-makers a broad margin of appreciation when deciding on whether or

not make her stateless, while Article 14(4) of the Dutch Nationality Act (1985) gives the minister of justice discretionary power to strip nationality from Dutch citizens over 16 years of age who are abroad and, on grounds of their conduct, are apparently part of an organization listed as partaking in national or international armed conflict. Article 23(2) of the Code of Belgian Nationality (1984) allows for the deprivation of citizenship on the condition that the Belgian citizen is convicted for any terrorist offence and sentenced to more than five years of imprisonment. It is nonetheless the case that the deprivation of Belgian citizenship cannot be requested for individuals who hold their Belgian citizenship from one of their parents or have become a Belgian citizen at birth on grounds of the double *ius soli* principle.

While the UK is no longer a member State of the EU, Section 40 of the British Nationality Act (1981) gives the home secretary the power to deprive a person of British citizenship whenever it would be conducive to the public good, even leading to statelessness for naturalized citizens who have engaged in behaviours seriously prejudicial to the UK's vital interests. Furthermore, it is important to highlight that the British case law has also considered the deprivation of citizenship to be in compliance with the prohibition of statelessness pursuant to Article 8 of the 1961 UN Convention on the Reduction of Statelessness, where the individual is believed to be able to obtain another nationality. See Maarten P. Bolhuis and Joris van Wijk, "Citizenship Deprivation as a Counterterrorism Measure in Europe: Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism", *European Journal of Migration and Law*, Vol. 22, No. 3, 2020, pp. 347–349. The same article also provides interesting data concerning the number of citizenship deprivations for terrorism-related acts in Belgium, France, the Netherlands, and the UK (p. 351).

32 Laura Van Waas, "Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications", in A. De Guttry, F. Capone and C. Paulussen (eds), above note 3, p. 475.

33 See, for instance, Article 3 of Legge 5 Febbraio 1992 No. 91 (Italian Law on Citizenship), including withdrawal of nationality from people who join a foreign army or render services to a foreign or enemy State.

34 Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc. A/HRC/25/28, 19 December 2013. The same legal reasoning can be applied whenever the deprivation of nationality is recognized as being in violation of freedom of movement.

not to strip someone of their nationality or citizenship.³⁵ Additionally, inasmuch as States are depriving foreign fighters of their nationality when they are overseas, this practice is in breach of due process.³⁶ As regards the legitimacy of the measure, the protection of internal security against the terrorist threat posed by returnees could be accepted as a legitimate aim at first glance. Nevertheless, this practice also shifts the State's responsibility towards the international community to other governments, given that its nationals will pose a security threat despite of their location; in such a context, Elena Pokalova shows how foreign fighters could remain in post-conflict areas and benefit from their post-conflict instability to let their networks grow, as well as how they could relocate either from conflict to conflict or to commit terrorist attacks in countries of transit.³⁷ Furthermore, it is questionable whether the deprivation of nationality is the least intrusive means able to reach the desired goal, and therefore whether it is a necessary and proportionate measure. In fact, considering other deployed practices, such as travel bans and the revocation of passports,³⁸ the necessity requirement could not be satisfied.

Ultimately, while examining the proportionate nature of depriving foreign fighters of their nationality, several human rights implications arise, given that such individuals would risk being condemned to civic death and thereby becoming unable to exercise their fundamental civil and socio-economic rights.³⁹ In addition to the complexities arising from this balancing mechanism between foreign fighters' rights and national security, Laura Van Waas outlines the risk of discrimination inherent to this counterterrorism measure, insofar as naturalized nationals are considered to enjoy less protection from deprivation of nationality, and especially from statelessness, than those who are nationals by birth.⁴⁰ At the same time, Sandra Krähenmann highlights how the attempt to prevent foreign fighters from returning runs counter to the letter and spirit of UN Security Council Resolution 2178 (2014).⁴¹ First, this legal instrument focuses on the obligations of the States of nationality or residence to impede the departure of foreign fighters. Second, States are required to develop and implement prosecution, rehabilitation and reintegration strategies for returnees, which is impossible when they are prevented from returning. Finally, the resolution emphasizes the importance of international cooperation, especially with States

35 L. Van Waas, above note 32, p. 477.

36 *Ibid.*

37 Elena Pokalova, *Returning Islamist Foreign Fighters: Threats and Challenges to the West*, Palgrave MacMillan, London, 2020, pp. 59–77.

38 *Ibid.*, pp. 111–114.

39 This human rights dimension is particularly evident in the case law of the European Court of Human Rights (ECtHR). More recently see ECtHR, *El Aroud v. Belgium*, Appl. No. 25491/18, 5 November 2018; ECtHR, *Soughir v. Belgium*, Appl. No. 27629/18, 5 November 2018; ECtHR, *Ghoumid and Others v. France*, Appl. Nos 52273/16, 52285/16, 52290/16, 52294/16, 52302/16, 23 May 2017; ECtHR, *Adam Johansen v. Denmark*, Appl. No. 27801/19, 11 November 2019.

40 L. Van Waas, above note 32, pp. 482–483.

41 Sandra Krähenmann, 'The Obligations under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination', in A. De Guttry, F. Capone and C. Paulussen (eds), above note 3, p. 250.

neighbouring conflict zones, to fight against the “foreign terrorist fighter” phenomenon.

Repatriating foreign fighters and their families

Lastly, member States could actively repatriate foreign fighters and their families, ensuring that their return is followed by adequate prosecution, rehabilitation and reintegration processes. In this context, EU governments are expected to undertake a case-by-case evaluation of every returnee’s individual involvement in hostilities and potential responsibility for crimes. While this policy option ensures a long-term security perspective, it also addresses human rights concerns about the situation of family members of foreign fighters and of foreign fighters themselves, trapped in overcrowded and insanitary camps or detention in Syria and Iraq.⁴² Considering that all member States are Contracting Parties to the UN Convention on the Rights of the Child (2000) and that the best interests of the child should be a primary consideration, most EU governments, including France, Belgium and Germany, have already accepted the responsibility of arranging repatriation of children who were taken to the region by their parents or were born there, under the evidence of official documentation or DNA testing.⁴³ Laura Cools argues, however, that in practice this last requirement may render a right to return theoretical.⁴⁴ As an example, she presents the case of a Belgian mother who requested that she and her two children, born in Syria, be returned to Belgium. While at first instance it was deemed that the children had a *prima facie* right to consular assistance due to the dire situation in which they found themselves, the Court of Appeal overturned that decision, deeming that the request was inadmissible since the mother did not have any proof of her parental link to the children, whose births were never registered, and thus could not have made a request on their behalf. Indeed, considering that her first child was born in a territory controlled by Da’esh and that the second was born in a detention camp controlled by the Kurds, it would be unreasonable to expect that these

42 See, for example, Organization for Security and Co-operation in Europe, “Repatriation of ‘Foreign Terrorist Fighters’ and Their Families Urgently Needed to Safeguard Human Rights and Security, OSCE Human Rights Head Says”, 11 February 2020, available at: www.osce.org/odihr/445909.

43 A. Dworkin, above note 25; A. Scherrer (ed.), above note 6, p. 49. Among the many reasons in favour of the repatriation of children is the appalling conditions in which many of them are being held in Syrian camps. See, for example, “UNICEF Urges Repatriation of All Children in Syria’s Al-Hol Camp Following Deadly Fire”, *UN News*, 28 February 2021, available at: <https://news.un.org/en/story/2021/02/1085982>. Finland’s government has also committed itself to repatriating children from camps in northern Syria and has even carried out the repatriation of two adult mothers. As there is no explicit reference to the requirement to prove nationality in the Finnish guidelines on returning children, it is not clear whether this was required in practice or not. See Finnish Government, “Government Outlined Guidelines for Repatriating Finnish Nationals from Al-Hawl Camp”, 16 December 2019, available at: <https://tinyurl.com/38amtcea>; Aleksi Teivainen, “HS: Finland Repatriated Two Women and Six Children from Al-Hol Camp”, *Helsinki Times*, 21 December 2020, available at: www.helsinkitimes.fi/finland/finland-news/domestic/18443-hs-finland-repatriated-two-women-and-six-children-from-al-hol-camp.html.

44 Laura Cools, “La reconnaissance d’un droit subjectif au rapatriement dans le chef des enfants belges retenus en Syrie: Un grand pas en avant”, Centre Charles De Visscher pour le Droit International et Européen, 31 December 2020, available at: <https://tinyurl.com/s3xjd2u>.

children would have official birth certificates. Thus, although in 2017 the Belgian government committed to the repatriation of children under the age of 10,⁴⁵ in practice, proving the nationality of these children in order to effectively proceed with their repatriation can be challenging. Furthermore, as their nationality is not being recognized by EU countries without concrete proof, those born in Syria without any formal registration now risk statelessness.

Despite these challenges, in March 2021, Belgium's prime minister restated Belgium's commitment to repatriating minors under the age of 12 from Syria, claiming that leaving them there may turn them into the terrorists of tomorrow.⁴⁶ This follows the idea, presented by EU counterterrorism coordinator Gilles de Kerchove, that children in areas controlled by Da'esh are a ticking time bomb.⁴⁷ This also seems to be the position of the national coordinator for security and counterterrorism in the Netherlands, who insists that non-retrieval of children from Syria poses more risks to national security than retrieving them.⁴⁸ While this argument points to a recognized need to repatriate children, the position is not necessarily the same with regard to mothers. Belgium, for example, while committing to repatriating the children, said that for the mothers it would conduct a case-by-case assessment, taking into account that some of them had already been convicted in Belgium or were the object of international arrest warrants.⁴⁹ In this regard, Cools notes that the Court of Appeals of Brussels, in a case from 2018, decided that separating children and their mothers by repatriating only the former would violate the European Convention on Human Rights and the Convention on the Rights of the Child.⁵⁰ Similarly, a court in Germany determined in 2019 that a mother had to be repatriated with her three children as there was no evidence that the mother posed a specific danger to Germany, and her children, who were likely to be traumatized, would need the care and support of their mother upon return.⁵¹ According to Cools, however, such decisions have to be relativized, as in some cases – for example, when a mother is considered to be extremely radicalized – it may be considered that separation is in the best interests of the child and thus would not constitute

45 See, for example, Johnny Vansevenant and Rik Arnoudt, "Automatisch terugkeerrecht voor kinderen van IS-strijders die jonger dan 10 zijn", *VTR News*, 22 December 2017, available at: <https://tinyurl.com/2hr6j6kz>.

46 Jean-Pierre Stroobants, "La Belgique va rapatrier les enfants de djihadistes détenus en Syrie", *Le Monde*, 5 March 2021, available at: <https://tinyurl.com/f9rca9m8>.

47 Tom Kington, "45,000 Children of Isis 'Are Ticking Time Bomb'", *The Times*, 8 May 2019, available at: www.thetimes.co.uk/article/45-000-children-of-isis-are-ticking-time-bomb-lp0nq9q2m.

48 Supreme Court of the Netherlands, Case No. 05/19666, ECLI:NL:HR:2020:1148, 26 June 2020, para. 2.5.

49 J. P. Stroobants, above note 46.

50 In this regard, IHL also prescribes that family life and, consequently, family unity must be respected as far as possible, and it would thus also seem to advocate for mothers to be repatriated together with their children. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 105, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

51 "Bundesregierung muss Mutter und Kinder aus Syrien zurückholen", *Legal Tribune Online*, 8 November 2019, available at: <https://tinyurl.com/55y8jjda>. As mentioned above, Finland also repatriated two mothers with their children, claiming it was not possible to repatriate the children alone; see above note 43.

a violation.⁵² The position of States and courts thus may need to mature further to provide clearer guidance on this issue.

In conclusion, despite challenges, the repatriation of foreign fighters and their families can be considered the most appropriate solution, as it is able to address existing security concerns, as well as to respect human rights. In fact, besides the political unfeasibility of the establishment of an international or hybrid tribunal, all the other policy options would deflect the responsibility of the State of origin to deal with foreign fighters to other countries, where they may be faced with an unfair trial or could be sentenced to civic death by their country of origin and thus might continue to pose a security threat in countries of transit. But to what extent could repatriation be effective? To answer this question, and going beyond the above-mentioned challenges, the following subsections will examine how member States are dealing with foreign fighters and their families upon return. Special emphasis will be put on the criminalization and prevention approaches, in light of the aforementioned EU counterterrorism framework.

The case of prosecution of foreign fighters and family members on EU soil

As mentioned above, one of the reasons why many countries do not wish to repatriate foreign fighters is because they are often believed to have committed criminal acts, sometimes framed as terrorist acts under anti-terrorism laws. Not only can such suspicion make States consider such fighters a threat to their national security, due to the fear that they may repeat the criminal acts in their territory, but it may also create a challenging obligation for the State of origin, which is to prosecute the alleged criminal conduct. Indeed, both IHL and international criminal law impose on States the obligation to prosecute certain crimes, regardless of where they happened, such as the international crimes of genocide,⁵³ crimes against humanity and war crimes,⁵⁴ as well as other crimes they may be bound to prosecute by the ratification of international treaties.⁵⁵ Furthermore, States are bound by UN Resolution 2178 (2014) to criminalize the phenomenon of foreign terrorist fighters, and national anti-terrorism laws may also apply to the conduct of returnees (be they fighters or family

52 L. Cools, above note 44.

53 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (entered into force 12 January 1951), Arts III–V.

54 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Arts 49, 50; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Arts 50, 51; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Arts 129, 130; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Arts 146, 147.

55 See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (entered into force 26 June 1987), Art. 7.

members).⁵⁶ In practice, EU States have indeed focused on repressive measures, such as prosecution and punishment, to curb the phenomenon of foreign fighters, as prosecution provides a more immediate response to the issue of foreign fighters and the threat they are deemed to pose. The alleged crimes of foreign fighters are likely to have been committed abroad, however, and prosecuting them nationally can present many challenges to States of destination, despite their obligation and willingness to do so.

For example, it may be very costly to investigate and collect evidence regarding facts that took place far away from and outside the jurisdiction of the investigating authorities. In this regard, it has been noted that, in the context of prosecuting European foreign fighters who joined armed conflicts in Iraq in Syria,

[c]ollection of evidence with regard to foreign fighters is a challenge: evidence from the battlefields in Syria and Iraq is difficult to obtain, collection and use of internet based evidence is challenging, cross-border legal cooperation is often necessary to get access to evidence (foreign fighters transit through other countries, internet providers might be located abroad), [and] some information originates from security services, hence the challenges of using intelligence information in judicial proceedings arise.⁵⁷

This may explain the limited judicial response to the issue of foreign fighters. In 2014, for example, it was said that in Europe there had been “less than 10 convictions for around 3000 EU citizens/residents involved in the phenomenon of foreign fighters”.⁵⁸ The 2020 *Eurojust Memorandum on Battlefield Evidence* seems to suggest that these challenges may be slowly being surmounted in the EU. In comparison to the Memorandum from 2018, Eurojust noted that

[w]hile the 2018 Eurojust Memorandum on Battlefield Evidence reported limited experiences of using battlefield evidence, the 2020 report shows that, during the past few years, several countries have used such evidence in their criminal proceedings against foreign terrorist fighters and other persons suspected of criminal offences during armed conflicts.⁵⁹

56 Even though both international crimes (such as genocide, war crimes and crimes against humanity) and terrorism offences can incur a State’s obligation to prosecute under universal jurisdiction and can indeed apply to the same situation (e.g., in a situation of armed conflict involving terrorist groups), they remain two different sets of crimes. In this regard, the European Network of Contact Points for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes (Genocide Network) “reiterated the difference between the sets of legislation on counter-terrorism offences and core international crimes, namely the crime of genocide, crimes against humanity and war crimes. As both sets of legislation can apply to a particular case, in accordance with the respective national legislations, it is important to stress that core international crimes are different in nature than counter-terrorism offences.” See Genocide Network, Austrian Presidency of the Council of the European Union, and Eurojust, *Conclusions of the 25th Meeting of the European Network of Contact Points for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes*, 14–15 November 2018, para. 3.

57 EU Counterterrorism Coordinator, *Foreign Fighters and Returnees: Discussion Paper*, EU Doc. 15715/14, Council of the European Union, Brussels, 24 November 2014, p. 3.

58 *Ibid.*, p. 1.

59 Eurojust, *Eurojust Memorandum on Battlefield Evidence*, The Hague, September 2020, p. 2.

In cases where evidence is still lacking, an issue that derives from the difficulties in obtaining evidence to prosecute foreign fighters is that when proceedings do take place,

prosecutors until recently have focused on charges such as membership of a terrorist organisation – as the evidentiary threshold is much lower here. Indeed, in that way, prosecutors do not need to prove the actual crimes, such as war crimes, but “merely” that these individuals joined a terrorist organisation.⁶⁰

In practice, this means that all foreign fighters convicted under such offences (be they male fighters or their family members) receive a similar penalty, regardless of whether they joined such groups assuming supporting, non-fighting functions such as cooks or whether they actively committed or organized war crimes or other heinous acts.⁶¹ This goes against the idea that penalties should be proportionate to the crime committed, as well as potentially over-simplifying returnees’ experiences abroad by considering them to be a uniform group, when their individual experiences might have been quite different.

Furthermore, as discussed in other articles in this issue of the *Review*, foreign fighters and their family members may be seen under different lights – that is, as fighters or civilians in a situation of armed conflict, to which the rules of IHL apply; or as foreign terrorist fighters, to which counterterrorism law applies. The body of law that will regulate proceedings against returnees may lead to different consequences for them. In this regard, focusing on anti-terrorism crimes sometimes overshadows IHL, leading to the punishment of acts that may be lawful under IHL but that constitute offences under terrorism laws.⁶² This is because

[a] crucial difference [between acts regulated under IHL and terrorism] is that, in legal terms, armed conflict is a situation in which certain acts of violence are considered lawful and others are unlawful, while any act of violence designated as “terrorist” is always unlawful.⁶³

In this situation, punishing acts that are lawful under IHL may risk “creating a negative precedent, suggesting that all acts carried out by NSAGs [non-State armed groups] are terrorist by nature, and hence rendering the issue of compliance with IHL by such groups or other NSAGs even more difficult”.⁶⁴

60 Hanne Cuyckens and Christophe Paulussen, *The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship between Counter-Terrorism and International Humanitarian Law*, Asser Research Paper Series 2019-04, TMC Asser Institute for International & European Law, 2019, p. 1, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3471908.

61 *Ibid.*, pp. 1–2.

62 *Ibid.*, p. 2.

63 International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, October 2015 p. 17.

64 H. Cuyckens and C. Paulussen, above note 60, p. 21.

Prosecuting child returnees

The above-mentioned challenges to prosecution are even more numerous when the concerned foreign fighters are minors.⁶⁵ The fate of children returning from conflict areas has received media attention in recent times, as with the announced defeat of the IS caliphate, “attention is increasingly turning to the complex issues surrounding any extradition or justice proceedings for captured fighters, as well as women and children”.⁶⁶ Indeed, the UN Committee on the Rights of the Child has declared that it has been credibly established that armed forces of the State and affiliated militias in Syria have recruited and used children in hostilities.⁶⁷ In this regard, it is worth noting that besides recruiting children locally, IS “managed to attract foreign recruits, among them young men, women and children from Western countries and the USA”.⁶⁸ More specifically, research shows that over 40,000 foreign fighters joined IS, about 12% of which were children.⁶⁹ Consequently, “it is of the utmost importance to understand whether these children should be held accountable for crimes they might have committed and, if so, what are the options available to ensure appropriate accountability”.⁷⁰

Overall, there has been a tendency not to prosecute children, especially in international fora, as actors in the international arena have given emphasis to the vulnerability and victimization of child soldiers.⁷¹ For example, the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed groups* state that “[c]hildren who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators”.⁷² Furthermore, “[n]ational and international institutions and agencies as well as governmental and non-governmental organizations, especially those with a focus on humanitarian work, strongly propagate the passive victim image of child soldiers”.⁷³ In fact, considering the

65 On accountability for children involved in conflict, see Júlia Zomignani Barboza, “Accountability for Child Soldiers Aged From 15 to 18”, in Fernando Bandeira, João Casqueira Cardoso, Glória Jóluskin, Cláudia Ramos and Isabel Silva (eds), *Readings in Humanitarian Action and Cooperation for Development*, Vol. 1, Publicações Fundação Fernando Pessoa, Porto, 2020. Some of the ideas included in this section derive from that piece.

66 Bethen McKernan, “Isis Defeated, US-Backed Syrian Democratic Forces Announce”, *The Guardian*, 23 March 2019.

67 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child on the Fifth Periodic Report of the Syrian Arab Republic*, UN Doc. CRC/C/SYR/CO/5, 6 March 2019.

68 Conrad Nyamutata, “Young Terrorists or Child Soldiers? ISIS Children, International Law and Victimhood”, *Journal of Conflict and Security Law*, Vol. 25, No. 2, 2020, p. 241.

69 *Ibid.*, p. 242.

70 J. Zomignani Barboza, above note 65, p. 123.

71 Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy*, Oxford University Press, Oxford, 2012.

72 UNICEF, *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007, Principle 3.6.

73 Leonie Steinl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes Under International Law*, Springer, Berlin, 2017, p. 12.

likely traumatizing effect of participating in an armed group, it has been argued that child soldiers' victimhood remains even after they reach majority.⁷⁴

The above-mentioned tendency to prosecute foreign fighters under anti-terrorism laws, however, means that "[w]ith the rise of violent extremist groups like [IS], al Qaeda, al-Shabab, and Boko Haram, many countries have adopted much more aggressive counterterrorism measures, including a marked increase in the detention and prosecution of children".⁷⁵ Indeed, as was mentioned above, as member States sometimes extend the perceived threat posed by adult returnees to children, minors may be classed as "foreign terrorist fighters" from a very young age.⁷⁶ This is a worrying development as it means that children may be charged with offences prescribed in anti-terrorism legislation. As mentioned above, the prosecution of such offences is said to sometimes violate human rights such as the rights to fair trial and due process.⁷⁷ Furthermore, terrorism-related procedures are rarely conducted in a child-friendly manner, as exemplified by the case of Omar Khadr, a child soldier who was captured at age 15 by US forces in Afghanistan and was convicted in 2010, after a lengthy procedure conducted by a US military court, for crimes he committed in 2002.⁷⁸ When it comes to the prosecution of children, it should be noted that

[t]he Convention on the Rights of the Child (CRC) requires States to establish a minimum age below which children should not be criminally prosecuted (CRC, article 40(3)), but does not set which age that should be. The Committee on the Rights of the Child affirmed that setting a minimum age below twelve is not internationally acceptable ..., but defines no further restrictions for setting the minimum age.⁷⁹

This would limit the prosecution of very young children (e.g., those considered to be foreign terrorist fighters at the age of 9 in the Netherlands⁸⁰), but would still allow children aged 12 or older to potentially face criminal proceedings. In this regard, it is worth mentioning that when it comes to vulnerable individuals, it has been said that in relation to those whose "misdeeds drift further towards the minor end of the criminal spectrum or involve particularly vulnerable persons (think of glorification, some pre-preparatory offences or cases involving children, the mentally ill or other vulnerable adults)",⁸¹

74 C. Nyamutata, above note 68, pp. 252–257.

75 Jo Becker, "Some Child Soldiers Get Rehabilitation, Others Get Prison", Human Rights Watch, 4 March 2019.

76 European Parliament, above note 6.

77 See also Sabine von Schorlemer, "Human Rights: Substantive and Institutional Implications of the War Against Terrorism", *European Journal of International Law*, Vol. 14, No. 2, 2003.

78 Bo Viktor Nylund, *Child Soldiers and Transitional Justice: Protecting the Rights of Children Involved in Armed Conflict*, Intersentia, Cambridge, Antwerp and Portland, OR, 2016.

79 J. Zomignani Barboza, above note 65, p. 123.

80 A. Scherrer (ed.), above note 6.

81 Christophe Paulussen and Kate Pitcher, *Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges*, ICCT Research Paper, The Hague, 30 January 2018, pp. 23–24.

[p]erhaps it may be better, in a specific case, not to start a criminal trial altogether and to divert the individual into deradicalisation programmes or other “softer”, preventive responses? Or, if prosecution is unavoidable, for prosecutors to recommend “softer” penalties that seek to rehabilitate offenders?⁸²

Some conclusions on prosecution

In practice, prosecuting foreign fighters can be very challenging due to the difficulty in obtaining evidence as well as the fact that procedures can be very costly and resource-consuming and, consequently, not always feasible for receiving States. Furthermore, when the concerned person is a minor, prosecuting them under anti-terrorism laws is rarely in the best interests of the child. Similarly, trials are not always considered an appropriate solution for vulnerable adults. In conclusion, although prosecution of returnees may provide an immediate response to EU internal security concerns, its implementation raises several issues with regard to the potential conflict between IHL and counterterrorism, the proportionate nature of the penalty, the complicated presentation of evidences, and respect for the child’s best interests. Ultimately, the short-term effectiveness of prosecution should also be considered; in other words, to what extent will the serving of a sentence prevent a radicalized individual from falling back into terrorism? On such premises, reintegration of former foreign fighters should therefore be favoured.

For these reasons, when dealing with returning foreign fighters, States may need to resort to means other than prosecution to handle the possible danger posed by such individuals. Indeed, such means are part of the reintegration strategies that countries are to apply to returning foreign fighters. The next subsections, therefore, will explore some of these options.

The case of reintegration

As shown in the previous section, prosecuting foreign fighters may be challenging and not always warranted. Furthermore, prosecution alone is not sufficient to address the phenomenon of foreign fighters, as reintegration is also an essential part of the strategy to deal with returnees in the long term. Since foreign fighters who have joined terrorist groups in Syria and Iraq are often radicalized (or were, at a minimum, confronted with extremist ideologies) by the teachings and trainings they followed while involved with such groups, exit interventions and transitional justice should be a key part of EU member States’ policy to mitigate the security threat posed by returnees. The same is true with their family members, especially those children who have lived under the control of terrorist groups and are therefore in need of specialized support.

82 *Ibid.*

Exit interventions

When returnees are not prosecuted (either because proceedings have not started or because prosecution is not warranted), or when foreign fighters have already served their prison sentence, they will return to society. In both scenarios, the long-term security of society is best addressed through fostering the social well-being and reintegration of returnees. Indeed, if former foreign fighters are and feel part of society, they are expected to be less likely to fall back into terrorism.⁸³

The reintegration of returnees can be pursued by exit interventions, namely processes of deradicalization and disengagement from radical ideology and violent behaviour. Because the profile of returnees varies according to gender, age, background, experiences in hostilities, and motivations, any exit intervention should be shaped according to the individual's situation, while looking both at short-term risks (such as the possible commission of terrorist attacks in the country of origin) and long-term ones (including trauma and other mental health issues deriving from participation in conflict situations).⁸⁴

Designed for both returnees and violent extremists more generally, exit intervention programmes are already under way in various member States, such as the Danish Aarhus programme⁸⁵ and the German "Live Democracy!" project.⁸⁶ Notwithstanding national peculiarities and international criticisms,⁸⁷ the above-mentioned RAN identifies some guiding principles that could be useful for understanding the importance of exit interventions in member States' policy on regulating returnees. For instance, a multidisciplinary and multi-agency approach is always required, by encompassing actors from law enforcement agencies as well as from civil society organizations and the public sector involved in secondary prevention (e.g., health care, youth, and probation services).⁸⁸ The ultimate aim of this comprehensive involvement goes beyond ensuring referrals of potential returnees, as it seeks to provide aftercare and effective options of employment, as well as to foster social cohesion and raise awareness amongst society. Indeed, given the well-known atrocities that Da'esh and other terrorist groups have committed in conflict areas, there is a high chance that foreign fighters and their families will face stigmatization and isolation in the local community to which they have returned; in this context, restoring positive

83 Marije Meines, Merel Molenkamp, Omar Ramadan and Magnus Ranstorp, *Responses to Returnees: Foreign Terrorist Fighters and Their Families*, RAN Manual, 2017, p. 53, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran_br_a4_m10_en.pdf.

84 *Ibid.*, p. 54.

85 For further reading, see Preben Bertelsen, "Danish Preventive Measures and De-Radicalisation Strategies: The Aarhus Model", *Panorama: Insights into Asian and European Affairs*, Vol. 1, No. 1, 2015.

86 For further information, see: www.demokratie-leben.de.

87 In particular, the effectiveness of exit programmes is considered to be largely unknown. Antonia Ward, "To Ensure Radicalisation Programmes Are Effective, Better Evaluation Practices Must First Be Implemented", *The Rand Blog*, 2019, available at: www.rand.org/blog/2019/03/to-ensure-deradicalisation-programmes-are-effective.html.

88 RAN Exit, "Exit Work in a Multi-Agency Setting", Ex Post Paper, 2016, available at: <https://tinyurl.com/vekywy6j>.

relationships with other family members and social networks is an essential step towards reintegration.

Looking at the performance of exit programmes,⁸⁹ these interventions are usually built on a strong relationship of trust and confidentiality with the practitioners and take place in safe environments, so that participants do not feel overheard or watched by third parties, with the potential consequence of being stigmatized amongst the local community. By being therapeutic (one-to-one) or socio-dynamic (group) processes, exit interventions primarily focus on personally lived-through experiences (e.g., biography, family, gender identity, peer relations, power struggles, recruitment, engagement), avoiding any ideological or argumentative discussion.

Last but not least, reintegration through exit programmes should be regarded as the best strategy for child returnees, in light of their vulnerability. Child returnees have usually faced violence and abuse, so that their normal social, moral, emotional and cognitive development has been interrupted and corrupted, and their return to the EU may result in further trauma, especially when member States limit repatriation procedures to minors. Consequently, in addition to potentially deconstructing the foundation of the identity of the child, exit interventions targeting minors also prioritize their personal, family and social needs while normalizing their day-to-day lives.⁹⁰

To conclude, by embracing a long-term approach and so limiting returnees' commitment to beliefs and conducts underpinning terrorism, exit interventions acknowledge returnees as legitimate and equal members of society seeking reintegration, and aim to break down barriers of distrust and hostility amongst citizens.

Transitional justice

Although they are still disregarded by EU member States, certain transitional justice mechanisms may also assist national governments in the reintegration of foreign fighters and their family members into society. Transitional justice “comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.⁹¹ While the benefits of these mechanisms are more often associated with their use in post-conflict societies, where the affected population and perpetrators can interact to establish what happened, assign responsibility, grant forgiveness and determine steps to move forward together, the toolbox of transitional justice contains mechanisms that can help returning States to reconcile with foreign fighters and their families and promote reintegration.

89 For further reading, see RAN Exit, “Outline: Deradicalisation Interventions for Violent Extremism”, Ex Post Paper, 2016, available at: <https://tinyurl.com/fu48h7dj>.

90 M. Meines *et al.*, above note 83, pp. 70–71.

91 UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616, 23 August 2004, para. 8.

Regarding child soldiers, for example, it has been claimed that, unlike prosecution, which, as shown above, is rarely in the best interests of the child, some of the transitional justice forms of accountability such as truth commissions are more rehabilitative and may facilitate reintegration.⁹² These commissions may give child soldiers the opportunity to talk about their experience and ask for forgiveness,⁹³ assuming responsibility for the acts they may have committed, as a step towards becoming fully fledged members of society.⁹⁴ Similar benefits can be expected for adult fighters and other family members during their reintegration process.

While an important advantage of transitional justice mechanisms such as truth and reconciliation commissions and endogenous mechanisms (i.e., customary and traditional ceremonies and rituals) is the interaction between victims and perpetrators, which allows victims to confront those who have harmed them and permits perpetrators to repent, this advantage is more difficult to achieve when such mechanisms are applied away from the affected population in the foreign fighter's country of nationality. However, other efforts may be made to reach such benefits. For example, such commissions, ceremonies and rituals can be undertaken with the voluntary participation of refugees coming from the concerned conflict areas who may wish to understand the motivations of foreign fighters and to share their experiences with the conflict in order to find closure; members of local communities who may fear terrorist attacks and seek ways to safely live in community with foreign fighters; and, in some cases, members of a particular ethnicity or religion that has been, possibly wrongly, associated in some way with the conflict or concerned terrorist group, enabling them to express possible frustrations related to the association. As these groups of affected populations are not often directly related to the possible crimes of foreign fighters, they are unlikely to be involved in criminal proceedings. Transitional justice mechanisms thus give them a chance to be heard by fighters as well as by other members of their community. This allows foreign fighters and local communities to better understand each other and to find ways to live together upon the former's reintegration.

In post-conflict situations, transitional justice mechanisms may also further reintegration by fostering the participation of fighters in reconstruction efforts.⁹⁵ While this cannot be done as such in returning countries, former fighters and family members may also engage in community service such as reconstructing sites that were damaged by terrorist attacks or by voluntarily being involved in, for example, exit interventions to prevent the radicalization of other members of

92 Cecile Aptel, "International Criminal Justice and Child Protection", in Sharanjeet Parmar, Mindy Jane Roseman, Saudamini Siegrist and Theo Sowa (eds), *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, Harvard University Press, Cambridge, MA, 2010, p. 352.

93 Pacifique Manirakiza, "Les enfants face au système international de justice: À la recherche d'un modèle de justice pénale internationale pour les délinquants mineurs", *Queen's Law Journal*, Vol. 34, No. 2, 2009.

94 Ilse Derluyn, Wouter Vandenhoele, Stephan Parmentier and Cindy Mels, "Victims and/or Perpetrators? Towards an Interdisciplinary Dialogue on Child Soldiers", *BMC International Health and Human Rights*, Vol. 15, No. 1, 2015.

95 M. A. Drumbi, above note 71.

society (when and if that is deemed appropriate by the professionals working in the programme). For children, participation in reconstruction efforts as well as in civil or moral training in centres for social rehabilitation may replace criminal sanctions for their wrongdoings⁹⁶ and better prepare them for life in their returning society (or even their new society, for those born in conflict countries). While it is unlikely that such trainings could replace prosecution for adult returnees, they could be undertaken by adult returnees during or following their term of imprisonment, and could be combined with the above-mentioned transitional justice mechanisms to increase their chances of reintegration.

Conclusions

In this paper we have looked at the phenomenon of foreign fighters in light of current developments in the Middle East, mainly Syria in Iraq. More specifically, we have analyzed how EU member States define and treat these fighters and their families, especially upon their return. With their actions frequently equated to terrorist activities, foreign fighters and their families are often considered a threat to their country of origin, which is why some States may take measures to prevent their return. However, considering the potential harm that can arise from prosecuting individuals in conflict areas or from stripping them of their nationality, as well as the difficulties in prosecuting them in international fora, repatriation seems to be the most appropriate solution for foreign fighters and their families. Upon return, prosecution is sometimes required of the State of origin, but in practice there are many challenges to be overcome, and in some cases prosecution will not be warranted. Therefore, a full strategy to address the phenomenon of foreign fighters must not only be based on repatriation and prosecution but must also include and favour efforts to reintegrate both foreign fighters and their families. In this context, exit interventions and transitional justice mechanisms can and should play a key role in achieving this goal and fostering the values of democracy and pluralism on which the EU has been founded.

96 P. Manirakiza, above note 93.

The public policy of sanctions compliance: A need for collective and coordinated international action

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Abstract

This paper sets out to explain the challenges of aligning sanctions compliance efforts with the delivery of humanitarian aid into highly sanctioned environments. It highlights that while the policy of sanctioning authorities is to encourage and permit humanitarian activity, there remain significant obstacles to achieving this objective. The paper offers insights into the key areas of complexity and the most urgent aspects requiring clarification. It expressly illustrates that striking the correct balance between the delivery of critical humanitarian responses and the application of United Nations and unilateral sanctions will necessitate some realignment. The paper concludes by highlighting the need for governments and sanctioning authorities to adopt a forward-leaning approach, and by stressing the necessity of collective and coordinated international action.

Keywords: sanctions, unilateral measures, counterterrorism, licensing, risk management, humanitarian aid, reconstruction.

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Recent years have seen an unprecedented growth in the use of sanctions, along with increased innovation in the types of sanctions applied.¹ Most notable is the rise in economic and trade restrictions which tackle a breadth of global concerns, including human rights abuses, conflict, cyber threats, corruption, terrorism and the spread of weapons of mass destruction. The growing prominence of financial sanctions has further generated enhanced scrutiny of their unintended impact, particularly in respect to how sanctions impact the delivery of humanitarian aid.

Whilst not a new issue, a re-energized “unintended consequences” debate has been triggered by the complexity of modern-day protracted conflicts, such as in Syria, and a range of new concerns, including the Taliban’s move into government leadership in Afghanistan. Further, the COVID-19 pandemic has raised questions regarding the extent to which sanctions may inhibit emergency responses to the global health crisis.²

The urgency of the COVID-19 situation resulted in a renewed effort by sanctions authorities to increase public messaging on the critical importance of supporting humanitarian activities. In turn, authorities have taken a number of steps in this regard, including the issuance of clarifying guidance that sets out the range of humanitarian and medical exceptions in place and, in some instances, new licenses to facilitate speedy COVID support.³ Yet despite such efforts, the challenges of aligning sanctions implementation with humanitarian delivery remain.

The humanitarian–sanctions nexus

By way of context, the international community is facing multiple humanitarian emergencies across a range of sanctioned environments. The humanitarian–sanctions nexus is most obvious in jurisdictions and territories such as Syria,

1 For a detailed overview of sanctions targets and numbers, see the *Sanctions by the Numbers* newsletter produced by the Center for a New American Security, available at: www.cnas.org/sanctions-by-the-numbers (all internet references were accessed in December 2021).

2 During March and April 2020 there were numerous instances of countries writing to United Nations (UN) Secretary-General António Guterres calling for “complete and immediate” sanctions lifting. See, for instance, “COVID-19 and Sanctions: Letter of 18 Governments to the UN Secretary-General”, 18 April 2020, available at: www.uspeacecouncil.org/4955-2/. Beyond the actual lifting of sanctions, calls have also focused on the need for “sanctions relief”, including from UN High Commissioner for Human Rights Michelle Bachelet and UN Special Rapporteur on the Right to Food Hilal Elver. See UN Office of the High Commissioner for Human Rights, “Bachelet Calls for Easing of Sanctions to Enable Medical Systems to Fight COVID-19 and Limit Global Contagion”, 24 March 2020, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25744&LangID=E.

3 For example, in the context of COVID-19, both the United States and European Commission issued a series of publications in respect of exemptions and licenses. See, for example, US Department of the Treasury, “Provision of Humanitarian Assistance and Trade to Combat COVID-19”, fact sheet, 16 April 2020 (updated 17 June 2021), available at: https://home.treasury.gov/system/files/126/covid19_factsheet_20200416.pdf; European Commission, “Sanctions: Commission Issues Additional Guidance on Providing COVID-19-Related Humanitarian Aid in Sanctioned Environments”, August 2021, available at https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/210813-humanitarian-aid-guidance-note-statement_en.pdf.

Afghanistan, Iran, North Korea, Yemen, Venezuela, Gaza and Myanmar.⁴ However, the challenges faced extend well beyond these highly sanctioned jurisdictions and impact an array of other locations where sanctions and conflict are a factor. Further compounding the situation is the evolving designated terrorist dimension, which presents a different type of sanctions implementation challenge.

The combined effect of comprehensive, unilateral sanctions plus terrorist and security concerns has created immense hurdles for those engaged in supporting humanitarian efforts. For instance, analysis conducted by Damascus-based international non-governmental organizations (INGOs) on the operational impact of sanctions in Syria is illustrative of the significant challenges encountered when seeking to make transfers into highly sanctioned jurisdictions. For Syria alone, during 2020, 12% of requested humanitarian transfers were rejected outright by international banking institutions. Of those processed, 12% were unsuccessful and 32% faced severe delays ranging from three to ten months.⁵ With regard to Iran, dialogue hosted by the Association of Certified Anti-Money Laundering Specialists (ACAMS) International Sanctions Compliance Task Force found that the figure of outright transfer rejections can be expected to be significantly higher than that of Syria.⁶

Yet, perhaps nowhere in recent years has the humanitarian-sanctions nexus become so striking as in Afghanistan, where following the Taliban's takeover, large swathes of the country's international reserves, including banking sector deposits and central bank resources, were frozen. The immobilizing effect of this has driven Afghanistan's financial and bank payment systems into disarray, with runs on banks, withdrawal restrictions, liquidity shortages and predictions of a wholesale banking sector collapse.⁷ Beyond the shattering socio-economic impact, humanitarian actors immediately encountered major delays in making and receiving payments. International correspondent banking relationships were paused, and for those wire transfer that did reach Afghanistan, the lack of in-country liquidity resulted in an inability to cash out.

Delayed or rejected humanitarian payments have real-life consequences for humanitarian operations. These include an inability to pay employees, programme suspensions or interruptions, and heightened security risks for humanitarian

4 In order for a situation to be considered an "armed conflict" under international law, a number of conditions must first be met. The author recognizes that some of the cases highlighted (i.e., Venezuela and North Korea) will not necessarily meet these conditions. However, the inclusion of such examples offers important lessons learned regarding sanctions and equally offers further context on the extent of humanitarian emergencies occurring across a range of sanctioned environments.

5 Damascus-Based INGOs, *Understanding the Operational Impacts of Sanctions on Syria II: Damascus-Based INGOs and Bank De-Risking*, April 2021.

6 For further information on the ACAMS International Sanctions Compliance Task Force humanitarian workstream, see ACAMS Sanctions Space, "ACAMS International Sanctions Compliance Task Force: Humanitarian-Sanctions Technical Dialogue Forum", 1 March 2021, available at: www.acams.org/en/media/document/16941.

7 United Nations Development Program, *The Afghan Banking and Financial System Situation Report*, policy brief, 22 November 2021, available at: www.af.undp.org/content/afghanistan/en/home/library/knowledge-products/Policy-brief-banking-crisis.html.

employees due to an inability to meet in-country financial obligations.⁸ Moreover, the challenges encountered are not solely confined to the actual transfer of funds and can impact an array of wider aspects, such as the ability to procure and move critical goods, secure insurance and access essential infrastructure (e.g. cloud computing, software upgrades and internet access) for humanitarian operations in highly sanctioned jurisdictions. The growing compliance use of internet protocol tracking can further be expected to result in many humanitarian operations within highly sanctioned jurisdictions being denied access to digital products and services.⁹

For humanitarian operations, it is important to note that sanctions are not only triggered by financial transactions, but can also come into play with the provision of services or the delivery of goods, even if no payments are involved. This is particularly relevant for the application of US sanctions, whereby humanitarian operators will need to consider a plethora of potential financial and non-financial “trigger” points, including the use of US dollar payments, the involvement of a US correspondent bank, the involvement of a US person (such as a US insurer, transporter/logistics provider, or manufacturer), and export authorization, which may be relevant depending on the item, the destination, the end use and/or the end user.

In the case of export control regulations, certain items involving US-origin parts (such as computers, medical equipment and water sanitization equipment) may be subject to US export regulation, even if located outside of the US and possessed by non-US persons.¹⁰ For US-embargoed destinations, there is a *de minimis* US content threshold; in the case of Iran, for example, it is 10%, meaning that any foreign-made good which has over 10% US-origin components will become subject to US export requirements.

Overall, the nature of prohibitions, the licensing framework, the export control requirements and associated due diligence, and the risk management expectations involved are enormously complex and difficult to understand. For both private sector operators and humanitarian actors alike, navigating sanctions compliance often involves costly legal analysis and in many scenarios acts as an impediment to the smooth and rapid delivery of humanitarian aid.¹¹

In seeking solutions to these challenges, it must be recognized that the wide-scale lifting of sanctions is unlikely to happen anytime soon, and that sanctions will remain a tool of choice for many Western governments who view their use as a critical component in protecting international law and defending

8 Based on feedback received during the ACAMS International Sanctions Compliance Task Force: Humanitarian-Sanctions Technical Dialogue Forum meetings. For further information on the Dialogue Forum, see ACAMS Sanctions Space, above note 6.

9 For further information on the relevant digital technology issues, see Ashley Campbell, *How to Navigate the Digital and Technology Landscape*, Sanctions Masterclass Series Follow-Up Briefing Paper, ACAMS Sanctions Space, April 2021, available at: www.acams.org/en/media/document/19051.

10 *Ibid.*

11 For further detail, see Justine Walker, *Humanitarian Impact of Syria-Related Unilateral Restrictive Measures*, National Agenda for the Future of Syria, 16 May 2016, available at: www.voltairenet.org/IMG/pdf/Humanitarian_Impact_of_Syria-Related_Unilateral_Restrictive_Measures.pdf.

against threats to international peace and security. As such, the debate here and now urgently needs to focus on addressing the obstacles that impede the effective use of humanitarian exemptions.

Humanitarian sanctions exemptions: Why is there a problem?

Sanctions frameworks, in most instances, do make specific allowances to permit activities in the context of humanitarian work. Even in the most stringent of scenarios, such as Iran and Syria, a wide number of exceptions and licenses permit the movement of humanitarian goods and medicines. Yet, despite the policy aim of not interrupting the export of medicines, foodstuffs or other critical humanitarian services, a major problem persists in terms of how exceptions frameworks are implemented and practically applied. The reasons for this are multifaceted but can be narrowed down to a number of common themes.

Firstly, the frameworks for implementing sanctions exceptions and licenses are highly technical and often require extensive expertise. What is and isn't permitted without requiring a license and/or prior authorization varies considerably across those countries imposing sanctions and across the different sanctions regimes. Often, banks, exporters and humanitarian actors need to consult multiple differing sets of legislation. This creates delays and confusion, and often leads to a lack of consistency in understanding and impacts pragmatic decision-making. The interrelating prohibitions, licensing frameworks, export control requirements and associated risk management expectations present a dizzying maze of regulations, and those responsible for compliance matters must now deal with a massive "grey area", in that individual decisions are often open to wide-ranging interpretations.

Secondly, central to decision-making are considerations around the amount of due diligence necessary to mitigate against the risk of a sanctions violation occurring. Exact levels of due diligence are not set out in legislation, but instead are determined by a range of factors including type of project, delivery partners, likely exposure to a designated actor and so forth. Often a first step in the due diligence process is the need to ensure that you are not engaging—directly or indirectly—with any sanctioned person or entity. For highly sanctioned jurisdictions, managing due diligence expectations can be fraught with challenges and uncertainties.¹²

Thirdly, concepts of ownership and control present a further component of the due diligence process. This is because obligations often extend beyond those individuals or groups directly identified as being subject to sanctions. In its most basic form, the sanctions restriction prohibits the making available of funds (generally

12 For expectations on due diligence, including the legal thresholds of surrounding "ownership and control" considerations, see Justine Walker, *Risk Management Principles Guide for Sending Humanitarian Funds into Syria and Similar High-Risk Jurisdictions*, ACAMS, May 2020, available at: www.acams.org/en/media/document/10691.

meaning cash and finance in any form) or economic resources (generally meaning assets of any kind, such as vehicles) directly or indirectly to a listed person/entity. Examples of indirect exposure could include the purchasing of equipment required for humanitarian purposes from a non-listed company which is ultimately owned by an individual or entity on the sanctions list, or renting a building for humanitarian operations from a company which is ultimately owned by a sanctioned individual. Managing indirect sanctions exposure is probably one of the hardest aspects to resolve, and the risks for humanitarian actors in undertaking such due diligence should not be underestimated.

Fourthly, for sanctions compliance professionals, even what constitutes “humanitarian assistance” and thus falls within scope of an available permission or license may be open to interpretation. This is further compounded by the fact that often, competent authorities from different jurisdictions may form a different view on how the same permissions should be applied. In short, even competent authorities can have varying opinions on what constitutes “humanitarian assistance”. This is especially notable in the European Union (EU) sanctions context, where different EU competent authorities may adopt differing interpretations on how to apply the same regulation – for instance, on whether a license may or may not be required.

Impact of the chilling effect

Where an activity is clearly permitted, there is often a fear that goods or payments may be diverted or could somehow benefit a sanctioned individual or entity – for instance, food distribution programmes which contract with suppliers that are designated, or payments to suppliers that will need to utilize sanctioned government bank accounts. This fear has created a “chilling effect”, or as some describe it, “over-compliance”. The worry for international banks, humanitarian actors and other private sector actors is that somehow a technical sanctions violation could occur, in which the actual activity is permitted but a violation occurs due to wider implementation factors.¹³

The chilling effect is further compounded by uncertainty over new or proposed sanctions regimes. A salient example of this complexity was the 2020 introduction of the Caesar Syria Civilian Protection Act¹⁴ in the United States, which was passed into law as part of the National Defense Authorization Act. The Caesar Syria Civilian Protection Act, which is named after an individual who documented torture against civilians by Bashar Al-Assad’s government, works by targeting foreign companies and individuals who engage in significant transactions involving the Syrian government and linked industries where

13 Justine Walker, *Navigating Humanitarian Exceptions*, ACAMS Sanctions Compliance Occasional Paper, April 2020, available at: www.acams.org/en/media/document/10686.

14 US Department of State, “Caesar Syria Civilian Protection Act”, fact sheet, 17 June 2020, available at: <http://2017-2021.state.gov/caesar-syria-civilian-protection-act/index.html>.

government influence may represent a heightened concern, such as fuel and construction.

While taking some comfort from the fact that humanitarian operations are not the intended targets of so-called “Caesar sanctions”, NGOs still found themselves significantly impacted. For example, upon the introduction of the Caesar sanctions legislation, exporters largely stopped sending goods into Syria, leaving NGOs without access to crucial goods that they relied on for their day-to-day operations. Similarly, regional banks became more reluctant to process certain transfers and closed Syrian-linked bank accounts. Much of this was driven by the fear of “secondary sanctions” and challenges over how to determine the scope of “significant transactions” (i.e., transactions that are considered materially sufficient to trigger a violation).¹⁵

Licensing frameworks: Breadth of coverage and incorporation of “humanitarian-plus” activities

Humanitarian actors also must attend to projects involving “humanitarian-plus”-type activities – i.e., activities that extend beyond a tightly defined conception of humanitarian assistance. Whether such activities are termed “development”, “early recovery” or “humanitarian-plus”, the essence is the need to ensure that systems and infrastructure function. For instance, ensuring that medical facilities can operate may require connections to the electrical grid, which could in turn involve elements of infrastructure repair. Equally, water, sanitization and housing projects are often dependent on repairing, installing or building some element of local infrastructure. Moreover, in contexts like Afghanistan, there is widespread agreement that humanitarian assistance alone will not be enough to avert a major humanitarian crisis, and as such donor humanitarian programmes often extend into wider activities, such as livelihoods and development assistance.¹⁶

For Syria, construction and reconstruction associated with humanitarian activities raise two key questions: (1) to what extent will/do sanctions carve out the necessary exceptions to permit (re)construction that primarily benefits the civilian population in need, and (2) how can this be done in a manner that avoids rewarding or strengthening the perpetrators responsible for conflict-related harm and human rights violations? Beyond Syria, the unfolding situation in Afghanistan further illustrates the paramount importance of ensuring that licensing frameworks are both sufficiently broad and provide clarity of application.

15 The imposition, or threat of imposition, of secondary sanctions related to Iran, North Korea, Syria, etc. has grown considerably over recent years. For an overview of the cross-border legal, regulatory and compliance considerations, see Samantha Sultoon and Justine Walker, *Secondary Sanctions’ Implications and the Transatlantic Relationship*, Atlantic Council, Washington, DC, September 2019, available at: www.atlanticcouncil.org/in-depth-research-reports/issue-brief/secondary-sanctions-implications-and-the-transatlantic-relationship/.

16 See, for example, European Commission, “Afghanistan: Commission Announces €1 Billion Afghan Support Package”, press release, Brussels, 12 October 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5208.

As the Taliban announced their newly formed government, urgent questions arose regarding the extent to which existing sanctions could potentially be interpreted to target the breadth of Afghanistan's government institutions.¹⁷ Sanctions targeting the Taliban have been in place for two decades and comprise a mixture of United Nations (UN) sanctions and unilateral measures, including those imposed by the United States. Yet, despite such long-standing sanctions, a precise definition of exactly who and what constitutes "the Taliban" has remained elusive. The situation took an even more complex turn when it transpired that the majority of interim government officials, including certain ministers, were subject to UN Security Council sanctions.

The inclusion of designated individuals within the new interim government brought into play critical compliance concepts of "ownership and control" and raised the question of whether "making funds available" to the new interim government would be a breach of sanctions. Specifically, the issue of how to distinguish relationships with ministries from those with sanctioned ministers is key. By virtue of operating in Afghanistan, humanitarian programmes (and other, non-humanitarian activities) will necessitate a degree of government-linked transactions and exposure to designated entities and individuals.¹⁸

Consequently, the international community and sanctioning authorities now face urgent deliberations as to how their licensing frameworks address aspects of designated actor engagement for humanitarian aid delivery within Afghanistan. Certain jurisdictions, such as the UK, took the view that the relevant UN resolutions did not provide an applicable humanitarian derogation, and were therefore unable to grant the required licenses.¹⁹ In comparison, the US framework, which has imposed wider comprehensive sanctions targeting the entire Taliban, moved ahead with the issuance of licenses that would permit certain otherwise prohibited activity.

For Afghanistan, the continuing uncertainty over what is and isn't permitted and the fractured international approach to licensing have posed huge challenges. Essential and comprehensive guidance, supported by competent authorities, on how to address the sanctions-humanitarian nexus for economic activity involving designated actors is urgently required. Specifically, across the spectrum, greater clarification is required on what programmes will fall within the terms of "humanitarian" and/or "permitted activity". The fear for Afghanistan, Syria, Yemen and similar scenarios is that a narrow sanctions licensing definition of what constitutes "humanitarian" or "permitted activity"

17 For an overview of these deliberations, see Justine Walker, *Afghanistan and Risk Managing Permissible Payments: Key Aspects Requiring Clarification and Future Public-Private Dialogue*, Sanctions Rapid Response Briefing Paper, ACAMS International Sanctions Compliance Task Force, 9 September 2021, available at: www.acams.org/en/sanctions-afghanistan-response-paper.

18 See ACAMS, "Sanctions Masterclass: Jurisdiction and Sanctions Regime: Rapid-Fire Update (Afghanistan)", September 2021, available at: www.acams.org/en/training/webinars/sanctions-masterclass-jurisdiction-and-sanctions-regime-rapid-fire-update-afghanistan.

19 See for example, Office of Financial Sanctions Implementation (OFSI), "OFSI Updates Charity Sector Guidance", *OFSI Blog*, 1 November 2021, available at: <https://ofsi.blog.gov.uk/2021/11/01/ofsi-updates-charity-sector-guidance/>.

and “making funds available to a designated actor” could significantly hamper international humanitarian efforts.

Availability of reliable payment channels

Beyond definitions and scope, perhaps one of the most challenging aspects is how to structure humanitarian activity and the processing of related funds into and within highly sanctioned jurisdictions. This presents a very real dilemma for both financial institutions and those delivering humanitarian aid. The imposition of sanctions can severely erode the capabilities of the banking industry to facilitate international payments, and the situation is further exacerbated when combined with ongoing conflict.

In Syria, for instance, the collapse of the banking system in non-government-controlled areas, along with US, EU, and other countries’ sanctioning of Syria’s government-owned banks (including Syria’s largest banks), has resulted in a situation where there are limited available channels and safe custodians for funds coming into Syria. The compound effect of sanctions and lack of alternative banks makes it extraordinarily difficult to carry out euro- or US dollar-denominated transactions within Syria, through what remains of the current banking system.²⁰ For NGOs and other actors carrying out humanitarian work in Syria, this has created a financial bottleneck; even where funding and support exists in theory, it’s hard to get the funds into the hands of those carrying out the work on the ground. In Afghanistan, UN agencies report that nearly 90% of NGO partners are facing difficulty bringing money into the country. Problems appear multifaceted and multilayered, with banks de-risking or awaiting sanctions clarifications or finding themselves unable to access liquidity within Afghanistan itself.²¹

Additionally, reduced correspondent banking²² channels for highly sanctioned jurisdictions have clearly impacted the ability of international banks to provide cross-border payment services in support of permissible humanitarian activity. Both banks and humanitarian actors report that the significant reduction of available correspondent bank routings into sanctioned jurisdictions has resulted in a more limited and drawn-out process for the transfer of operational humanitarian funds. Therefore, even if there is a willingness to process humanitarian-related funds, the channels for doing so are either not readily available or may be subject to frequent change. Furthermore, unilateral sanctions

²⁰ See J. Walker, above note 13.

²¹ ACAMS International Sanctions Compliance Task Force expert-level meetings with humanitarian actors, INGOs and financial institutions: first session held virtually, November 2021; second session held in Washington, DC, November 2021; third session held in London, December 2021.

²² Correspondent banking is the provision of banking services by one bank (the “correspondent bank”) to another bank (the “respondent bank”). Large international banks typically act as correspondents for thousands of other banks around the world. Correspondent banks are most likely to be used by domestic banks to service transactions into and from jurisdictions in which the latter do not have a physical presence. The provision of correspondent banking is viewed as an essential component of the global payment system, especially for cross-border transactions.

regulations may impose extensive restrictions on the opening of new correspondent relationships, or on the provision of banking services. Therefore, for some highly sanctioned jurisdictions, opportunities for creating readily available banking channels are few and far between.²³ For instance, the EU Syria regulations impose a prohibition on Syrian financial institutions opening new branches or subsidiaries in the EU and on establishing new joint ventures or new correspondent banking relationships with EU banks.²⁴ This EU regulation applies to both sanctioned and non-sanctioned Syrian financial institutions. The United States imposes a wider restriction by prohibiting US banks from providing financial services or access to banking services to banks located in Syria.²⁵

As a consequence of the combined impact of legal, sanctions and regulatory requirements and expectations, coupled with the challenging operational risk environment, banks have taken action by exiting correspondent banking relationships and minimizing their overall exposure to many highly sanctioned jurisdictions.

In turn, this has necessitated the movement of humanitarian funds by alternative, non-banking channels. This displacement, whereby payment routings may utilize unregulated transfer agents and/or bulk cash movement, elevates the overall picture of risk. For instance, bulk cash movement is not only a costly option but also increases vulnerabilities to extortion and escalates the overall physical security threat to those moving the cash. Unregulated transfers pose a different set of risks which centre around the ability to ensure end-to-end payment transparency and whether those holding and moving funds may be sanctioned actors and/or are involved in wider criminal activity such as money laundering, drug trafficking or terrorist financing.

Public policy of sanctions compliance: Future priorities, considerations and leadership

Managing the unintended humanitarian consequences of sanctions compliance will require collective vision and leadership. It is also apparent that building the necessary conditions for ensuring effective humanitarian responses within sanctioned jurisdictions will undoubtedly require governments imposing sanctions to be much more forward-leaning in how they approach certain implementation matters.

First, a more defined and consistent position on what is permitted must be taken. Currently, the system is too convoluted, disjointed and open to interpretation. As it is structured now, even seasoned sanctions experts struggle with addressing ambiguities and downstream implementation challenges.

23 Justine Walker, *Examining Viable Banking and Payment Options for the Movement of International Humanitarian Funds into Syria*, National Agenda for the Future of Syria, 2017.

24 See EUR-Lex, "EU Restrictive Measures against Syria", 20 January 2020, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A4336644>.

25 J. Walker, above note 23.

Second, there are a range of standout technical challenges that must urgently be addressed by competent authorities. This includes streamlining regulatory and legal frameworks across sanctions-imposing countries in order to ensure coordination on the scope of humanitarian permissions, and that these cover the full range of necessary activity. For instance, competent authorities should ensure that items used for “basic human needs” can be automatically exported without license. Equally, competent authorities should address key implementation differences between export control regulations and financial sanctions, including the many variations in how different sanctions frameworks are applied to UN bodies versus NGOs and their local private contractors.

Third, of paramount importance is the need for sanctions frameworks to address the fact that humanitarian activity entails much more than the delivery of items covered by current export license exceptions (i.e., food and certain medicines). Sanctioning authorities must advance a new – and clearly messaged – approach when designing sanctions and the exceptions thereto that covers broader essential humanitarian infrastructure for use in highly sanctioned environments. This essential humanitarian infrastructure might include computers for use in local offices, related business software, communications devices, internet and phone access, passenger vehicles and trucks, basic office equipment and supplies, materials and equipment for construction, and emergency/rescue infrastructure.

Fourth, sanctions authorities, donors and humanitarian actors need to further align on how to manage the controversial issue of whether a humanitarian activity could somehow benefit a sanctioned person. It may be unavoidable that during the course of providing humanitarian assistance, economic resources may need to be made available to a designated person. For instance, due to security concerns, humanitarian staff may need to travel on designated internal airlines, goods may need to transit a sanctioned port or airport, fuel for local humanitarian operations may need to be purchased from a designated actor, or payments associated with humanitarian projects may need processing through a sanctioned bank. As such, competent authorities should proactively ensure that licensing frameworks are adaptable and are able to rapidly take account of common scenarios which may entail humanitarian actors’ unavoidable economic engagement with a designated actor.

Finally, an absolute must is ensuring the availability of viable and transparent payment channels. Governments cannot expect to sanction large swathes of a country’s financial system without it having major consequences for legitimate transactions – including humanitarian ones. A collective cross-government international effort needs to be advanced to ensure that meaningful avenues are in place for the speedy processing of humanitarian transactions. This may potentially include greater utilization of special-purpose vehicles which are dedicated to supporting humanitarian transactions. Getting the public policy of sanctions compliance right in terms of payment corridors is critical for international security, stabilization, and humanitarian efforts.

In conclusion, sanctioning countries and others involved in the process of sanctions design and implementation need to work proactively together to solve these problems and ensure that sanctions do not unacceptably impede humanitarian activities. In achieving these goals, the need for dialogue at the international level cannot be underestimated. International bodies, governments, banks, humanitarian actors and other stakeholders should come together to share their experiences, ensure synergies and address the issues highlighted in this paper.

However, there first needs to be strong coordination amongst the relevant authorities within individual governments. The machinery of government must ensure that systems are in place to coordinate across sanctions authorities, regulators, donors, export agencies and foreign service departments. Effective sanctions implementation must be based on a clear understanding of the ways in which individual requirements are implemented, as well as the challenges, effects and emerging good practice. The current complexity of sanctions compliance and the challenges of interpretation, scope and utility for humanitarian operations are all too evident. Collective and coordinated international action is urgently required.

Can stakeholder dialogues help solve financial access restrictions faced by non-profit organizations that stem from countering terrorism financing standards and international sanctions?

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Abstract

Counterterrorism architecture has grown exponentially in the last two decades, with counterterrorism measures impacting humanitarian, development, peacebuilding and human rights action across the world. Addressing and mitigating the impact of these measures take various forms in different contexts, local and global. This article will

address one particular form of engagement and redressal—that of the multi-stakeholder dialogue process—to deal with the unintended consequences for civil society of countering the financing of terrorism rules and regulations. The impact is seen in the difficulties that non-profit organizations face across the world in terms of financial access. Involving civil society, banks, government, financial intelligence, regulators, supervisors and banking associations, among others, in a dialogue process with clearly defined objectives is considered by policymakers and civil society to be the most appropriate and effective form of engagement for dealing with and overcoming this particular set of challenges. Multiple examples are provided of ongoing initiatives, with the nuances of each drawn out for a closer look at the conditions needed to sustain such dialogue, and an examination of whether such stakeholder dialogue processes are fit for purpose for solving the seemingly intractable problem at hand.

Keywords: counterterrorism measures, stakeholder dialogues, development, peacebuilding, human rights, financial access, de-risking.

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Introduction

The chilling effect of global counterterrorism measures on the operating environment of civil society is affecting humanitarian, development, peacebuilding and human rights actors across the world. The measures have legal, financial and operational implications for civil society, and are felt in their day-to-day operations. The need to address the problems they experience, stemming from the implementation of counterterrorism measures, is now widely acknowledged amongst policymakers. In this article, the rubric non-profit organization (NPO) is used for civil society and humanitarian organizations.

The counterterrorism ecosystem is vast and complex. Authoritative policymakers in the international realm have shown an eagerness to regularly identify new threats, primarily related to violent radicalization and more so since the attacks of 11 September 2001 (9/11) and the rise of Daesh. This has resulted in a steady growth of international rules to address these threats. There has been much less incentive for policymakers to address the underlying causes of the growth of terrorism or the rise of terrorist threats or, indeed, of applying existing laws and measures to mitigate these threats. The expansiveness of this ecosystem or architecture has resulted in the growth of private and public organizations, and public–private partnerships that have been mandated to implement and help shore up counterterrorism measures. And because humanitarian and other civil society organizations often operate in areas where terrorist or non-State armed groups are active, they are considered to be vulnerable and at risk, and therefore in need of protection. The rapid expansion of large commercial companies that sell terrorist risk profiles for customer- or partner-vetting purposes so that

material support does not end up in the wrong hands, or that offer to conduct the screening process for public and private stakeholders, illustrates that measures to counter terrorism threats are part of profitable business models.¹

The acknowledgement of the impact of counterterrorism measures on civil society has so far not resulted in the termination or withdrawal of these measures. To the contrary, new laws and more complicated measures have been invoked, leading to a piling up of regulation. Very few governments have commissioned an independent assessment of the effectiveness of existing rules and regulations to address existing and new terrorist threats, prior to calling for and implementing more measures. The flexing of political muscle to insist on new legislation, measures or policy for the control of endlessly evolving threats has been deemed more important than informed decisions on the use of existing regulations and policies to address terrorism or violent extremism.²

These developments mean that NPOs have to constantly navigate an increasingly complex landscape of stringent regulations and opaque policies. There has been limited choice for NPOs but to adapt to a reality where counterterrorism measures determine their operational scope and environment to a large extent. NPOs are currently walking a tightrope between complying with these measures and deciding not to give in to demands or requests by authorities and donors that would undermine their role and mandate. Humanitarian organizations like the Norwegian Refugee Council and Islamic Relief Worldwide that have engaged on the issue over the past ten to fifteen years have increasingly been more vocal about compromising their humanitarian principles due to counterterrorism measures.³ The demand by some donors to screen beneficiaries against designated terrorist lists is clearly a red line for these and other

- 1 Charity & Security Network, “World-Check: The Dangers of Privatizing Terrorist Lists”, 11 February 2016, available at: https://charityandsecurity.org/financial-access/worldcheck_private_databases_raise_concerns/; Tamsin Allen, “World Check Database: Due Diligence or Blacklist?”, Bindmans, 27 September 2016, available at: <https://inform.org/2016/09/27/world-check-database-due-diligence-or-blacklist-tamsin-allen/>; Peter Osborne, “Why Majed al-Zeer’s Case Against World-Check Matters”, *Middle East Eye*, 21 January 2019, available at: <https://www.middleeasteye.net/opinion/why-majed-al-zeers-case-against-world-check-matters>; Tom Keatinge, “Who Checks World-Check? It’s High Time Someone Did”, *Middle East Eye*, 2 February 2017, available at: <https://www.middleeasteye.net/opinion/who-checks-world-check-its-high-time-someone-did> (all internet references were accessed in December 2021).
- 2 Fiona de Londras, “Politics, Accountability and Counter-Terrorism Review”, *University of Birmingham Blogs*, 26 July 2018, available at: <https://blog.bham.ac.uk/counterterrorismreview/2018/07/26/politics-accountability-and-counter-terrorism-review/>; Fionnuala Ní Aoláin, “My Priorities as UN Special Rapporteur on Counter Terrorism: The Problem of Permanent Emergencies”, *Just Security*, 9 October 2017, available at: <https://www.justsecurity.org/45640/priorities-special-rapporteur-counter-terrorism-problem-permanent-emergencies/>; Ben Saul, “The Legal Black Hole in United Nations Counterterrorism”, *IPi Global Observatory*, 2 June 2021, available at: <https://theglobalobservatory.org/2021/06/the-legal-black-hole-in-united-nations-counterterrorism/>.
- 3 The Norwegian Refugee Council and Islamic Relief Worldwide are members of the Global NPO Coalition on the Financial Action Task Force (FATF). This is a loose coalition of over 300 NPO networks and organizations that engages the FATF to ensure that countries apply the FATF AML/CFT standards in a proportionate and effective manner based on a risk-based and not a rule-based approach. See Global NPO Platform on FATF, “Global NPO Coalition on FATF (Financial Action Task Force)”, available at: www.fatfplatform.org.

humanitarian organizations.⁴ For counterterrorism policymakers, the probability of terrorists mingling with refugees or forcibly displaced persons, and the need to detect and prosecute them, trumps the mandate of humanitarian organizations to deliver aid and protect civilians and State and non-State armed actors, including terrorists.⁵

Fortunately, the engagement between civil society and policymakers to address the impact of counterterrorism measures on the operational space of NPOs has increased over the past years, ranging from one-off consultations to sustained dialogue to everything in between. Within this typology of engagement, sustained multi-stakeholder dialogue processes/forums or stakeholder roundtables (stakeholder dialogues, in short), with clearly defined objectives, are considered by policymakers and civil society to be the most appropriate form for dealing with and overcoming the challenges that counterterrorism measures pose.⁶

This article specifically focuses on stakeholder dialogues that have been set up to address the effects of the countering the financing of terrorism (CFT) standards and terrorism financing sanctions on the ability of NPOs and humanitarian organizations to carry out their work. The misinterpretation or abuse of CFT standards by government authorities is the driver for some of the most impactful effects of overall counterterrorism measures on NPOs. The effects are broadly two-fold:

1. Overregulation of NPOs under the pretext of the entire sector being at risk for terrorism financing abuse without the necessary evidence to justify it, and
2. Financial access restrictions stemming from bank supervisor guidance for retail banks on due diligence requirements for NPO clients, which often classifies, in broad brushstrokes, NPOs as being at risk for terrorism financing abuse. NPOs have been greatly affected by these measures, leading to restrictions on the

4 Norwegian Refugee Council, “Counterterrorism Measures”, Position Paper, January 2019, Humanitarian Principles section, p. 2, available at: https://www.nrc.no/globalassets/pdf/position-papers/counterterrorism-measures_position-paper.pdf.

5 Overseas Development Institute (ODI), “Humanitarian Negotiations with Armed Non-State Actors: Key Lessons from Afghanistan, Sudan and Somalia”, 18 March 2014, available at: <https://odi.org/en/publications/humanitarian-negotiations-with-armed-non-state-actors-key-lessons-from-afghanistan-sudan-and-somalia/>; Eva Svoboda, “Strengthening Access and Proximity to Serve the Needs of People in Conflict”, Humanitarian Policy Group, 2015, available at: <https://cdn.odi.org/media/documents/9737.pdf>; Voluntary Organisations in Cooperation in Emergencies (VOICE), “The Impact of EU Sanctions and Restrictive Measures on Humanitarian Action”, Workshop Report, 2019, p. 16, available at: <https://www.dgecho-partners-helpdesk.eu/download/dgechoblock/2188>.

6 Global Center on Cooperative Security, “Ensuring the Effective Implementation of Countering the Financing of Terrorism Measures While Ensuring Civic Space”, Concept Note, October 2020, available at: <https://www.globalcenter.org/project-descriptions/ensuring-the-effective-implementation-of-countering-the-financing-of-terrorism-measures-while-safeguarding-civic-space/>; International Committee of the Red Cross, “Counter-Terrorism Measures must not Restrict Impartial Humanitarian Organizations from Delivering Aid”, 12 January 2021, available at: <https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations>; Emile van der Does de Willebois, “De-Risking Impedes Access to Finance for Non-Profit Organizations”, *World Bank Blogs*, 24 February 2017, available at: <https://blogs.worldbank.org/psd/de-risking-impedes-access-finance-non-profit-organizations>.

collection and disbursement of funds in support of their operations, their partners and beneficiaries.

An example of over-regulation is the obligation set out for all foundations and associations to register gifts over €100 from donors with competent authorities.⁷ An example of a broad-brush approach is the Netherlands Central Bank guidance for banks on screening charity foundations that provide humanitarian aid:

Charity foundations are crucial for providing humanitarian help to people in need. There are strong indications that terrorists and terrorist organisations are abusing these organisations to finance their activities. Gaining an understanding of the risks and adequately monitoring the financial flows of such organisations is not only essential, but should be a regular component of an (financial) institution's sound and ethical operational management.⁸

Some lessons from past and ongoing stakeholder dialogues can already be drawn, and because the organization that the authors belong to, the Human Security Collective (HSC), is a co-convenor of the Round Table on Financial Access in the Netherlands, lessons learnt from this particular dialogue are central to the article. The analysis of and reflections on stakeholder dialogues are the authors' and HSC's alone. The insights provided are largely based on discussions about financial access restrictions stemming from the framework of the Financial Action Task Force (FATF) standards – the global standard setter on anti-money laundering and countering the financing of terrorism (AML/CFT). The HSC is co-chair of the Global NPO Coalition on the FATF – a loose network of diverse NPOs advocating for the effective, risk-based implementation of the FATF standards affecting NPOs, and aiming to mitigate the unintended consequences of AML/CFT policies on civil society in order that legitimate charitable activity is not disrupted – and hosts the website of the Coalition.⁹ In this capacity, the HSC has, along with other members of the Coalition been engaging in discussions with FATF and other stakeholders on financial access restrictions facing NPOs for the last six years. Another important driver for financial access restrictions of NPOs is terrorism financing sanctions, including those that are part of broader economic and trade-based sanctions imposed by States or multilateral entities such as the United Nations (UN) or the European Union (EU). These will be mentioned where relevant to highlight lessons learnt from stakeholder dialogue processes.

7 Regarding regulatory requirements for NPOs under AML/CFT laws in Spain, see Hanna Surmatz, "EFC/ WINGS Webinar – November 8th: How Can Philanthropy Engage Around FATF Money Laundering and Terrorism Financing Policy and Implementation?", available at: <http://wings.issuelab.org/resources/29200/29200.pdf>.

8 De Nederlandsche Bank, "Customer Due Diligence on Foundations with Respect to Terrorist Financing", 21 June 2018, available at: <https://www.dnb.nl/en/sector-information/supervision-laws-and-regulations/laws-and-eu-regulations/anti-money-laundering-and-anti-terrorist-financing-act/customer-due-diligence-on-foundations-with-respect-to-terrorist-financing/>.

9 Global NPO Platform on FATF, above note 3.

A granular look at the drivers of financial access restrictions will be presented first, followed by the perspectives of and actions taken by NPOs, international organizations and governments to address the growing obstacles for humanitarian organizations and NPOs to secure services from financial service providers.

Financial access restrictions faced by non-profit organizations

Restrictions experienced by humanitarian and other civil society organizations to access financial service providers also go by the term “de-risking”. De-risking is defined as the practice of financial service providers declining and exiting relationships with and closing the accounts of customers considered “high risk”. Regular delays in transferring funds to high-risk or sanctioned areas, or a bouncing back of these funds, also qualify as de-risking. Together with NPOs, money service businesses (MSBs) and correspondent banks also fall within the ambit of entities that face de-risking.¹⁰

De-risking of MSBs, such as Western Union, and correspondent banks has been researched extensively in macro-policy studies by the World Bank, amongst others.¹¹ Correspondent banks are third-party banks, who act as middlemen between different financial institutions. They provide services such as funds transfer, wire transfer and currency exchange between sending and receiving banks. They are the cornerstone of the global payment system, designed to serve the settlement of financial transactions across country borders. The decline of correspondent banks has affected the transfer of funds in support of humanitarian work, with the driver being the decisions by global banks over the last decade to tighten their operations in light of AML/CFT compliance.

10 HSC, “Queen Maxima Discusses De-Risking of NPOs”, available at: <https://www.hscollective.org/news/timeline/queen-maxima-discusses-derisking-of-npos/?acceptCookies=60a37eee04d6c>; World Bank Group and ACAMS, “Stakeholder Dialogue on De-Risking: Findings and Recommendations”, 2016, available at: <http://documents1.worldbank.org/curated/en/397411476868450473/pdf/109337-WP-StakeholderDialogueonDerisking-PUBLIC-ABSTRACT-SENT.pdf>. De-risking of NPOs documentation focuses primarily on cross-border and international payments. It should be noted that it also occurs within countries. On this issue in this empirical study carried out in Brazil, Mexico and Ireland, see Global NPO Coalition on FATF, “New HSC/ECNL Research Report: Understanding the Drivers of ‘De-Risking’ and the Impact on Civil Society Organizations”, 20 April 2018, available at: <https://fatfplatform.org/news/new-hsc-ecnl-research-report-understanding-the-drivers-of-de-risking-and-the-impact-on-civil-society-organizations/>. Financial Conduct Authority, “De-Risking: Managing Money-Laundering Risk”, 24 February 2016, available at: <https://www.fca.org.uk/firms/money-laundering/derisking-managing-risk>.

11 Bank of International Settlements Committee on Payments and Market Infrastructure, “Cross-Border Retail Payments”, February 2018, available at: <https://www.bis.org/cpmi/publ/d173.pdf>; World Bank, “Defying Predictions, Remittance Flows Remain Strong During COVID-19 Crisis”, 12 May 2021, available at: <https://www.worldbank.org/en/news/press-release/2021/05/12/defying-predictions-remittance-flows-remain-strong-during-covid-19-crisis>; World Bank, “Migration and Remittances Data”, available at: <https://www.worldbank.org/en/topic/migrationremittancesdiasporaissues/brief/migration-remittances-data>; Global NPO Platform on FATF, “De-Risking & Financial Access”, available at: <https://fatfplatform.org/issues/over-regulation-2/>.

Studies related to the de-risking of MSBs illustrate that the volume of remittance financial flows has not been significantly affected by the de-risking of money transfer agencies or correspondent banks. This is because there has been a continual development of innovative and new transaction channels for remittances, offering remitters an opportunity to secure their financial transactions.¹² NPOs, largely speaking, do not have the option to resort to other banks or alternative payment channels once they have been de-risked. If an NPO is de-risked by a bank, other banks will not want to have them as a customer. Without a bank account, NPOs are unable to collect and disburse funds. The stringent compliance requirements from donors and other requirements from NPO oversight bodies concerning governance, accountability and transparency oblige NPOs to open and maintain a bank account. Transactions via payment service providers, if used by NPOs, are subject to the same if not more rigorous countering terrorism financing, AML and sanctions compliance requirements by banks. Thus, for NPOs, banks are and remain a lifeline. NPOs have resorted to using unregulated channels or carrying cash into conflict and high-risk zones, thereby increasing the probability of abuse by criminals and terrorist groups and of reputational damage.¹³

Due to the absence of meta-level policy studies that generate longitudinal quantitative facts and figures for the de-risking of NPOs, partly because of the costs involved, the issue has been less visible to policymakers and regulators in treasury departments. However, it has been the subject of numerous, and no less significant, smaller-scale quantitative and qualitative studies conducted by think-tanks, universities and NPOs.¹⁴

- 12 Blessing Adada Gaiya, “Issues in the Compilation and Analysis of Remittances in BPM6”, Bank for International Settlements, 17–18 February 2020, available at: https://www.bis.org/ifc/publ/ifcb52_11.pdf.
- 13 Lia van Broekhoven, Vanja Skoric and Ben Hayes, “De-Risking and Non-Profits: How do You Solve a Problem That No-One Wants to Take Responsibility For?”, 11 July 2017, available at: <https://www.opendemocracy.net/en/de-risking-and-non-profits-how-do-you-solve-problem-that-n/>; Lia van Broekhoven, “Derisking and Civil Society: Drivers, Impact and Solutions”, HSC, 2018, available at: <https://www.hscollective.org/news/timeline/article-derisking-and-civil-society-drivers-impact-and-solutions/>.
- 14 The bibliography of NPOs and financial access-related reports is available upon request; see HSC website, available at: www.hscollective.org. The most significant recent publications concerning de-risking of humanitarian NPOs include amongst others: InterAction, “Detrimental Impacts: How Counter-Terror Measures Impede Humanitarian Action”, April 2021, available at: <https://www.interaction.org/wp-content/uploads/2021/04/Detrimental-Impacts-CT-Measures-Humanitarian-Action-InterAction-April-2021.pdf>; VOICE, “Adding to the Evidence: The Impact of Sanctions and Restrictive Measures on Humanitarian Action”, 29 March 2021, available at: [https://voicceu.org/publications?string=The+impact+of+sanctions+and+restrictive+measures+on+humanitarian+action&start_date=&end_date=](https://voicceu.org/publications?string=The+impact+of+sanctions+and+restrictive+measures+on+humanitarian+action&start_date=&end_date=;); Khaleel Desai, “Vulnerable People are Paying the Price as Bank ‘De-Risking’ Undermines Humanitarian Aid”, *Islamic Relief Worldwide Blogs*, 2020, available at: <https://www.islamic-relief.org/vulnerable-people-are-paying-the-price-as-bank-de-risking-undermines-humanitarian-aid/>; Alice Debarre, “Making Sanctions Smarter: Safeguarding Humanitarian Action”, International Peace Institute, 19 December 2019, available at: <https://www.ipinst.org/2019/12/making-sanctions-smarter-safeguarding-humanitarian-action>; Sherine El Taraboulsi-McCarthy, “Counter-Terrorism, Bank De-Risking and Humanitarian Response: A Path Forward”, Overseas Development Institute, 22 August 2018, available at: <https://odi.org/en/publications/counter-terrorism-bank-de-risking-and-humanitarian-response-a-path-forward/>.

Financial access restrictions: the Financial Actions Task Force anti-money laundering and countering the financing of terrorism standards and banks' customer due diligence procedures

Why do financial service providers de-risk NPOs? In theory, the goals of financial inclusion and compliance with AML/CFT standards for global financial integrity are aligned. The assumption underlying the theory is that the use of formal financial services leads to transparency and thereby to a reduction in the use of informal services or channels. AML/CFT standards stipulate that financial institutions and payment service providers are obliged entities, meaning that they are required by national and international law to report suspicious transactions of their customers to competent authorities, like the Financial Intelligence Unit. Customers that use formal banking and payment systems are thus subject to due diligence procedures with the aim of identifying terrorism financing and money laundering. Less misuse of financial resources coupled with enhanced customer due diligence (CDD) by banks should only strengthen the formal banking sector and help in meeting financial inclusion goals. However, things look very different in practice. AML/CFT standards, codified in bodies like the FATF and transposed into laws and regulations at the national level, have led instead to financial exclusion of certain classes of customer, NPOs being one.¹⁵

Banks, like other vital sectors that safeguard international financial integrity such as money transfer businesses, lawyers, trusts and company service providers, are obliged entities under the FATF standards. Analyses conducted by the Financial Intelligence Unit based on suspicious transaction reports filed provide insight and evidence for the prevention, investigation and prosecution of financial crime. Financial Intelligence Units share financial intelligence through the Egmont Group, the international network of Financial Intelligence Units and through FIU.net which is hosted by EUROPOL.¹⁶ The FATF recommends that countries establish a Financial Intelligence Unit with three core functions: the collection, analysis and dissemination of information regarding money laundering and terrorism financing. In practice, Financial Intelligence Units have, in many countries, become the State authority responsible for the compliance with the FATF AML/CFT standards as a whole.¹⁷

Financial service providers are legally obliged to carry out extensive due diligence on their customers to fulfil AML/CFT compliance and sanctions-related requirements. They face large fines if they are found to be in contravention of

15 FATF website, available at: <https://www.fatf-gafi.org/>; Mark T. Nance, "Re-Thinking FATF: An Experimentalist Interpretation of the Financial Action Task Force", *Crime, Law and Social Change*, Vol. 69, 2018.

16 Egmont Group, "About the Egmont Group", 2021, available at: <https://egmontgroup.org/en>; EUROPOL, "Financial Intelligence Units – FIU.net", 7 December 2021, available at: <https://www.europol.europa.eu/about-europol/financial-intelligence-units-fiu-net>.

17 Caribbean Financial Action Taskforce, "Recommendation 29: Financial Intelligence Units", June 2021, available at: <https://www.cfatf-gafic.org/index.php/documents/fatf-40r/395-fatf-recommendation-29-financial-intelligence-units>.

any of these regulations. Many NPOs, especially but not necessarily those that work in or around conflict zones, have fallen foul of these stringent requirements. After the takeover of Afghanistan by the Taliban in September 2021, some humanitarian organizations with long years of presence in the country have resorted to using unregulated *hawala* and other informal channels to enable payments of their local staff and continue with their projects on basic service delivery such as health and education. They have had very few other alternatives in the short term, especially once their banks stopped wire transfers to the country due to the designation by the UN and the United States (US) of Taliban members in government and central bank positions.¹⁸ And this, coupled with the fact that NPOs are not banks' most profitable customers, has led to de-risking. The FATF issued a statement concerning humanitarian aid to Afghanistan and the prevention of terrorism financing.¹⁹

The FATF reiterates the utmost importance of ensuring non-profit organisations (NPOs) and all other humanitarian actors can provide the vital humanitarian assistance needed in the region and elsewhere, without delay, disruption or discouragement. The FATF calls on all jurisdictions to protect NPOs from being misused for terrorist financing. This includes competent authorities conducting sustained and targeted outreach, consistent with the FATF Recommendations, while respecting human rights and fundamental freedoms.

Banks have to comply with national laws and regulations that stem from the FATF standards and the EU Anti-Money Laundering and Countering the Financing of Terrorism Directive, as well as with US and international terrorism financing-related sanctions. The latter includes the US Treasury Economic and Trade Sanctions Program and UN Security Council counterterrorism sanctions. In their CDD process for NPOs at the onboarding stage or for transaction monitoring to high-risk and sanctions countries, banks check the national AML/CFT laws, tax laws, bank supervisor guidance on terrorism financing and money laundering risks for NPOs, as well as the sanctions regimes. They do not check what Recommendation 8 of the FATF standards (the standard related to NPOs) encompasses, unless the Recommendation, with all its nuances, has been adequately transposed into national laws and regulations. Also, this rarely happens, and if it does—for example, if it is included in the guidance from the bank supervisor/s—it very seldom adequately represents the significance of the Recommendation.

FATF Recommendation 8 lays out the policy for governments to protect NPOs from terrorism financing abuse: “Governments need to regulate NPOs which a country has identified as being vulnerable to terrorist financing abuse” and emphasizes that this has to happen “through focused and proportionate

18 Information from a meeting with the Financial Intelligence Unit, compliance officers of banks and NPOs under Chatham House Rule in a European country.

19 FATF, “FATF Public Statement on the Situation in Afghanistan”, October 2021, available at: <https://www.fatf-gafi.org/publications/fatfgeneral/documents/afghanistan-2021.html>.

measures, in line with the risk based approach”. In other words, banks only need to conduct extensive due diligence on NPOs at risk, not on all NPOs.

A risk-based approach to determine which NPOs are at risk for terrorism financing abuse became FATF policy in 2016. From then onwards, NPOs were no longer considered particularly vulnerable to terrorism financing abuse. Until the revision (and since the incorporation by the FATF of counterterrorism financing recommendations in the wake of the events of 9/11), NPOs were singled out as a sector for their vulnerability to terrorism financing. The change in policy was the result of years-long engagement by the Global NPO Coalition on the FATF with the Task Force. The amendment was also supported by some FATF members as it had, in practice, caused impediments for humanitarian action and other legitimate charitable activity. NPOs had resorted to using unregulated channels for money transfers, such as money mules and hand-carrying cash, because of restrictive counterterrorism financing due diligence processes by banks. These practices were exactly the opposite of what the FATF standards were supposed to achieve: a mitigation of terrorism financing risk.

Prior to the revision, NPOs that collected and disbursed funds for “good works” were considered to be particularly vulnerable for terrorism financing abuse. Typologies of abuse included the setting up of sham organizations – organizations established with the aim of collecting and disbursing funds to support terrorist activities. Another form of abuse is the use of charitable funds by an employee in support of terrorism without the organization or co-workers being aware of this. Governments across the world interpreted this Recommendation in a way that put humanitarian and other NPOs in the spotlight. They applied a rule-based approach to prevent NPOs from becoming abused for terrorism financing. Laws were enacted and regulations put in place that affected the entire non-profit sector, without any sort of distinction made between organizations that were genuinely at risk and those that were not at all or hardly at risk for terrorism financing abuse. Humanitarian organizations that operate in risky contexts where non-State armed actors or terrorist organizations are active fell, by the very nature of their work, in the “particularly vulnerable for risk of abuse” category.

Despite the revision of Recommendation 8 very few governments, banks regulators and supervisors have revised their policies and guidance according to the revised Recommendation. They so far have shown little or no interest in the various guidance papers issued by the FATF for an adequate implementation of the Recommendation such as the recognition that zero-risk, when it comes to mitigating terrorism financing, is not feasible. Governments across the world have, wittingly and unwittingly, interpreted and implemented the Recommendation in a way which has curtailed the operational space of humanitarian and other civil society organizations. In practice the effects of a rule-based instead of a risk-based application of the Recommendation can mainly be seen in the over-regulation of NPOs through onerous registration and reporting requirements and the overzealous application of due diligence protocols by banks when accepting NPOs as their clients or when transferring money to high-risk areas. In countries led by governments that distrust independent civil society, Recommendation 8 has been

used as a pretext to clamp down on humanitarian, human rights or anti-corruption organizations. In these countries Recommendation 8 has become another mechanism in the playbook of governments to push back on civil society that oftentimes speaks truth to power by labelling them as “foreign agents” or “terrorists”. A few recent examples include Serbia, Uganda, Turkey and Israel.²⁰

The FATF evaluates countries for compliance with their forty AML/CFT standards every eight to nine years. A national money laundering and terrorism financing risk assessment in which the NPO sector is featured or a separate, NPO-focused, sectoral risk assessment is the basis on which the FATF assesses countries for compliance with Recommendation 8 and for the effectiveness of the measures taken to prevent NPOs at risk from being abused for terrorism financing.²¹ The FATF country evaluations or assessments and their outcome determine a country’s international financial standing. Repetitive non-fulfilment with and failure to fix shortcomings of the standards places a country on the FATF grey- or blacklist, and impacts its index and credit ratings, influencing trade and investment prospects. Currently more than 200 countries and jurisdictions are committed to implementing the FATF standards.

The practice of countries conducting a risk assessment of the non-profit sector is only slowly gaining ground. Countries, by and large, have little understanding on how to conduct such an assessment. Methodologies developed to help countries implement an NPO-specific risk assessment by a United Kingdom (UK) consultancy firm and the World Bank both aim to stress the importance of conducting such an assessment in collaboration with civil society

- 20 On Serbia, see United Nations Office of the High Commissioner for Human Rights, “Serbia’s Anti-Terrorism Laws Being Misused to Target and Curb Work of NGOs, UN Human Rights Experts Warn”, 11 November 2020, available at: <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26492&LangID=E>; on Uganda, see Kenneth Kazibwe, “Govt Unfreezes Accounts of NGOs Accused of Terrorism Funding”, *NilePost*, 27 February 2021, available at: <https://nilepost.co.ug/2021/02/27/govt-unfreezes-accounts-of-ngos-accused-of-terrorism-funding/>; on Turkey, see Jonathan Spicer, “Finance Watchdog ‘Grey Lists’ Turkey in Threat to Investment”, *Reuters*, 21 October 2021, available at: <https://www.reuters.com/business/finance-watchdog-grey-lists-turkey-threat-investment-2021-10-21>; on Israel, see United Nations Security Council, “Identical Letters Dated 1 November 2021 From the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council”, 1 November 2021, available at: <https://undocs.org/pdf?symbol=en/S/2021/915>; and United Nations Office of the High Commissioner for Human Rights, “Israel’s ‘Terrorism’ Designation an Unjustified Attack on Palestinian Civil Society – Bachelet”, 26 October 2021, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27708&LangID=E>.
- 21 HM Treasury and Home Office, UK, “National Risk Assessment of Money Laundering and Terrorist Financing 2017”, October 2017, available at: <https://www.gov.uk/government/publications/national-risk-assessment-of-money-laundering-and-terrorist-financing-2017>; Henk van der Veen, Lars Franciscus Heuts and Erik Leertouwer, “Dutch National Risk Assessment on Terrorism Financing 2019”, WODC, November 2020, available at: https://www.researchgate.net/publication/348382454_Dutch_National_Risk_Assessment_on_Terrorist_Financing_2019; German Federal Ministry of the Interior, Building and Community, “Sectoral Risk Assessment: Terrorist Financing Through (the Abuse of) Non-Profit Organisations in Germany 2020”, 2 March 2021, available at: https://www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2020/sectoral-risk-assessment.pdf?__blob=publicationFile&v=5; Global NPO Coalition on FATF, “Stories: Tunisia: Lessons of a Successful Multi-Stakeholder Engagement Process”, 2021, available at: <https://fatfplatform.org/stories/tunisia-lessons-in-a-successful-multistakeholder-engagement-process/>.

organizations. Without an NPO sectoral risk assessment, the FATF evaluation or assessment team is not able to assess the country for an effective compliance with Recommendation 8. If a country has not conducted a sectoral risk assessment, the evaluators will, under the current round of evaluations, rate the country as non-compliant for Recommendation 8, forcing the country to perform such an assessment in the follow-up of the evaluation.²² The FATF does not prescribe how a country should carry out a risk assessment. It does, however, stress that a money laundering and terrorism financing risk assessment should be conducted regularly to ensure that the laws, regulations and practices to mitigate these risks are sufficiently robust to deal with evolving or new threats and vulnerabilities.

The issue of de-risking on NPOs has been given insufficient attention in risk assessments so far. Notable exceptions are countries like Tunisia and Kosovo where members of the Global NPO Coalition have been actively involved in the risk assessment exercise. The shadow NPO and terrorism financing risk assessment conducted by the German NPO umbrella organization, VENRO, was incorporated in the German 2021 National Risk Assessment.²³ A report by the Centre for Global Policy published in 2019, which analysed FATF country evaluation reports over the preceding four years, concluded that FATF assessors hardly ever address the issue of NPO de-risking. The main reason lies in the phrasing of the immediate outcomes in the FATF evaluation methodology, which do not mention de-risking as a consequence of the interpretation and implementation of Recommendation 8 by governments. These immediate outcomes, as formulated by the FATF, guide the assessment team during the FATF Mutual Evaluation Review of a country.²⁴ In the report, the author recommends that questions concerning NPO de-risking should be incorporated in assessor training and training manuals/modules produced by the FATF.²⁵ Awareness of FATF evaluators around the drivers of de-risking of humanitarian and other civil society organizations could lead to a critical reflection about terrorism financing risk guidance from bank regulators and supervisors to financial service providers. If the guidance does not reflect the spirit of Recommendation 8, and is not based on an inclusive NPO risk assessment,

22 If a country has performed an assessment that concludes that the entire sector is at risk for terrorism financing and has been broadly regulated to prevent abuse, the evaluators will criticize the methodology applied for having been insufficiently specific to determine which sub-set is at risk. This happened to Australia in their country evaluation in 2014. See FATF and Asia/Pacific Group on Money Laundering (APG), “Terrorist Financing and Financing of Proliferation”, in *Anti-Money Laundering and Counter-Terrorist Financing Measures – Australia, Fourth Round Mutual Evaluation Report*, FATF, Paris and APG, Sydney, 2015, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/4-Terrorist-Financing-and-financing-proliferation-Mutual-Evaluation-Australia-2015.pdf>.

23 German Federal Ministry of the Interior, Building and Community, above note 21.

24 FATF, “FATF Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems”, November 2020, available at: <https://www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html>.

25 Michael Pisa, “Does the FATF Help or Hinder Financial Inclusion? A Study of FATF Mutual Evaluation Reports”, Center for Global Development, 23 May 2019, available at: <https://www.cgdev.org/publication/does-financial-action-task-force-fatf-help-or-hinder-financial-inclusion-study-fatf>.

resulting in risk aversion by banks to provide services to NPOs, the FATF could decide to take this omission into account when grading a country for compliance with the standard.

Non-profit organization due diligence to address risk associated with terrorism and sanctions

The intricate regulatory system to prevent terrorism financing that has evolved since 9/11 has prompted some humanitarian organizations to design their own due diligence methods to address the risks associated with terrorism and sanctions. The application of their own assessment methods to mitigate the potential risk of their activities, partnerships, and delivery of services in high-risk areas could, in their view, complement the due diligence on terrorism financing and sanctions carried out by banks and donor governments. Being able to show financial service providers and donors that one is aware of terrorism and terrorism financing risks, and of requirements posed by sanctions regimes, and having practical tools to mitigate these risks, such as the vetting of service delivers and local partners, could contribute to the comfort that banks and donors would need for their own due diligence processes. This assumption has proved to be correct, as banks and donors not only value organizational risk mitigation measures put in place by NPOs, but increasingly a certification from a fundraising or NPO regulator that validates the quality of such risk mitigation is becoming obligatory in order to open a bank account.²⁶

NPOs such as the humanitarian organization the Norwegian Refugee Council have developed a risk management toolkit for addressing the different risks associated with terrorism.²⁷ The Start Network is a group of humanitarian organizations which, in collaboration with TechSoup, and the UK Foreign, Commonwealth and Development Office, has developed a self-assessment tool for humanitarian and development organizations which encompasses dimensions of governance, personnel management and financial (fraud, corruption) related risks. The application of the tool facilitates access to funding from governments and other donors. Most donors require grantees to comply with counterterrorism, including countering terrorism financing, requirements. The self-assessment tool allows for an inclusion of risks associated with terrorism financing and other financial crime risks that would help banks facilitate the necessary due diligence for NPOs.²⁸ Lexis Nexis (a company specializing in data analytics supporting

26 Accountancy Van Morgen, "Rabobank Must Accept Palestinian Aid Foundation to Provide Auditor's Report", 3 September 2021, available at: <https://www.accountancyvanmorgen.nl/2021/09/03/rabobank-moet-palestijnse-hulpstichting-als-klant-houden-door-accountantsverklaring/>.

27 Norwegian Refugee Council, "Toolkit for Principled Humanitarian Action: Managing Counterterrorism Risks", 27 May 2020, available at: <https://www.nrc.no/toolkit/principled-humanitarian-action-managing-counterterrorism-risks/>.

28 The self-assessment tool has not yet been made public; see Start Network, "A New Era of Humanitarian Action", available at: <https://startnetwork.org/>. TechSoup presented the tool in this recording during Humanitarian Networks and Partnerships Week (HNPW): Islamic Relief Worldwide, "HNPW:

compliance, among others) and a group of NPOs are developing a risk compliance assessment tool to address AML/CFT requirements that empowers NPOs to become active contributors to compliance, thereby mitigating the risks associated with bank customer and extended CDD procedures, leading to de-risking. The Association of Certified Anti-Money Laundering Specialists (ACAMS), a network of specialists dedicated to fighting financial crime, and The Graduate Institute, Geneva (IHEID) have produced risk compliance guidance for humanitarian organizations active in Syria.²⁹

These developments show that NPOs have had to spend more time on terrorism- and terrorism financing-related compliance to be able to provide comfort to donors and financial institutions. That this has come with incrementally more cost is apparent from studies like the one commissioned by Voluntary Organisations in Cooperation in Emergencies (VOICE), an NPO network promoting effective humanitarian aid worldwide. Titled “Adding to the Evidence”, and launched in 2021, it addressed the impact of sanctions and restrictive measures on humanitarian action. The aim was to obtain a clearer understanding of the way VOICE members have been affected by sanctions and counterterrorism (financing) measures and what actions they have undertaken to mitigate these measures. One of the many significant findings of the study was that resources that could have been otherwise spent on the organization’s mandate and mission now have to be dedicated to providing evidence to assuage banks and donors that it manages risks.³⁰

The effort involved in understanding and complying with the non-risk-based requirements of financial service providers and (intermediate) donors has resulted in a disproportionate burden of proof being placed on smaller organizations. They have fewer resources to deal with these onerous requirements, while ironically, it is they and their local partners who are often the ones operating on the frontlines of crises. De-risking is undermining localization of humanitarian aid objectives as local organizations are not in a position to comply with these burdensome requirements.³¹

De-risking of non-profit organizations: recognition by international organizations, donors and governments

International bodies like the International Monetary Fund, the World Bank and the FATF have been noting the practice of extended CDD by banks as a driver

Financial De-risking & Humanitarian Impact – Protecting NGOs Ability to Support the Vulnerable”, available at: <https://www.youtube.com/watch?v=NOzLXamQ2g8>.

29 Global Governance Centre at The Graduate Institute, Geneva, “Compliance Dialogue on Syria-Related Humanitarian Payments”, available at: <https://www.graduateinstitute.ch/research-centres/global-governance-centre/compliance-dialogue-syria-related-humanitarian-payments>; Justine Walker, “Risk Management Guide for Sending Humanitarian Funds to Syria and Similar High-Risk Jurisdictions”, May 2020, available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200526-risk-management-guide_en_0.pdf.

30 VOICE, above note 14.

31 K. Desai, above note 14.

for the de-risking of NPOs. The FATF has issued guidance on CDD for financial service providers with the aim of avoiding the wholesale de-risking of specific customers.³² In their 2018 report to the Group of 20 (G20) Member States, the Task Force stressed that de-risking remains a challenge and that loss of access to banking services for some remittance service providers and NPOs remains a key concern for the global community.³³

De-risking remains a challenge for the countries affected. Loss of access to banking services for some remittance service providers and non-profit organizations remains a key concern for the global community. This has a wider impact on financial inclusion and efforts of governments and business sector to provide essential services to those who need help around the world.

When the COVID-19 pandemic started, the FATF issued a statement in support of the work that NPOs and charities do, and the need for charitable donations to be processed without disruption. It stressed that NPO money transfers should proceed expeditiously through legitimate and transparent channels without disruption. The Task Force also emphasized that their standards do not require all NPOs to be considered high risk and most NPOs carry little or no risk for terrorism financing.³⁴

This global public health emergency has highlighted the vital work of charities and non-profit organizations (NPOs) to combat COVID-19 and its effects. (...). The aim of the FATF Standards is not to prevent all financial transactions with jurisdictions where there may be high ML/TF [money laundering and terrorism financing] risks, but rather to ensure these are done through legitimate and transparent channels and money reaches its legitimate intended recipient. National authorities and financial institutions should apply a risk-based approach to ensure that legitimate NPO activity is not unnecessarily delayed, disrupted or discouraged. FATF encourages countries to work with relevant NPOs to ensure that much needed aid is getting to its intended recipients in a transparent manner.

This year, the Task Force has initiated a workstream that addresses the unintended consequences of the AML/CFT standards. De-risking of NPOs and financial inclusion are topics under review, as are the suppression of NPOs and human rights. The workstream is led by the Vice-President of the FATF and is part of FATF Plenary discussions, the forum where Member States discuss strategic issues. The HSC is co-chair of the Global NPO Coalition of the FATF and, in that capacity, has coordinated and submitted the Coalition's submissions to the workstream. The first phase of the workstream (up to June 2021) is a stocktaking exercise on trends and patterns regarding the topics under review, which will be followed by a second phase where options for solutions and

32 FATF, "FATF Guidance: Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion, With a Supplement on Customer Due Diligence", available at: <http://www.fatf-gafi.org/media/fatf/Updated-2017-FATF-2013-Guidance.pdf>.

33 FATF, "FATF Report to the G20 Leaders' Summit", November 2018, para. 32, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/Report-G20-Leaders-Summit-Nov-2018.pdf>.

34 FATF, "Statement by the FATF President: COVID-19 and Measures to Combat Illicit Financing", available at: <https://www.fatf-gafi.org/countries/a-c/china/documents/statement-covid-19.html>.

mitigating measures will be compiled, analysed and discussed. The Global NPO Coalition is the liaison for NPO submissions to and discussions with the FATF Secretariat and the members of the project team, which includes Member States and observers. The US Treasury and the World Bank are the penholders on the streams on de-risking of NPOs and financial inclusion, respectively.³⁵

A World Bank employee official blog post recognized the paradox of the negative impact of AML/CFT standards on the operational space of NPOs: “(.....) a cruel irony if, in seeking to combat terrorist financing, financial institutions were simultaneously harming those best placed to address the root causes of terrorism (...)”. The actions by banks to de-risk NPOs which leads to their financial exclusion, and the remarkably persistent idea that all NPOs pose a high risk for terrorism financing, is counterproductive to humanitarian and other actions that intend to help those harmed by terrorist groups:³⁶

If you’ve opened a bank account in the last few years, you likely had to answer a bunch of more or less intrusive questions about yourself, your background and why you wanted to open the account. Annoying, but part and parcel of Anti-Money Laundering/Combating the Financing of Terrorism (“AML/CFT”) rules that all banks in all parts of the world are subject to. The ostensible purpose is to enable banks to prevent bad actors using the financial system to launder their funds and, where bad actors are not identified at entry, to detect any suspicious financial activity and provide appropriate background to competent authorities. (Whether they are successful in this endeavour is another question.) (...). One of the sectors particularly affected are non-profit organizations (NPOs). This is an unfortunate consequence of the mistaken and remarkably persistent idea that all NPOs pose a high AML/CFT risk. (...). It is precisely the peacebuilding and humanitarian work that NPOs do, that helps those harmed by terrorist groups and undermines the terrorist narrative. It would be a cruel irony if, in seeking to combat terrorist financing, financial institutions were simultaneously harming those best placed to address the root causes of terrorism (...).

At the country level, too, governments such as those of the UK and Germany underscore the counterproductive effects of bank de-risking on NPOs, stressing in their National Risk Assessments the negative consequences of NPO de-risking on the beneficiaries of humanitarian and other civil society organizations. The German government approaches the issue as a donor government, and the negative consequences de-risking has on funds for beneficiaries which have to then be disproportionately used for risk mitigation to comply with terrorism financing and sanctions rules. The German government also emphasizes the reputational risk that NPOs may suffer, leading to a drop in public financial support for the causes they espouse.³⁷

35 FATF, “Mitigating the Unintended Consequences of the FATF Standards”, available at: <https://www.fatf-gafi.org/publications/financialinclusionandnpoissues/documents/unintended-consequences-project.html>.

36 E. van der Does de Willebois, above note 6.

37 German Federal Ministry of the Interior, Building and Community, above note 21, p. 49.

If an NPO is abused as a cover for terrorist financing, its reputation can suffer greatly as a result. If the public loses trust in the integrity of an NPO, this may result in loss of income through donations or government funding. At the same time, pressure may grow for additional monitoring mechanisms to be introduced to protect against terrorist financing, making business processes more complicated and raising the administrative costs of preventive measures. Loss of trust can also destroy relationships with institutions in the financial sector. Loss of support from banks can prevent an NPO from achieving its aims and severely compromise its success. (...). For donors, the abuse of an NPO represents a loss because money they donate is not used as they intended. People who work for the NPO as employees rather than volunteers may lose their jobs. If the NPO's business is compromised, this may be to the disadvantage of the very people the NPO is trying to help (the target group). If aid deliveries or financial support are no longer forthcoming, this could have serious consequences for those in need such as the deterioration of health.

The UK government approaches the issue from an angle of risk, which increases if humanitarian and other civil society organizations have to resort to transferring funds via unregulated channels. This undermines not only the purpose of financial crime regulations but also the credibility, transparency and accountability of donor government funding. Aid funds may ultimately end up in the wrong hands if NPOs continue to experience difficulty with accessing formal banking services:³⁸

In recent years, in some jurisdictions many charities have experienced transaction delays or denials or account closures by their banks due to concerns around terrorist financing risk. If this trend persists, de-risking may have the effect of pushing charities out of more intensely regulated areas of activity and into higher risk ways of working, such as transacting through physical cash or unregulated MSBs, thereby increasing the risks in the sector. The potential use of physical cash, particularly in high-risk jurisdictions, may make it challenging to ensure that funds are reaching the intended recipients and not directly or indirectly falling into the hands of terrorists, and presents a higher risk for charities operating this way.

Key conditions needed for and enabling stakeholder dialogues

The recognition by international organizations and governments that humanitarian and other civil society actions are hindered by de-risking, coupled with studies about the impact of financial access restrictions on NPOs, as well as NPOs collectively and coherently sounding the alarm bell about the impact of de-risking on their work and daily practice, were key enablers for multi-stakeholder dialogue processes or roundtables (or stakeholder dialogues, in short) being set up to address the issue. These dialogues differ in their mandates, missions and goals. Some are still ongoing, others have been ended and others may soon be set up.

38 HM Treasury and Home Office, UK, above note 21, para. 12.8.

The UK Trisector Working Group, ongoing since 2014, was established by the Ministry of Home Affairs to address the impact of counterterrorism and counterterrorism financing measures on NPOs working internationally. It is a mechanism for dialogue between government, NPOs and financial institutions for resolving practical issues arising for international NPOs working in high-risk jurisdictions and for banks that provide the financial services to facilitate that work. Besides mounting evidence about non-profit de-risking and a growing critique from a wide representation of the sector that the issue needed to be addressed by the government and by banks, an important external enabler was the pressure that came from a report by an independent reviewer of terrorism legislation. The report recommended that a dialogue needed to be initiated to address the financial access restrictions being faced by NPOs. The dialogue needed to explore how to implement anti-terrorism laws without unnecessarily prejudicing the ability of NPOs to deliver humanitarian aid and engage in peacebuilding in parts of the world where designated and proscribed groups are active.³⁹ The Working Group has four workstreams encompassing key thematic areas including: research and innovation, legislative guidance, operational guidance, and communications, and is underpinned by a set of non-binding principles that provide a basis for dialogue and collaboration, and for any guidance or measures produced by the Working Group.

The World Bank–ACAMS Financial Access Stakeholder Dialogue (2017–2018) set out to identify practical solutions to address de-risking of humanitarian and civil society organizations in the US with activities outside the country.⁴⁰ A report by the Charity & Security Network provided quantitative and convincing evidence, illustrating that two-thirds of all US NPOs that worked abroad experienced financial access problems, from transfer delays to the closing of accounts.⁴¹ In earlier meetings at the World Bank about the negative consequences of de-risking for money transfer businesses and correspondent banks when it came to the achievement of the Sustainable Development Goals, banks and NPOs stressed the issue of de-risking for their work. The report and these events eventually led to a stakeholder dialogue in which government entities, regulators and NPOs were invited to participate. The World Bank took on the role of convener and facilitator of a series of meetings to identify solutions which were developed along four workstreams: facilitating information and understanding of NPOs for government and bank regulators, exploring technical

39 David Anderson QC, Independent Reviewer Of Terrorism Legislation, “Terrorism Prevention and Investigation Measures in 2012”, March 2013, available at: https://www.legislationline.org/download/id/4605/file/terrorism%20prevention%20and%20investigation%20measures%20in%202012_independent%20reviewer_2013.pdf.

40 World Bank Group and ACAMS, “Stakeholder Dialogue on De-Risking: Supporting Financial Access for Humanitarian Organizations and Charities”, 2017, available at: <https://documents1.worldbank.org/curated/pt/538271487141265874/pdf/112804-WP-SupportingFinancialAccessforHumanitarianOrganizationsandCharities-PUBLIC-ABSTRACT-SENT.pdf>.

41 Sue E. Eckert, Kay Guinane and Andrea Hall, “Financial Access for U.S. Nonprofits”, Charity & Security Network, February 2017, available at: [https://www.charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20\(2\).pdf](https://www.charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20(2).pdf).

solutions to facilitate NPO transfers, clarifying regulatory requirements and risk guidance, and enhancing understanding, communication, and outreach about the issue and the solutions being developed. The dialogue had a fixed project term with set objectives that were determined in collaboration with the philanthropic donor. The dialogue may not have delivered fully on the perhaps high expectations that some of the participants may have had at the start of the project. The Charity & Security Network and ACAMS produced a guidance paper for NPOs about challenges that financial services providers and civil society organizations encounter when applying financial crime rules and how to mitigate these obstacles.⁴² Another positive effect of the dialogue was the interest in the issue by influential policy research institutes like the Center for Global Development, which resulted in studies that helped showcase the issue internationally as well as raise awareness among US government policymakers that de-risking was an international phenomenon that required international solutions. The drawback was the lack of interest on the part of bank regulators in addressing the bank supervisors' guidance and manual concerning NPOs, which posit that NPOs are high risk for terrorism financing. The dialogue took place in a political context (during the then Trump administration) that was not conducive to addressing financial access restrictions of humanitarian and other NPOs. On the contrary, the US government of the time, also in its capacity as president of the FATF in 2018–2019, imposed more anti-terrorism-related sanctions, leading to further restrictions for humanitarian action. At the time of writing, a new stakeholder dialogue in the US has been initiated by the Center for International and Strategic Studies with support from the United States Agency for International Development.

At the start of 2018, the World Bank, together with the Dutch Ministry of Finance and the HSC, organized a first international stakeholder dialogue in The Hague as part of the understanding, communication and outreach workstream. The objective was two-fold: outreach to relevant European institutions, European Member States and international stakeholders like the FATF about the usefulness of this type of dialogue to help solve financial access restrictions, and showcasing to the stakeholders that the drivers and consequences of bank de-risking needed to be addressed at national and international levels as these are intimately linked in terms of policy, regulation and operations. The international stakeholder dialogue offered up the opportunity for the Netherlands Stakeholder Roundtable, which had been established and co-convened by the Ministry of Finance and the HSC since 2017, to boost its own objectives. The international dialogue resulted in the formalization of the Dutch Stakeholder Dialogue in 2019, which is underpinned by a formal agreement in which the background, objectives, expected outcomes, roles, responsibilities, resources required and commitments of the participating organizations, the Ministries of Finance and Foreign Affairs, the

42 Consortium for Financial Access, “Banking Nonprofit Organizations – The Way Forward”, Charity & Security Network, June 2019, available at: https://www.moneylaundering.com/wp-content/uploads/2019/06/ACAMS.Report.NPOs_060119.pdf.

Dutch Banking Association and the HSC, are specified. The Dutch Roundtable is characterized by its commitment to addressing de-risking-related issues that affect a wide range of civil society organizations, from small voluntary foundations with a social mission to large multi-mandated organizations. Due to the COVID-19 pandemic, a public launch of the Roundtable had to be postponed.⁴³

More recently, the dialogue between the French government, the French National Bank, banks and NPOs in the country (ongoing since 2020) was established with the impact of the FATF standards and international sanctions on humanitarian actors in mind. The Swiss government, ACAMS, the EU and the IHEID co-convene the Syria Risk Compliance Dialogue (2019–2020) and the ACAMS International Sanctions Compliance Task Force—a humanitarian technical dialogue workstream (2020–ongoing)—both focus on the impact of international sanctions on the ability of humanitarian actors to access financial services in sanctioned and high-risk countries. The German Ministry of Finance and VENRO, a membership organization of humanitarian and multi-mandated NPOs, are currently exploring a stakeholder dialogue to address the de-risking of NPOs, and Swedish NPOs have informed the HSC that there is interest from the Swedish International Development Cooperation Agency and a number of Swedish NPOs for a multi-stakeholder roundtable to discuss obstacles in the transfer of humanitarian funds to Syria.

Two country dialogue processes in North Macedonia and Kosovo, facilitated by members of the Global NPO Coalition on the FATF, focus specifically on the impact of the FATF standards on civil society banking access in these countries. A similar process is planned for Tunisia.

Moreover, the HSC, the International Center for Not-for-Profit Law network and Islamic Relief Worldwide have co-convened—in collaboration with local NPO colleagues, commercial banks and government delegates—side events at the G20 through the Civil Society 20 (C20) mechanism in Buenos Aires in 2018, Osaka in 2019 and Riyadh in 2020 (the last, virtually). The connection with the G20 was made to place the issue of de-risking of NPOs on the agenda of the Global Partnership for Financial Inclusion, an inclusive platform for all G20 countries, interested non-G20 countries and relevant stakeholders to carry forward work on financial inclusion, including implementation of the G20 Financial Inclusion Action Plan, endorsed at the G20 Summit in Seoul.⁴⁴

43 Netherlands Ministry of Finance, World Bank Group and HSC, “International Stakeholder Dialogue: Ensuring Financial Services for Non-Profit Organizations”, 15 February 2018, available at: https://fatfplatform.org/assets/Final-Report_Feb-15.pdf and at: https://www.hscollective.org/assets/Final-Report_Feb-15.pdf.

44 Global NPO Coalition on FATF, “High-Level Discussion on De-Risking, Side Event at G20 Summit”, 11 December 2018, available at: <https://fatfplatform.org/news/high-level-discussion-on-de-risking-side-event-at-g20-summit/>; Global NPO Coalition on FATF, “C20 Japan: Financial and Security Constraints for CSOs”, 14 May 2019, available at: <https://fatfplatform.org/news/5122-2/>; HSC, “C20 Panel on the Financial Integrity/Financial Inclusion Conundrum”, 11 November 2020, available at: <https://www.hscollective.org/news/timeline/c20-panel-on-the-financial-integrityfinancial-inclusion-conundrum/>; Global Partnership for Financial Inclusion, “G20 2020 Financial Inclusion Action Plan”, October 2020, available at: <https://www.gpfi.org/sites/gpfi/files/sites/default/files/G20%202020%20Financial%20Inclusion%20Action%20Plan.pdf>.

The make-up of the aforementioned stakeholder dialogues may be different in terms of localization (national, regional or international), ownership, convening, visibility, frequency, participation (types of NPOs, government departments, financial institutions), and specific issues discussed, but they have two things in common: (1) all three requisite sectors have to take part: government, financial institutions and NPOs; and (2) participants must commit to identifying solutions that are tangible and feasible within the legal and regulatory frameworks. The participation in the dialogues is voluntary and based on an intrinsic motivation to collectively help solve the problem.

In the stakeholder dialogues mentioned in this article, government, financial institutions and NPOs have all been present. The crux to developing solutions to help resolve financial access restrictions lies in the participation of and contribution by each one of these stakeholders. All three have a role to play. The roles come with different responsibilities. The key responsibility lies with governments, and the intergovernmental organizations they are part of, in their capacity to adapt or eventually change financial crime policies. This particular stakeholder is best represented by the different departments, who need to work together to help resolve the issue. As a rule, the ministries of Finance, International Development Cooperation and Foreign Affairs need to be present given they hold responsibility for policies that regulate the financial sector, determine donor support and decide on the implementation of terrorism-related sanctions. It remains problematic in terms of the development of solutions that the mandates and policies of the different ministries are, in practice, difficult to reconcile. For example, there is, as a rule, policy incoherence between government donor policy in support of humanitarian action grounded in humanitarian principles, and policies that support the prevention of terrorism and terrorism financing, aiming to prevent terrorist actions. Despite the FATF guidance that zero risk does not exist, that most NPOs do not pose a risk for terrorism financing, and that facilitating transfers for humanitarian action through regulated channels is important to prevent risk of abuse, donor governments have, overall, remained very cautious when exploring solutions that NPOs would like to see implemented, such as humanitarian exceptions for transfers to high-risk countries. Some governments provide so-called “letters of comfort” to banks to facilitate humanitarian payments to high-risk and sanctioned countries. This is as far as most governments want to go in terms of taking on a shared responsibility for complying with counterterrorism financing and sanctions-related rules.

Stakeholder dialogues are helpful as they bring different government departments to the table, who are then encouraged to have an inter-departmental conversation about the issue and to start thinking about ways of reconciling conflicting policies that hinder the development of solutions. A key stakeholder is the Netherlands Central Bank, the country’s monetary policy regulator and supervisor of financial institutions. It has proven hard but not impossible to convince this institution to take part in the stakeholder dialogues. It will more often than not stress its independent position concerning the oversight of banks,

and likely find discussions with banks about the need for more precise guidance from them about NPOs at risk uncomfortable to a degree.

The participation and commitment of international banks, who may also perform a role as a correspondent bank, are prerequisites for success in these stakeholder dialogues. These banks provide the infrastructure for payments within and across borders. Banks have different departments, ranging from compliance to financial crime to those focusing on charitable clients, that need to work together to prevent the unnecessary de-risking of NPOs. Banks with a charity department perform better on providing services to humanitarian and other civil society organizations. However, they often mandate significant financial thresholds for NPOs to be able to access the services of a dedicated relationship or account manager, meaning that smaller organizations get left out.⁴⁵ Due diligence on high-risk clients costs banks, leaving smaller organizations dependent on outsourced customer services for their onboarding and transaction services. These services typically have very little knowledge about civil society organizations. The result is that smaller NPOs, especially those with activities that customer services are not familiar with or that are implemented in high-risk countries, are de-risked. This issue has been raised in all the stakeholder dialogues showcased in this article. Banks are at liberty to refuse as clients organizations they deem to be too costly in terms of compliance for the revenue they will accrue. However, the Roundtable in the Netherlands resulted in one bank starting an internal discussion on whether refusing services to civil society organizations would not be in contravention of the bank's implementation of the UN Guiding Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises.⁴⁶

With regard to delays of transfers for larger humanitarian organizations to high-risk or sanctioned countries, the discussions in the stakeholder dialogues revolve around the need for solutions that would prevent correspondent banks in the US that facilitate international US dollar transactions from carrying out enhanced due diligence on customers. It is unlikely that a solution will be reached within the current system where the regulators and supervisors of US financial institutions hold authoritative regulatory and judicial powers.

The participation of a diverse group of NPOs is of importance to address the different problems that are experienced and to develop solutions that are adequate for all. A growing number of NPOs, especially those operating in high-risk areas, have to deal with stringent financial crime-related requirements from their banks and donors. They have a responsibility to show their supporters and their financial service providers that the financial support for their activities does

45 Netherlands Ministry of Finance, World Bank Group and HSC, above note 43.

46 See HSC, "New Report: A Business and Human Rights Perspective on Bank De-risking of Non-Profit Clients", 2021, available at: <https://www.hscollective.org/news/timeline/new-report-a-business-and-human-rights-perspective-on-bank-de-risking-of-non-profit-clients/>; and NYU Paris EU Public Interest Clinic, "Bank De-Risking of Non-Profit Clients: A Business and Human Rights Perspective", June 2021, available at: https://www.hscollective.org/assets/Uploads/NYU-HSC-Report_FINAL.pdf.

not contribute to terrorism or money laundering. They also have a right to carry out their mission. Stakeholder dialogues, if executed in a participatory way, could provide a space where the dilemmas and challenges around this oftentimes precarious balance can be openly and safely discussed. In the UK, within the Trisector Working Group, this type of discussion has, as mentioned, resulted in workstreams that focus on legislative and operational guidance.

Larger organizations that are overall better resourced to carry out due diligence requirements, and have access to banking or other services that facilitate the navigation of the complex regulatory landscape, may be well positioned to support smaller organizations that operate in environments where non-State armed actors and designated groups are active. What we often see, however, is larger organizations transferring the risk down the chain to their sub-contracted, smaller partners working on the frontline. The intermediate donor is not always willing to help the sub-contracted partners with banking access. This carrying over or down-streaming of risk, instead of the sharing of it between NPOs, and between them and governments and banks, is an item that is regularly discussed in the stakeholder dialogues, with very little progress made so far.⁴⁷

It may be too early to conclude which stakeholder dialogues have so far accomplished results that have contributed to an actual alleviation of the de-risking problems experienced by NPOs. Two types of consultations can be distinguished on both sides of the spectrum: international dialogues focused on technical solutions and national dialogues focused on legal, regulatory, practical and innovative solutions.

International and national stakeholder dialogues

The international technical dialogue to address humanitarian compliance with sanctions regimes requirements

The dialogue has a specific set of objectives that need to be achieved within a specific timeframe. The expected outcome is a set of tools or guidance that humanitarian organizations can apply to facilitate compliance with CFT and broader sanctions requirements based on government sanctions and CFT policies, laws and regulations. The focus is on larger humanitarian organizations with the expertise and resources to develop risk compliance methodologies. Through the course of the dialogue, a common understanding is expected to be developed between NPOs, regulatory authorities, donor governments, and banks around ways to

47 Duke Law and Women Peacemakers Program, “Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security”, March 2017, available at: <https://law.duke.edu/sites/default/files/humanrights/tighteningpursestrings.pdf>; Gender, Peace & Security Working Group of WO=MEN Dutch Gender Platform and HSC, “Protecting us by Tying our Hands: Impact of Measures to Counter Terrorism Financing on Dutch NGO’s Working on Women’s Human Rights and Gender Equality”, April 2019, available at: <https://www.hscollective.org/assets/Uploads/2019-04-Protecting-us-by-tying-our-hands.pdf>.

collaborate to enable the delivery of humanitarian aid to populations in need in high-risk and sanctioned countries. Additionally, it discusses existing exceptions and support mechanisms by donor governments to enable financial flows to these communities.

The dialogue addresses restrictions for a limited number of countries based on which generic guidelines are developed. It is co-convened by recognized and trustworthy experts on the issue and a donor government(s) that is committed to identifying concrete and tangible solutions. The co-conveners are able to tap into their networks to ensure that the best possible group of donor and government representatives, regulatory authorities, international policymakers, affected NPOs and representatives of financial institutions participate. Participants commit to investing time in preparation, discussions and reviewing draft versions of the guidance. They agree to submitting real-life cases, which are then sanitized and used as workshop material in order to provide a better understanding of the workarounds needed to navigate the complex legal and regulatory requirements. This dialogue is premised on the understanding that AML/CFT frameworks and sanctions regimes are dynamic systems that are here to stay, that the (geo) political decisions that drive these systems need to be taken as a given, and that technical solutions need to be framed within these systems and based on the mandates of distinct groups. The assumption by the organizers and conveners is the ability of all stakeholders to collectively identify solutions in a safe space, a space that ensures that everyone can be open and candid about their practices, challenges and ideas. During the course of the meetings rapport is built between participants, creating a certain measure of trust between them. This type of stakeholder dialogue produces helpful guidance for problem-solving “within the existing regulatory countering the financing of terrorism and sanctions system” through a process of guided and facilitated co-creation. It does not pretend to address or revise systemic drivers of financial access and other terrorism financing- and sanctions-related restrictions.

The national technical and policy stakeholder dialogue, that addresses practical issues that arise for non-profit organizations active in high-risk and risky jurisdictions and banks that provide financial services to facilitate their work

This type of dialogue takes place at the national level and addresses legal and operational bottlenecks that NPOs encounter in sanctioned or high-risk countries where terrorist groups, non-State armed actors or criminal networks are active, across the borders, and where authorities push back with counterterrorism (financing) measures. The objective is to produce, in a collaborative spirit, legal and operational guidance and innovative solutions to enable international NPOs to carry out their work in high-risk/risky jurisdictions. It convenes all relevant government departments, regulatory authorities and NPOs that are affected by rules and regulations that aim to push back on financial crime. Due to the variety of the topical issues under discussion, the diversity of the participating NPOs –

humanitarian, multi-mandated, development, peacebuilding, human rights, faith-based – and the conflicting mandates of and interests between government ministries, this dialogue requires a longer process of trust building and a laying of the groundwork prior to deciding on concrete workstreams to be pursued by the stakeholders.

The dialogue provides stakeholders with a platform where sensitive and complex CFT and counterterrorism challenges can be understood and discussed. It fulfills the need of NPOs to be informed about policies and regulations that do not necessarily concern their day-to-day mandate. It may take NPOs time to comprehend the counterterrorism architecture and sanctions regimes, and the ways in which these impact national laws and regulations that have such influence on the operational space of civil society. For Ministries of Finance and Justice, for example, it may be the first time they are engaging with NPOs, their activities and the way they perceive counterterrorism measures. For banks, the dialogue with NPOs on policy choices and compliance practices leading to de-risking may initially feel uncomfortable but provides them with an opportunity to express their own challenges and limitations in terms of offering solutions, while at the same time triggering ideas on how to address internal compliance and other practices that result in NPO de-risking.

The national stakeholder dialogues, as illustrated in the examples from the UK, the US and the Netherlands, differ with regard to the structure, roles and responsibilities of the participating stakeholders and the objectives and outcomes they set out to achieve. They also differ because not all national contexts allow for a dialogue that addresses such sensitive issues as counterterrorism (financing) measures and sanctions. Moreover, some national contexts have a tradition of government, civil society and private sector/financial institutions engagement on issues other than CFT and sanctions-related issues, while this may be a novelty in other contexts.

We can broadly distinguish three types of national dialogues based on their structure: (1) the government convenes; (2) government, NPOs and banks co-convene; or (3) impartial and/or expert organizations convene. The first two have their strengths and weaknesses, which are outlined below. The third is advantageous in that it can convene a wide range of stakeholders, as the World Bank and ACAMS-convened dialogues in the US illustrated, but it can also become too technocratic or overly pragmatic in its approach, with insufficient room for addressing the systemic drivers of de-risking.

A top-down approach

The first approach can be characterized as top-down, with high-level political and executive support. This could be both a strength and a weakness. The strength is that there is a bigger probability of a legal and regulatory revision that would result in a more conducive operational environment for NPOs than in the other approach that is, in essence, bottom-up. The weakness may be that NPOs and banks and the Banking Association are more circumspect and guarded because of

the dynamics between regulatory authorities, the donor government and other relevant government authorities with their different, and possibly conflicting, mandates and policy agendas. NPOs that receive government funding are more guarded, given that they are competitors for government subsidies and are engaging on a sensitive topic that requires them to provide an insight into their own governance and accountability structures. A set of jointly formulated principles for guiding the dialogue can be helpful to clarify roles, responsibilities and expectations.

It is important to understand the mandate, interest and convening power of the government department(s) that bring the participants to the dialogue together. The participation of relevant government departments, regulatory authorities, the Financial Intelligence Unit and inter-governmental structures to address counterterrorism and CFT measures gives NPOs insight into the complex nature of counterterrorism (financing) measures and international sanctions, which are the remit of multiple authorities, as well as into the lengthy process for legal and regulatory problem solving. While this may help create some understanding amongst NPOs about the complexity of identifying solutions, some NPOs may not have the stamina, patience or resources to commit to such a long-term engagement and drop out because tangible solutions take too long to develop. They may feel that the dialogue takes more from them than it gives them. A top-down approach gives the government the authority to act as the sole gatekeeper, deciding who can and cannot participate. This can be especially problematic for NPOs that are more vulnerable to (unfounded) criticism and allegations concerning their support for listed terrorist groups. The approach is also more vulnerable to political and policy setbacks due to the volatility of the political processes in a country.

A bottom-up approach

When all three relevant stakeholders—government, banks and NPOs—co-convene the dialogue, it can create conditions for a more creative and practical problem-solving approach. Conditional to this approach is a framework agreement that sets out the rationale for the dialogue, roles and responsibilities of each one of the stakeholders, objectives, ways of communication and representation, and resources to initiate projects and activities coming out of the dialogue. In this model, the absence of high-level political buy-in allows for a more open atmosphere for discussion and exchange. The drawback is that legal and regulatory revisions or relevant draft laws cannot be automatically discussed, let alone taken up for further higher-level action through the bureaucratic system by the government participants.

In this approach the government departments take it upon them to use their leverage to invite other government stakeholders or authorities, such as the Financial Intelligence Unit or the Netherlands Central Bank, to take part in the dialogue. The Association of Banks together with the Ministry of Finance reaches out to commercial and retail banks, inviting them to participate. The NPO or NPO coalition or NPO umbrella body with expertise on the subject uses its

convening influence to ensure the participation of a broad cross-section of civil society. The NPO should not receive funds from the government for its work. The agenda for the dialogue is determined by the needs of NPOs. They share the challenges they face with regard to onboarding, crowdfunding and transactions to certain risky or high-risk countries, as well as with regard to contractual counterterrorism (financing) requirements from donors. The government and banks provide information and explain the legal, regulatory and policy requirements they have to adhere to and challenges they face with regard to other commitments they have, such as adhering to “principles of good donorship”, and “a duty of care to customers”. These discussions lead the way to the placing of specific and topical issues on the agenda that participants care to address, ranging from practical steps to accessing banking services through to, for example, an online portal to helping facilitate this access; from a better understanding of new AML/CFT-related laws and regulations to counterterrorism clauses in donor contracts; from exploring technology-driven solutions to discussing sectoral terrorism financing risk assessments and the FATF country evaluations; from the initiation of studies to address certain deficiencies in the existing knowledge about de-risking to developing practical guidance to address internal bank practices which lead to the de-risking of smaller organizations.

A drawback of this approach is that the enabling environment for NPOs to address many issues necessitates a structure of smaller dialogues to address specific issues. While this can facilitate a deeper dive into the specific problem and trigger a more tailor-made solution, it also requires more of the already-scarce time and other resources from the co-conveners. Moreover, the connection between dialogues in a smaller setting and the bigger stakeholder dialogue also needs to be maintained.

Whether the approach is top-down or bottom-up, or a mix of the two, there are a few common threads around lessons learnt:

1. The high turnover amongst government, NPO and bank staff demands the designation of certain persons/organizations (especially on the part of NPOs) who can safeguard institutional memory. For this and other reasons as elaborated on above, having a framework document or document with principles underpinning the dialogue is imperative;
2. Due to the complex nature of the issue, stakeholders need to be represented by the appropriate persons, ideally a mix of financial and policy/strategic staff that then commit to circulating the information and reports of the stakeholder dialogues to relevant colleagues in their organizations or networks;
3. The sensitivity of the issues discussed have often resulted in the decision not to publicize the ins and outs of national stakeholder dialogues so far. In view of accountability to a broader group of civil society, it merits exploring ways for more openness, for example through a website/platform. Such a platform would also act as a repository of information, which is helpful for newcomers when

participants are transitioning, and for the openness and accessibility of information and knowledge gathered in and through the dialogues;

4. The conveners or co-conveners need to manage expectations of what a stakeholder dialogue can realistically achieve. Expectations differ between the different government stakeholders, across NPOs and amongst banks. The Foreign Affairs department responsible for security and counterterrorism policy may have other expectations than the department in charge of Humanitarian Aid and Social Development. Civil servants implementing security policy may expect that the dialogue will offer up an opportunity to obtain information from NPOs about those in the sector who are at risk of terrorism financing. With this information, they might hope to address these potential risks with NPO regulators. Their colleague in the Humanitarian and Social Development departments may be primarily interested in safeguarding humanitarian principles and the operating space of civil society. Larger NPOs may have found workarounds to address extended CDD by their banks, while smaller ones with a faith-based or voluntary background struggle with collecting and disbursing funds because banks and payment service providers refuse to provide them with financial services. The non-committal role that bank supervisors prefer to take creates a serious obstacle in coming up with solutions to the issue of de-risking. It may require bilateral conversations between regulatory authorities and ministries of Foreign Affairs to convince supervisors to issue banks and bank examiners with CDD guidance for NPOs based on the FATF standards;

5. To address the international drivers of CFT and sanctions regimes, and their impact on NPOs, lessons learnt from national and international stakeholder dialogues need to be leveraged through to an international mechanism that will allow for an institutionalized and sustained dialogue.

The ACAMS-led International Sanctions Compliance Task Force, focusing on the development of technical risk guidance and being developed in co-creation sessions with relevant stakeholders, is an example of an international mechanism that is helpful for generating practical and tangible solutions. Addressing the systemic drivers of and the policies on CFD through an international roundtable approach or model would need further exploration in terms of the institution or the type of institutional collaboration that may facilitate it. Such a stakeholder model would provide added value to the ACAMS initiative as it would allow for discussions concerning the need to enable humanitarian aid and protection, the implementation of the sustainable development goals, and the protection of human rights, while addressing the current international obstacles stemming from global AML/CFT standards and sanctions regimes in a systemic manner.

In this regard, ongoing initiatives like the Unintended Consequences Workstream of the FATF,⁴⁸ the Global Counterterrorism Forum “Good Practices

48 FATF, “Mitigating the Unintended Consequences of the FATF Standards”, 2021, available at: <http://www.fatf-gafi.org/publications/financialinclusionandnpoissues/documents/unintended-consequences-project.html>.

Memorandum for the Implementation of Countering the Financing of Terrorism Measures while Safeguarding Civic Space”,⁴⁹ and the international and US dialogue processes co-convened by the World Bank provide those of us involved in national and international dialogues with practices to explore an approach or model for an international dialogue that would be fit for purpose.

Are the stakeholder dialogues that are being set up to address financial access restrictions facing non-profit organizations fit for purpose? Some concluding remarks

To try to answer the question of whether the stakeholder dialogues set up to address financial access restrictions facing NPOs are fit for purpose, we are reminded of a question and a statement by participants to a roundtable: “Why is it difficult to execute solutions based on sensible ideas?”, and “De-risking is everyone’s problem and no-one’s responsibility”.

What the practice of the stakeholder dialogues, the setting out of the FATF Unintended Consequences Workstream, and the issuing of the Global Counterterrorism Forum memorandum illustrate is a growing awareness amongst relevant policymakers that sensible ideas to resolve financial access restrictions need to be implemented. Some donor governments have stepped up their efforts to share in the risk burden through, for example, issuing comfort letters which act as a guarantor for a light-regime/simplified CDD by the bank. It is a small step towards risk sharing, for a problem that has so far been shouldered largely by NPOs and, to some extent, by financial service providers. It is true, however, that much more needs to be done to share risks that emanate from international counterterrorism (financing) rules and regulations and which compromise other global agreements, such as the achievement of the Sustainable Development Goals, as well as undermining the principles underpinning international humanitarian law and international human rights law.

The stakeholder dialogues or roundtables have proven to be helpful, even with all their shortcomings and potential for improvement, because they enable all relevant stakeholders to engage in a process of mutual understanding and trust building, which are the foundations for technical and systemic problem solving. They are fit for purpose but that is not to say that they are a panacea for solving all the intended and unintended consequences that stem from the AML/CFT standards, the international sanctions regimes and counterterrorism measures.

We have witnessed the incremental growth of global counterterrorism (financing) laws, rules and regulations over the past twenty years that have impacted NPOs through intricate measures and policies—something which

49 Global Counterterrorism Forum, “Good Practices Memorandum for the Implementation of Countering the Financing of Terrorism Measures While Safeguarding Civic Space”, September 2021, available at: https://www.thegctf.org/Portals/1/Documents/Links/Meetings/2021/19CC11MM/CFT%20GP%20Memo/CFT%20Memo_ENG.pdf?ver=fahs72ucLyYOTj7WDwBkQ%3d%3d.

cannot be easily undone. They can, however, be revised and the harms mitigated, and the revision of the UN's Global Counter Terrorism Strategy, the FATF Unintended Consequences Workstream and the Global Counterterrorism Forum's Good Practices memorandum provide a few avenues with which to do this. The COVID-19 pandemic and its consequences for global health—along with poverty, food insecurity, the growing social and economic gap, and climate change that exacerbate the negative effects of the pandemic—have opened up the opportunity to put humanitarian relief, the Sustainable Development Goals, peacebuilding and human rights at the forefront of commitments that the international community needs to deliver on. There is traction to change the political and security discourse and the policies that have for so many years allowed for the sprawling of counterterrorism (financing) measures, to the detriment of the development agenda. At the same time, developments driven by nationalist and nativist populist ideologies, movements and authoritarian leaders and policymakers will influence the agenda of those of us that want to safeguard and protect space for humanitarian relief, development aid and human rights. Stakeholder dialogues have a role to play to address these developments but can only do so if they are opened up to involve not only legal, financial and regulatory experts and policymakers and the large NPOs, but also smaller organizations active on the frontlines who are currently bearing almost the entire brunt of the legal, regulatory and other risks, but are less visible when it comes to determining/engaging in the discourse. A more open and accountable approach would be a step in the right direction.

Whose risk? Bank de-risking and the politics of interpretation and vulnerability in the Middle East and North Africa

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Abstract

Following the events of 11 September 2001, measures aimed at countering the financing of terrorism (CFT) were intensified by States. Many countries around the world adopted strict anti-money laundering and CFT regulations for the transfer of funds globally. This process increased the costs of complying with regulatory requirements and imposed high penalties on banks for non-compliance. As a result, preventive measures—often known as “de-risking”—were taken up by banks, including terminating the accounts of clients perceived as “high-risk” for money laundering or terrorist financing, and delaying transfers. These measures, however, have had negative consequences, reducing financial access for local civil society organizations in conflict-affected contexts that are deemed high-risk for terrorist

activities. Drawing on five years of research to understand the impact of de-risking on conflict-affected contexts from a local perspective, this paper reflects on the local political economy of CFT, with a focus on the Middle East and North Africa. It explores two key areas of inquiry. The first of these is the politics of interpretation—how counterterrorism as a discourse and a set of practices, of which CFT is one, gets interpreted by local authorities and banks, and subsequently gets reinterpreted to the population. This also has implications for which local actors are better positioned to access funds than others, and why. The second area of inquiry is the politics of vulnerability—how the local political economy impact of CFT can increase the social and economic vulnerabilities of some groups more than others. This paper demonstrates that under the guise of “counterterrorism”, local authorities in conflict-affected contexts have used CFT to restrict the non-profit and philanthropic space and are using banking regulations to shape that space in ways that are bound to have negative medium- and long-term implications for it.

Keywords: counterterrorism, countering the financing of terrorism, political economy, Middle East and North Africa, humanitarian engagement, philanthropy, civil society, banks, de-risking.

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Introduction

“A diamond may be forever, but terrorism, promiscuously funded, will be too”, remarked comedian Bill Maher in his book on the “War on Terror”.¹ While delivered in a satirical tone, his statement reflects the zeitgeist at the time, with growing concerns following the events of 11 September 2001 about the intersections between flows of funds through the formal financial sector and terrorist financing. In response to these concerns, the Bush administration quickly signed Executive Order 13224 with the aim of launching “a strike on the financial foundation of the global terror network” in order to “starve the terrorists of funding”.² Several countries around the world followed suit and adopted strict anti-money laundering (AML) and combatting the financing of terror (CFT) regulations for the transfer of funds globally. This process increased the costs of complying with regulatory requirements³ and imposed high penalties

1 Bill Maher, *When You Ride Alone You Ride with Bin Laden: What the Government Should Be Telling Us to Help Fight the War on Terrorism*, New Millennium Press, Beverly Hills, CA, 2002, p. 112.

2 Aimen Dean, Edwina Thompson and Tom Keatinge “Draining the Ocean to Catch One Type of Fish: Evaluating the Effectiveness of the Global Counter-Terrorism Financing Regime”, *Perspectives on Terrorism*, Vol. 7, No. 4, 2013, p. 4.

3 The cost of non-compliance for banks is significant. For example, between 2018 and 2019, [global regulators levied a near-record \\$10 billion worth of fines](#) against banks, and by summer 2020, these same regulators had already issued \$5.6 billion in fines against financial institutions. See Jeff John Roberts, “A Near Record Year for Money Laundering: Banks Hit with \$10 Billion in Fines”, *Fortune*, 11 March 2020, available at: <https://tinyurl.com/2hdbuczv> (all internet references were accessed in

for non-compliance on banks.⁴ As a result, banks adopted preventive measures⁵ – often known as “de-risking” – that included terminating the accounts of those considered high-risk for money laundering or terrorist financing, and delaying transfers.⁶ As several analysts and commentators have pointed out, however, these measures have also had negative consequences, “impacting the innocent as much as the guilty”,⁷ and have resulted in reduced financial access for local civil society organizations in conflict-affected contexts that are deemed high-risk for terrorist activities.⁸ While there is a significant body of literature that documents the adverse implications of bank de-risking on humanitarian and development operations in conflict-affected contexts,⁹ this paper considers how the global counterterrorism regime, of which CFT measures are part, manifests itself at the local level in conflict-affected contexts in the Middle East and North Africa, how local regulatory authorities, banks and civil society professionals are adapting to and adopting the counterterrorism regime within their own contexts, and the broader implications on the non-profit and philanthropic space in those countries.

This paper draws on the author’s five years of research and engagement at the Overseas Development Institute (ODI) on local experiences of bank de-risking, a review of the literature and a series of key informant interviews with civil society professionals and philanthropists in the Middle East and North Africa conducted in April 2021.¹⁰ It reflects on the local political economy of CFT in the region,

November 2021); Ascent, “The Not So Hidden Costs of Compliance”, 30 June 2020, available at: www.ascentregtech.com/blog/the-not-so-hidden-costs-of-compliance/

4 See J. J. Roberts, above note 3.

5 It is worth noting here that financial firms spend significant sums on ensuring compliance. For example, the Asia-Pacific, European, Middle Eastern and African, Latin American, and North American markets spend about \$181 billion per year on maintaining financial crime compliance. See Ascent, above note 3.

6 While “terrorist finance” is usually understood as money and as such, approaches to countering the financing of terrorism have been mainly about disrupting the flow of money for terrorist organizations or those suspected on terrorism, Wittig argues that the term is best understood as “exchange of value in any form”, with money being only one such form. See Timothy Wittig, “Terrorist Finance: Myth and Reality”, in T. Wittig, *Understanding Terrorist Finance*, Palgrave Macmillan, London, 2011.

7 Tom Keatinge, *Uncharitable Behaviour*, Demos, London, 2014, p. 130, available at: <https://demosuk.wpengine.com/files/DEMOSuncharitablebehaviourREPORT.pdf>.

8 Jim Woodsome, Vijaya Ramachandran, Clay Lowery and Jody Myers, *Policy Responses to De-Risking: Progress Report on the CGD’s 2015 Recommendations*, Center for Global Development (CGD), London, 2018, available at: www.cgdev.org/sites/default/files/policy-responses-de-risking.pdf; Stuart Gordon and Sherine El Taraboulsi-McCarthy, “Counter-Terrorism, Bank De-Risking and Humanitarian Response: A Path Forward”, Policy Brief No. 72, Humanitarian Policy Group (HPG), Overseas Development Institute (ODI), London, 2018, available at: <https://odi.org/en/publications/counter-terrorism-bank-de-risking-and-humanitarian-response-a-path-forward/>.

9 See T. Keatinge, above note 7; S. Gordon and S. El Taraboulsi-McCarthy, above note 8; Samantha Bricknell, “Misuse of the Non-Profit Sector for Money Laundering and Terrorism Financing”, *Trends & Issues in Crime and Criminal Justice*, No. 424, September 2011; Radiah Othman, “Institutionalization of Risk Management Framework in Islamic NGOs for Suppressing Terrorism Financing”, *Journal of Money Laundering Control*, Vol. 17, No. 1, 2014; Sherine El Taraboulsi-McCarthy and Camilla Cimatti, *Counter-Terrorism, De-Risking and the Humanitarian Response in Yemen: A Call for Action*, HPG Working Paper, ODI, London, 2018, available at: <https://odi.org/en/publications/counter-terrorism-de-risking-and-the-humanitarian-response-in-yemen-a-call-for-action/>.

10 All interview respondents in this paper are anonymized because of the sensitivity of the topic and to alleviate concerns about reputational risk.

with a focus on bank de-risking and the various interests that underpin its implementation in policy and regulatory frameworks in the Middle East. De-risking is the focus here because it is a key outcome of the pressure on banks and other financial institutions to maintain CFT regulatory compliance, and it has had a significant impact on the capacity of non-profits to operate in crisis-affected contexts.¹¹ To understand the local political economy of CFT, the paper focuses on two areas. The first of these is the politics of interpretation and how counterterrorism more broadly, as a discourse and a practice, gets interpreted by local authorities and banks, and subsequently gets reinterpreted to the population. This also has implications for which local actors are better positioned to access funds than others, and why. The second area of focus is the politics of vulnerability and how the local political economy of CFT is increasing the social and economic vulnerabilities of some groups more than others within conflict-affected contexts in the Middle East and North Africa. Examples will be drawn from Yemen, Libya, Syria, the West Bank and Gaza, among others. This paper demonstrates that under the guise of “counterterrorism”, local regulatory authorities in many contexts in the Middle East are restricting the space for civil society organizations, and that banking regulations have been used to shape this space in ways that are bound to have negative medium- and long-term implications for the non-profit and philanthropic sectors more broadly. It also shows that the practice of CFT and its knock-on effects contradict the objective of counterterrorism – i.e., to stem the threat of terrorism globally – and in fact create an environment where economic and social vulnerabilities are exacerbated. Finally, the paper concludes with a call for a reconceptualization of “risk” to include the perspective of the global South as the foundation for a CFT regime that is more targeted and effective in reducing violence globally.

The paper is divided into two substantive sections and a conclusion. The first section addresses the inherent complexity of the role of banks as a security actor and the conflict that results from being expected to strike a balance between the risks and costs of client relationships, while at the same time fearing the consequences of de-risking clients or keeping them.¹² The second section highlights important gaps in the debate on the adverse implications of the global counterterrorism regime and, particularly, bank de-risking. It reflects on the local political economy implications of the securitized role of banks, with a particular focus on the impact of de-risking on the scope of associational life in conflict-affected contexts.

11 Princess Bazley-Bethea and Selena Bridges, “De-Risking: A Product of Avoidance”, *InterAction*, 15 November 2019, available at: www.interaction.org/blog/de-risking-a-product-of-avoidance/.

12 Anthony Scott, “If Banks Can’t Solve the Derisking Dilemma, Maybe the Government Will”, *American Banker*, Vol. 1, No. 60, 2015.

Banks as gatekeepers of global security

As early as the 1980s, analysts were reflecting on pathways to stem the threat of terrorism by tracking and blocking financial flows.¹³ Terrorist attacks that took place in the 1990s, such as the 1993 bombing of the World Trade Center, the 1995 Sarin gas attack in the Tokyo subway and the 1995 bombing of the federal building in Oklahoma City, all signalled the emergence of what was described at the time as the “new terrorism”, which was instigated by religious fervour and was arguably significantly more lethal than previous, State-sponsored forms of terrorism. A key distinguishing feature of these attacks was the diversity of funding sources that were available to the terrorists, and this diversity later manifested itself in the 9/11 terrorist attacks in New York. As explained by Giraldo and Trinkunas, “[t]he portrait of terrorism financing that has emerged since the September 2001 attacks on the United States is of a formal and informal global financial system that terrorists can manipulate with ease”. Moreover, they add that “diverse and dispersed sources of funding and methods of transferring funds are exploited by equally decentralized and flexible terrorist networks that can easily shift from one means to another in response to efforts to thwart their activities”.¹⁴

To exercise control over the movement of funds, banks around the world have become a fixture of the global counterterrorism regime and, in turn, have found themselves at the heart of debates on global security. Banks have a responsibility to detect and report illicit activities, freeze the assets of designated terrorists and enforce government-imposed sanctions. The practice of “de-risking” covers a range of actions and measures, including delaying transfers, and withdrawing or terminating correspondent banking relationships in response to heightened regulatory compliance expectations and increased enforcement actions and penalties.¹⁵ A study by the Charity and Security Network pointed out that for US non-profit organizations (NPOs) that work internationally, the two most commonly encountered problems are delayed wire transfers, affecting 37% of NPOs, and increased fees, affecting approximately 33%.¹⁶ These restrictions are often explained in light of the requirements of the Financial Action Task Force

13 See, for example, US Congress, “International Terrorism, Insurgency, and Drug Trafficking Present Trends in Terrorist Activity – Joint Hearings Before the Senate Committee on Foreign Relations and the Committee on the Judiciary, May 13, 14, and 15, 1985”, 1985, available at: www.ojp.gov/ncjrs/virtual-library/abstracts/international-terrorism-insurgency-and-drug-trafficking-present-0; Neil C. Livingstone, *Fighting Back: Winning the War against Terrorism*, Heath, Lexington, MA, 1987; Rachel Ehrenfeld, *Narco-Terrorism: How Governments around the World Have Used the Drug Trade to Finance and Further Terrorist Activities*, Basic Books, New York, 1990; Thomas Petzinger Jr., “We Clean Cash! Pakistan Pitches Money-Laundering in the U.S.”, *Wall Street Journal*, 18 March 1992; Bruce Hoffman, *Inside Terrorism*, Columbia University Press, New York, 2006.

14 Jean K. Giraldo and Harold A. Trinkunas, *Terrorism Financing and State Responses: A Comparative Perspective*, Stanford University Press, Stanford, CA, 2007, p. 11.

15 Michaela Erbenová *et al.*, *The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action*, International Monetary Fund (IMF), 2016, available at: www.imf.org/external/pubs/ft/sdn/2016/sdn1606.pdf.

16 Sue Eckert, Kay Guinane and Andrea Hall, *Financial Access for US Non-Profits*, Charity and Security Network, 2017, available at: [www.charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20\(2\).pdf](http://www.charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20(2).pdf).

(FATF)¹⁷ regime and, specifically, its Forty Recommendations.¹⁸ According to the Human Security Collective, however, the FATF standards “do not always provide clear and illustrative guidance for implementation, thus creating space for misinterpretation and, most worryingly, for misuse by national regulators”.¹⁹ Cutting off the flow of funds to prevent criminal or terrorist activities seems to be a logical measure – but at what cost?

First, as argued by Favarel-Garrigues *et al.*, the global counterterrorism regime has given banks a role they were not established for.²⁰ Banks fear reputational damage and substantial fines, and “find it difficult to ‘profile’ NPOs whose activities appear more ‘random’ than their other commercial clients”. This is made more difficult by the fact that banks “do not necessarily receive any regulatory guidance from Central Banks on how to deal with NPOs”.²¹ As a result, serious errors occur, with grievous consequences for financial access especially for vulnerable groups such as those disadvantaged by their socioeconomic situation or other forms of marginalization (on account of ethnicity or regional affiliation, for example), and assessments of “risk” tend to be subjective rather than based on rigorous analysis and comprehensive information-gathering. How banks understand “risk”, and how decisions to close bank accounts are made, remain unclear. Risk-based approaches to financial crime usually define risk through a set of variables that include “sector, occupation, [and] types of business; geography and jurisdiction risk; political risk; distribution channels; and product or services that [the] customer requires or uses”.²² There is, however, no generally agreed methodology for assessing

17 The FATF is an inter-governmental body established in 1989 by the ministers of its member jurisdictions. The mandate of the FATF is to “set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system”. The FATF also collaborates with other international stakeholders and works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse. See FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations*, p. 7, 2012, available at: www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html.

18 The original FATF Forty Recommendations were drawn up in 1990 as an initiative to combat the misuse of financial systems by persons laundering drug money. The Recommendations were revised for the first time in 1996 to reflect evolving money laundering typologies. In 2001, the FATF expanded its mandate to deal with the issue of the funding of terrorist acts and terrorist organizations, and created the Eight (later expanded to Nine) Special Recommendations on Terrorist Financing. The FATF Recommendations were revised a second time in 2003, and these, together with the Special Recommendations, have been endorsed by over 180 countries, and are universally recognized as the international standard for AML/CFT. See *ibid.*

19 Human Security Collective (HSC), “Impact of CFT Measures on Civil Society”, 2021, available at: www.hscollective.org/our-work/working-themes/impact-of-cft-measures-on-civil-society/

20 Gilles Favarel-Garrigues, Thierry Godefroy and Pierre Lascoumes. “Reluctant Partners? Banks in the Fight against Money Laundering and Terrorism Financing in France”, *Security Dialogue*, Vol. 42, No. 2, 2011.

21 Human Security Collective (HSC) and European Center for Not-for-Profit-Law (ECNL), *At the Intersection of Security and Regulation: Understanding the Drivers of “De-Risking” and the Impact on Civil Society Organizations*, 2018, p. 7, available at: www.hscollective.org/assets/Uploads/Reports/8f051ee3cb/Understanding-the-Drivers-of-De-Risking-and-the-Impact-on-Civil-Society-Organizations_1.pdf.

22 David Artingstall, Nick Dove, John Howell and Michael Levi, *Drivers and Impact of Derisking: A Study of Representative Views and Data in the UK for the Financial Conduct Authority*, John Howell & Co.,

financial crime risk, and “it is difficult to determine to what extent the data are sufficient for this purpose, other than to make a broad subjective assessment”.²³ Based on a series of interviews with compliance officers whose duties include responsibility for AML/CFT activities, a study by Favarel-Garrigues *et al.* on de-risking practices in French banks has shown the extent to which these banks have invested in watch lists and various software-based profiling tools to perform this role. Using these instruments, compliance officers have the power to decide whether particular customers should be included in or excluded from banking operations. Nevertheless, the study also highlights that processes of information-gathering are often lacking in rigour and, as such, are not reliable.²⁴ As noted in a 2018 study by the Woodrow Wilson Center, banks also lack incentives to improve the quality of the data they are collecting, since their primary concern is avoiding potential fines: “One particularly pernicious effect of the status quo is that financial institutions do not have an incentive to adopt innovative techniques or practices that might enhance the quality of information needed by law enforcement officials.”²⁵ A Center for Global Development report confirms this view that the fear of potential fines is a key determining factor in shaping a bank’s de-risking practices; it points out that the rate of CFT- and AML-related enforcement actions does not necessarily decrease following clarifications of regulatory policy, and that “[t]he key analytical point is that *uncertainty* over the prospect of future fines may be affecting bank behaviour, despite clarifying statements from regulators”.²⁶

Second, lack of clarity on what constitutes terrorist financing “risk”²⁷ has created a situation where banks are cutting ties not just on a case-by-case basis but wholesale, withdrawing from entire categories of customers, business lines or regions. This has resulted in the financial exclusion of specific social groups.²⁸ Moreover, de-risking “disproportionately affects smaller organizations who are unable to meet a bank’s extended due diligence requirements and have no recourse to remedy when derisked”.²⁹ This has posed a risk to “international financial integration, financial inclusion, and financial transparency – and by

Shamley Green, 2016, p. 8, available at: www.fca.org.uk/publication/research/drivers-impacts-of-derisking.pdf.

23 See *ibid.*.

24 See G. Favarel-Garrigues, T. Godefroy and P. Lascoumes, above note 20.

25 James A. Haley, *De-Risking of Correspondent Banking Relationships: Threats, Challenges and Opportunities*, Woodrow Wilson International Center for Scholars, Washington, DC, 2018, p. 12, available at: www.wilsoncenter.org/sites/default/files/media/documents/article/2018_haley_report-edits-2-2018-final.pdf.

26 *Ibid.*, p. 12, fn. 24 (emphasis in original).

27 It is important to note that the argument here is not to say that the threat of terrorism is not real. In the UK, horrific attacks on London and Manchester in 2017 are examples of the continued threat that terrorism poses. The argument here is about proportionality – that is, ensuring that counterterrorism measures are not victimizing the innocent and that conceptualizations of risk adequately encompass contextual factors.

28 IMF and Union of Arab Banks, *The Impact of De-Risking on MENA Banks*, Joint Survey, Washington, DC, 2015, available at: https://uabonline.org/wp-content/uploads/2020/06/De-Risking_on_the_MENA_Region.pdf.

29 HSC and ECNL, above note 19, p. 7.

extension, to economic growth and poverty reduction”.³⁰ Humanitarian and development operations in conflict-affected contexts in particular continue to suffer because of these measures, which have caused significant harm to local non-profit and philanthropic actors. Financial access is essential to the local humanitarian response.

The Syrian conflict is an example of the failure of global financial systems to enable local and international humanitarian actors to respond in a timely fashion.³¹ One analyst has described the refugee crisis as a direct outcome of the financial disenfranchisement of the Syrian population:

[T]he hidden story behind this movement of people was, in part, the failure of the world’s financial institutions to engage with transactions linked to Syria. This included opening bank accounts for aid agencies and charities, facilitating payments and the transfer of funds, as well as the payment of aid agency staff, and others engaged in humanitarian support.³²

As argued by Gordon *et al.*, in the case of Syria, de-risking practices hindered the ability of NPOs to cooperate with donors in the United States and Western Europe because the NPOs were unable to receive funds. Almost a third of all money destined for Syria was held in a permanent limbo because of blockages in the correspondent banking system.³³

A study by the present author on the implications of bank de-risking for the humanitarian sector in Somalia points out the deep interconnectedness between the two. As one respondent from Somalia stated: “If we want the humanitarian sector to work well, we need a banking sector in Somalia.”³⁴ Another Somali humanitarian worker described how banking is essential to business, and in turn to creating livelihood opportunities for Somalis and facilitating a transition from humanitarian response to recovery. A functioning banking sector will give a more “secure footing” for businesses by providing them with access to international financial services.³⁵ Moreover, research by the ODI, in partnership with the

30 J. Woodsome *et al.*, above note 8.

31 This is particularly true today as cross-border delivery of humanitarian aid becomes significantly more difficult, threatening lives and putting people at risk of acute food insecurity. Unlocking financial flows can help relieve the humanitarian crisis by allowing Syrians to have access to funds. See Alan Shaw-Krivosh, “UN Mandate for Cross Border Aid to Syria to Expire Today”, *Foreign Brief*, 10 July 2021, available at: www.foreignbrief.com/daily-news/un-mandate-for-cross-border-aid-to-syria-to-expire-today/.

32 James King, “How Derisking Became a Humanitarian Issue”, *The Banker*, 1 February 2017, available at: [www.thebanker.com/World/How-derisking-became-a-humanitarian-issue/\(language\)/eng-GB](http://www.thebanker.com/World/How-derisking-became-a-humanitarian-issue/(language)/eng-GB).

33 Stuart Gordon, Alice Robinson, Harry Goulding and Rawwad Mahyub, *The Impact of Bank De-Risking on the Humanitarian Response to the Syrian Crisis*, HPG Working Paper, 2018, available at: www.syrialearning.org/system/files/content/resource/files/main/the-impact-of-bank-de-risking-on-the-humanitarian-response-to-the-syrian-crisis.pdf.

34 Sherine El Taraboulsi-McCarthy, *The Challenge of Informality: Counter-Terrorism, Bank De-Risking and Financial Access for Humanitarian Organizations in Somalia*, HPG Working Paper, ODI, London, 2018, p. 1, available at: <https://odi.org/en/publications/the-challenge-of-informality-counter-terrorism-bank-de-risking-and-financial-access-for-humanitarian-organisations-in-somalia/>.

35 Sherine El Taraboulsi-McCarthy, “Philanthropy in Captivity: Counter-Terrorism Measures and Arab Philanthropy” *Alliance*, 2 May 2018, available at: www.alliancemagazine.org/blog/philanthropy-captivity-counter-terrorism-measures-arab-philanthropy/.

London School of Economics and Political Science, has pointed out that bank de-risking is contributing to war economies that seek to sustain existing violence, as in the case of Yemen, and the expansion of informal and potentially corrupt channels for financial access and the transfer of funds.³⁶

The political economy of CFT in the Middle East and North Africa

While the previous section has addressed some of the challenges that result from the securitization of the role of banks globally, this section addresses the political economy implications of this securitization for local actors, with a focus on banks, government authorities and NGOs in the Middle East and North Africa. This is to situate the analysis within an understanding of the broader political and economic context in the region. The point of departure here is that the securitization of banks within the region is the outcome of a twofold process. As discussed in the previous section, it is the result of a global counterterrorism regime that emerged as a reaction to the events of 9/11 and through which banks have become wary in their dealings with individuals and organizations based in countries deemed high-risk. Equally important, however, is the recognition that this securitization is also influenced by the local sociopolitical environment, which is itself influenced by the broader counterterrorism regime, and this is especially the case in conflict-affected contexts. As noted by Modirzadeh *et al.*, the global counterterrorism regime has spawned a parallel regime whereby a number of States have issued their own domestic criminal laws “prohibiting material support to listed terrorist entities”, as well as multilateral laws and policies, thereby presenting “serious but little-discussed concerns for those engaged in the provision of life-saving humanitarian assistance in armed conflicts”.³⁷ This means that in order to understand the implications of bank de-risking, it is important to take into account both spaces within which the securitization process takes place: the global and the local. This also necessitates understanding the securitization process less as a fixed process and more as a fluid and “intersubjective” one that requires “negotiation” between the securitizing actor and a significant audience.³⁸ In this case, banks are both securitizing actors in their own right and significant audiences to the international counterterrorism environment and local securitization forces. Another significant audience is the non-profit and philanthropic space and associational life more generally. So far, the majority of existing analysis on CFT and its implications for conflict-affected contexts has not fully taken into account the intersubjective nature of exchanges between various actors and the impact of

36 See S. Gordon and S. El Taraboulsi-McCarthy, above note 8.

37 Naz K. Modirzadeh, Dustin A. Lewis and Claude Bruderlein, “Humanitarian Engagement under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape”, *International Review of the Red Cross*, Vol. 93, No. 883, 2018, p. 624.

38 Odysseas Christou and Constantinos Adamides, “Energy Securitization and Desecuritization in the New Middle East”, *Security Dialogue*, Vol. 44, No. 5–6, 2013, p. 509.

those exchanges on the capacity of CFT measures to result in a meaningful decrease in terrorist financing.

The Middle East and North Africa has been particularly vulnerable to de-risking, with implications for financial access especially for vulnerable groups in conflict-affected contexts in the region. The humanitarian and developmental crisis in Yemen is an example of how bank de-risking can significantly exacerbate existing vulnerabilities and even create risks. In February 2017, Deutsche Bank and Commerzbank closed the bank accounts of almost 100 Yemeni students, businesspeople and diplomats in Germany without any explanation. It later became clear that this wave of cancellations was not just targeting individuals – transactions with Yemeni banks had been blocked as well.³⁹ Recent discussions with Yemeni civil society leaders have highlighted that long delays in receiving transfers have become the norm and that financial access remains a problem.⁴⁰ This has further weakened Yemen's banking sector in the eyes of the regional and international financial system and has contributed to its marginalization and financial exclusion.⁴¹ More generally in the region (including beyond conflict-affected contexts), in a study that surveyed 216 banks in the region, 39% of participant banks indicated that they had experienced a significant decline in the scale and breadth of correspondent banking relationships, while 55% reported no significant change and 5% indicated an increase. The study also pointed out that the number of accounts being closed appeared to be increasing, with 63% of participant banks reporting the closure of correspondent bank accounts in 2015 versus 33% in 2012.⁴²

Based on data collected for this paper and a review of the literature, this section zooms in on two main areas through which the local political economy of CFT manifests itself quite distinctly: the first is that of regulatory interpretations to clients, and the second is related to the implications of limited or non-existent financial access for vulnerability in the region, especially in conflict-affected contexts.

“Power plays” and the politics of interpretation

The local political economy of CFT manifests itself in the ways through which counterterrorism and AML regulations get interpreted by banks in the region and then reinterpreted for their clients, and the consequences of those processes of interpretation on conceptualizations of “risk”. As pointed out by the Human

39 Benjamin Bathke, “German Bank Blacklist of Yemeni Nationals Widens”, *DW*, 10 March 2017, available at: www.dw.com/en/germanbank-blacklist-of-yemeni-nationals-widens/a-37839413.

40 S. El Taraboulsi-McCarthy, Yazeed Al Jeddawy and Kerrie Holloway, *Accountability Dilemmas and Collective Approaches to Communication and Community Engagement in Yemen*, HPG Commissioned Report, ODI, London, 2020, available at: <https://odi.org/en/publications/accountability-dilemmas-and-collective-approaches-to-communication-and-community-engagement-in-yemen/>.

41 See S. El Taraboulsi-McCarthy and C. Cimatti, above note 9.

42 Arab Monetary Fund, IMF and World Bank Group, *Withdrawal of Correspondent Banking Relationships in the Arab Region: Recent Trends and Thoughts for Policy Debate*, 2016, available at: www.amf.org.ae/sites/default/files/Files/content/CBRs%20in%20the%20Arab%20Region%20Survey_FINAL%20Report_Final.pdf.

Security Collective, the FATF regulations single out the non-profit sector as being vulnerable to terrorism financing abuse despite a lack of evidence, and as a result, there is a growing number of countries that are enacting laws which restrict the legitimate activities of NPOs.⁴³ It is worth noting here that while the FATF standards were amended in 2016 to indicate that risk to terrorist financing is not inherent to the sector, but is instead experienced by some NPOs based on their characteristics and operations, the misconception has continued to linger in the minds of regulatory authorities.⁴⁴ If we accept that the goal of regulations related to the broader counterterrorism regime, of which CFT is part, is to reduce the risk of terrorist activities, then by looking closely at the consequences of CFT measures from a local perspective, we can infer that those measures exacerbate risks, especially for humanitarian actors and the non-profit sector, while ostensibly preventing risks associated with terrorist financing and other criminal activities.⁴⁵ Based on an analysis of how de-risking is carried out in conflict-affected contexts and its implications, it is clear that there is a lack of clarity in how those regulations are understood and interpreted, and this has created an opportunity for this space to become increasingly politicized. A review of experiences of bank de-risking in the region shows that incentives to enforce counterterrorism measures can be deeply political, and the consequences of enforcing those measures are political too.

A key area in which the politics of interpretation manifests itself is where documentation and regulatory requirements are concerned. Most of the interviews conducted for this study with local NGOs and philanthropists from the Middle East and North Africa pointed out that the regulatory requirements enforced by banks on clients were not uniform. It is also important to note that in a number of countries in the region, governments also require additional documentation and clearances for funds to be cleared by banks, and this has meant that recipients of international transfers have had to negotiate access to funds through both entities: the banks and their own governments. The knock-on effect has been a significant tightening of the non-profit and philanthropic space—as described by a number of Palestinian humanitarian actors, a state of “siege”.⁴⁶ The challenge of financial access in the West Bank and Gaza is an

43 HSC, above note 19.

44 FATF, “Outcomes of the Plenary meeting of the FATF, Busan Korea, 22–24 June 2016”, 24 June 2016, available at: www.fatf-gafi.org/publications/fatfgeneral/documents/plenary-outcomes-june-2016.html.

45 Clive Walker, “Terrorism Financing and the Governance of Charities”, in Colin King, Clive Walker and Jimmy Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law*, Palgrave Macmillan, Cham, 2018; Ben Hayes, Lia van Broekhoven and Vanja Skoric, “De-Risking and Non-Profits: How Do you Solve a Problem that No-One Wants to Take Responsibility For?”, *OpenDemocracy*, 13 July 2017, available at: www.tni.org/my/node/23602; CGD Working Group, *Unintended Consequences of Anti-Money Laundering Policies for Poor Countries*, Washington, DC, 2015, available at: www.cgdev.org/publication/unintended-consequences-anti-money-laundering-policies-poor-countries.

46 Sherine El Taraboulsi-McCarthy, “A Humanitarian Sector in Debt”: *Counter-Terrorism, Bank De-Risking and Financial Access for NGOs in the West Bank and Gaza*, HPG Working Paper, ODI, London, 2018, p. 5, available at: <https://odi.org/en/publications/a-humanitarian-sector-in-debt-counter-terrorism-bank-de-risking-and-financial-access-for-ngos-in-the-west-bank-and-gaza/>.

important case in point. According to a 2018 study by the present author,⁴⁷ because of the compound realities of Israeli occupation, the fragmentation of the Palestinian leadership between the Palestinian Authority in the West Bank and Hamas⁴⁸ in Gaza, and the land, air and sea blockade on Gaza enforced by Israel and Egypt, financial access for Palestinian NGOs is blocked on three levels: international, regional and local. Internationally, CFT and AML regulations have slowed down and often blocked the transfer of funds to NGOs in the West Bank and Gaza. Regionally, a number of Arab governments have placed restrictions on the transfer of funds to Palestinian NGOs to avoid any reputational threats related to engagement with Hamas. Locally, there is administrative and bureaucratic oversight placed on local organizations by the Palestinian Authority in Ramallah, and Hamas in Gaza.⁴⁹

In an interview with the head of an organization in Jordan, “power plays” by local government officials to secure access to funds were mentioned as a key barrier for his organization as well as others. Securing approvals from several ministries and lengthy meetings of committees to decide whether or not an NGO could have access to funds were examples of how counterterrorism was interpreted locally in a way that restricted the operations of the non-profit sector. Respondents from local NGOs and foundations highlighted that in order to access financial transfers, they were asked to provide detailed information on a number of issues such as what the funds were to be used for and by whom, and one respondent mentioned that information requested included details about staff salaries within the respondent’s organization. Requests for details were not always the same, however, and it seems that they largely depended on the person that each respondent was dealing with at the bank. Interviews with Yemeni humanitarian actors indicated that delays in receiving funds continue to feel haphazard and the reasons for them are not always understood; organizations still struggle to access funds, and regardless of how thorough the documents they provide to the bank are, it takes months for the funds to arrive. Respondents also highlighted that this has meant that clients had to visit the banks in person, with specific compromising effects on their health because of the looming COVID-19 pandemic. Overall, difficulties in interpreting adequate documentation to satisfy a bank’s concerns regarding terrorism or money laundering have meant added costs for humanitarian staff and continued delays in receiving funds. Many organizations interviewed for this study stated their interest in moving out of the region altogether, or at least moving their headquarters to the United States and/or Europe in order to facilitate access to funds.

Another area where the politics of interpretation are manifest is related to money flow disruptions that are specific to Islamic NGOs or NGOs that have an Islamic name. Islamic NGOs have been particularly affected by counterterrorism

47 *Ibid.*

48 Hamas, which took control of Gaza following elections in 2006, is considered a terrorist organization by a number of Western and Middle Eastern countries.

49 For a more detailed account of the interlocking challenges faced by Palestinian NPOs, see *ibid.*

measures, both global and local. In the United States and United Kingdom, these NGOs have been subjected to “the discriminatory and disproportionate application of freezing orders, police raids, media attacks, and regulatory investigations”.⁵⁰ In the Middle East, Islamic NGOs or those with an Islamic name have been targeted by local authorities in addition to already existing disruptions in resource flows from the West. The aforementioned 2018 study by the present author points out that delays can last up to six months or sometimes longer and are more likely in relation to transactions to Gaza than to the West Bank because of Gaza’s association with Hamas, which in 2003 was designated as a terrorist organization and subjected to sanctions.⁵¹ Delays are quite common, and as a result, organizations are put in situations where they look for other local resources, accruing debt, to meet the costs of their operations.⁵² In addition to delays through international banking, local NGOs in Gaza are under pressure to satisfy the bureaucratic requirements of Hamas, the Palestinian Authority in Ramallah and the international banking regime. According to the study, the existence of more than one governing body has imposed on NGOs a number of contradictory bureaucratic procedures and has led to delays in accessing funds. These organizations perform a vital role in providing services to Palestinians in lieu of the government, including health care, rehabilitation and special education.⁵³

A third area is that of increased policing of NPOs by government bodies. Confusion about how “risk” can be interpreted has created an opportunity for governments to increase their control over the civil society space. As mentioned in the previous section, in the West Bank and Gaza, the adoption of the global counterterrorism regime that has informed bank de-risking has provided fertile ground for the Palestinian Authority to enforce further restrictions on local Palestinian NGOs’ access to international grants. This has also led to a perception within the Palestinian non-profit sector that the Palestinian Authority is actively competing against local NGOs for international grants, with

50 Radiah Othman and Rashid Ameer, “Institutionalization of Risk Management Framework in Islamic NGOs for Suppressing Terrorism Financing”, *Journal of Money Laundering Control*, Vol. 17, No. 1, 2014, p. 106.

51 S. El Taraboulsi-McCarthy, above note 46. Hamas was listed as a terrorist organization in 2003 and is subject to sanctions by a number of Western States, including includes Australia, Canada, Japan, the United States and countries of the European Union. See Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter Terrorism Measures on Principled Humanitarian Action*, United Nations Office for the Coordination of Humanitarian Affairs and Norwegian Refugee Council, 2013, p. 87, available at: www.nrc.no/globalassets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf; Omar Shaban, “Unlocking the Gaza Strip’s Economic Potential and Fostering Political Stability: Europeans should Seize the Opportunity of the Rapprochement between Fatah and Hamas”, SWP Comments No. 42, German Institute for International and Security Affairs, October 2017, p. 2, <https://tinyurl.com/5rmby4bp>. No-contact policies have also been introduced with regard to members of the Hamas-led cabinet. Canada was the first Western State to introduce such a policy, followed—among others—by the United States under the Palestinian Anti-Terrorist Act, passed in May 2006. This stipulates that “no officer or employee of the US Government should negotiate or have substantive contacts with members of the Palestinian terrorist organizations” (K. Mackintosh and P. Duplat, above, p. 90).

52 See S. El Taraboulsi-McCarthy, above note 46.

53 See *ibid*.

regulations requiring funding authorization from the Prime Minister's Office and approval by the Ministry of Interior and relevant line ministries.⁵⁴ Another example is Jordan, where operational foundations and NGOs that receive grants from international donors have been required to secure approvals from a number of ministries, resulting in a state of "paralysis" until those approvals are secured.⁵⁵

In Saudi Arabia, the government, in an effort to stamp out terrorism after the events of 9/11, has centralized all overseas funding through two government-led entities: the King Salman Humanitarian Aid and Relief Center, and the Saudi Fund for Development. As a result, individual philanthropists struggle to fund projects in other countries because of government restrictions as well as banking restrictions.⁵⁶ In the Syrian context, Syrian NGOs based in Turkey in particular have reported widespread de-risking and closure of bank accounts by Turkish banks as well as blockages in the transfer of money from abroad, particularly when the organization uses "Syria" or "Sham" (referencing Damascus) in its title. For example, in a 2018 study by Stuart Gordon and the present author, staff at one Turkish-registered but Syrian-staffed NGO described how the organization was de-banked and was then unsuccessful in gaining access to banking services for several months. Only when the organization changed its name and logo, removing any indication that it was an Islamic or Syrian organization, and ensured that its trustees were known as secular rather than religious personalities was it able to obtain banking services again. Several of the NGOs that went through this process opened accounts with a State-owned Turkish bank and suggested that the Turkish authorities were keen to encourage NGOs to bank with State-owned institutions as part of a plan to increase State control over the sector.⁵⁷

The politics of vulnerability

The knock-on effect of delayed transfers, increased bureaucratic red tape and frozen bank accounts has been a deepening of the social and economic vulnerabilities of particular social groups. Interviews conducted with humanitarian and development actors for this study pointed out that delays in receiving funds meant that programmes and projects are either cancelled or delayed to the point where they lose relevance. In the aforementioned study by Stuart Gordon and the present author, respondents described the adverse impact of delayed transfers as a "chilling effect" on humanitarian action. They also made it clear that the majority of NGOs looked for alternative routes to find the necessary funds, either relying on the organization's own reserves or through commodities and in-kind deliveries bought from other funds.⁵⁸ This has resulted in negative coping mechanisms by populations who cannot access funds through the formal banking

54 See *ibid.*

55 See S. El Taraboulsi-McCarthy, above note 35.

56 See *ibid.*

57 See S. Gordon and S. El Taraboulsi-McCarthy, above note 8.

58 See *ibid.*

sector and serious implications for humanitarian and development action in conflict and post-conflict societies.

A key area for understanding the politics of vulnerability resulting from bank de-risking is the reputational risk that organizations and individuals experience as a result of being exposed to delays or freezing of bank accounts, which can contribute to a disenfranchisement of those organizations in the long term. In the West Bank and Gaza, local organizations face an “international, regional and local blockade, both as an intentional policy and as an unintended consequence of counter-terrorism measures”.⁵⁹ As a result, NGOs have been starved of much-needed funds. This has also rendered them more vulnerable because of the reputational risks associated with those delays. Getting denied a transaction by an international bank “renders the affected NGO suspect”, and this could mean that the organization is excluded from other grants, especially as donors become increasingly wary of counterterrorism measures themselves. For their part, donors seem to be responding to bank de-risking by selecting regions and organizations that present “as little bureaucratic burden and reputational risk as possible”.⁶⁰ Moreover, while investigations by governments and the media help to ensure the sector’s transparency, these same public platforms can be used to make unproven and unverified accusations that could damage an organization’s reputation and funding prospects.⁶¹

Another area where the politics of vulnerability are manifest is related to negative coping strategies by affected individuals and organizations. As CFT measures cause de-risking, the practice ends up undercutting CFT aims by reducing transparency and accountability within NPO transactions considered vulnerable for abuse. In Yemen, as noted in a study by the present author and Camilla Cimatti,⁶² de-risking and the consequent restrictions on legitimate transactions have contributed to the creation of a black market trade in food and fuel, and the absence of a functioning formal banking system has led to the expansion of other money transfer routes. This has been described as a “door to corruption”, as these other routes rely on networks of money brokers (such as the traditional *hawala* system) that are unregulated and often perceived as corrupt. One Yemeni banker based in Sanaa stated: “The *sarafeen* [money brokers] have more than doubled. They are the only source of local and external distribution of cash. We cannot survive without them.”⁶³ Humanitarian assistance can also find its way onto the black market, for instance to meet urgent needs for cash in the context of Yemen’s liquidity crisis, or because the assistance provided may not meet people’s needs.⁶⁴

A third and less well-trodden area where the politics of vulnerability is visible is that of perceived discrimination by organizations and individuals alike.

59 See S. El Taraboulsi-McCarthy, above note 46, p. vii.

60 See *ibid.*, p. 6.

61 See *ibid.*

62 S. El Taraboulsi-McCarthy and C. Cimatti, above note 9.

63 *Ibid.*, p. 10.

64 *Ibid.*

In the aforementioned study by the present author on the implications of bank de-risking in Somalia, while Somalian bankers saw the merits of bank de-risking insofar as it seeks to combat financial crime, some viewed it as inherently “malicious” and “discriminatory” because “policies are not well defined and it causes harm and destitution to many people, just because of a few bad apples”. Some also saw de-risking as an attack on Muslim nations; one banker described it as “a financial embargo to weaken Muslim nations” and dismissed counterterrorism as “the brainchild of the West”. Another described de-risking as Islamophobic.⁶⁵

Conclusion: Reconceptualizing risk from the perspective of the global South

A common message from the interviews conducted for this study and the literature is that there is a strong desire to be “compliant” and “transparent”, but that it is difficult to understand what compliance actually entails or how it can be attained. This confirms earlier studies on the impact of CFT on conflict-affected contexts. One study respondent explained the situation by saying:

There has to be a way to have financial access, to have financial coverage, without causing harm. Regulators need to be clear about what they want and need from our end. We want to be transparent, we do, but it is useless. We have tried everything but we still get delays.⁶⁶

As discussed in this paper, the global counterterrorism regime is localized in different ways, and in order to strike a balance between managing risk and ensuring financial access for much-needed humanitarian and development engagement, it is essential to gain an understanding of the global and local political economy implications of counterterrorism. A “Southern” perspective on CFT remains limited in global conversations.

To address issues related to the interpretation of regulatory frameworks, cross-stakeholder engagement at the international, regional and local levels is important. Banks need to be able to interpret counterterrorism regulations clearly and consistently to themselves and their clients. Moreover, the role of governments and authorities in enforcing and interpreting those regulatory frameworks needs to be investigated on a case-by-case basis. As for concerns about exacerbating vulnerabilities, international and regional actors need to ensure that their engagement helps support financial access for local organizations and actors. They also need to keep putting pressure on regulatory bodies in the West to continue revising their tools, programmes and measures for countering terrorist financing, especially where conflict-affected contexts and humanitarian crises are concerned.

⁶⁵ See S. El Taraboulsi-McCarthy, above note 34, p. 7.

⁶⁶ See S. Gordon and S. El Taraboulsi-McCarthy, above note 8, p. 5.

CORRIGENDUM

The updated ICRC Commentary on the Third Geneva Convention: A new tool to protect prisoners of war in the twenty-first century – CORRIGENDUM

**Jemma Arman, Jean-Marie Henckaerts,
Heleen Hiemstra and Kvitoslava Krotiuk**

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The Authors apologise for two errors within their published Article. These appear on pages 391 and 416.

On page 391, the first sentence of the second paragraph:

Updating the Commentaries on each of the 142 articles of GC III required consideration of a wide range of historical, legal, military, ethical, socio-cultural and technological issues.

should read as follows:

Updating the Commentaries on each of the 143 articles of GC III required consideration of a wide range of historical, legal, military, ethical, socio-cultural and technological issues.

On page 416 in the Conclusion's second paragraph, the sentence:

The 142 articles of GC III provide a rich framework of realistic but essential protections covering all aspects of a prisoner's capture until their final release and repatriation.

should read as follows:

The 143 articles of GC III provide a rich framework of realistic but essential protections covering all aspects of a prisoner's capture until their final release and repatriation.

Reference

Jemma Arman, Jean-Marie Henckaerts, Heleen Hiemstra and Kvitoslava Krotiuk, "The updated ICRC Commentary on the Third Geneva Convention: A new tool to protect prisoners of war in the twenty-first century", *International Review of the Red Cross*, Vol. 102, No. 913, 2020.

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