

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 Vaios 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; Vaios 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 Nikolich, 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. Sassòli, 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 Leiaë 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 dérogoire au droit international humanitaire et au droit international des droits de l’homme”); Switzerland, Code Pénal, Art. 260^{quinqües} 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 Zwaneburg, “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 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 disbursement 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.