

# Respecting international humanitarian law and safeguarding humanitarian action in counterterrorism measures: United Nations Security Council resolutions 2462 and 2482 point the way

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## **Abstract**

*United Nations, regional and domestic counterterrorism measures have generated a cascade of adverse effects for impartial humanitarian activities in areas where designated groups are present. Certain humanitarian activities, diverted supplies and incidental payments can fall foul of broadly worded counterterrorism regulation proscribing or criminalizing financial and other support to designated groups. Donors to humanitarian organizations set strict conditions and financial*

\* The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations (UN).

*institutions decline transactions, hampering impartial humanitarian activities in the very instances in which international humanitarian law (IHL) requires that they be allowed. Recognizing this, United Nations Security Council (UNSC) resolutions 2462 and 2482 adopted in 2019 have spelled out more explicitly than ever before the need for counterterrorism measures to comply with IHL and safeguard impartial humanitarian action in line with IHL. This article sets out those IHL obligations that govern humanitarian and medical activities and the types of safeguards that States have put in place to ensure their counterterrorism measures comply with IHL and allow for these activities. The UNSC's latest steer in resolutions 2462 and 2482 provides a foundation for States' exclusion of impartial humanitarian and medical activities from the scope of application of their counterterrorism measures. This can be an effective way of averting adverse consequences for these activities where designated entities are present.*

**Keywords:** counterterrorism, international humanitarian law, humanitarian action, United Nations Security Council resolutions.

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## Introduction

States today increasingly acknowledge that there is no dissonance between their counterterrorism measures and their support for humanitarian action.<sup>1</sup> Yet significant concerns remain about the barriers that counterterrorism measures – and in particular measures to counter the financing of terrorism – have created for impartial humanitarian activities in situations of armed conflict that involve groups designated as terrorist.

As foreseen under international humanitarian law (IHL), such humanitarian activities can include assistance to civilians under a designated group's control, medical care for the group's wounded or sick members, or assistance and protection to the group's members in detention. In turn, certain humanitarian activities, incidental financial transactions, and diverted humanitarian supplies can fall foul of broadly worded counterterrorism regulation proscribing or criminalizing financial and other forms of support to designated groups. Conscious of this legal risk, through their own processes to comply with counterterrorism measures, donors to humanitarian organizations set strict conditions and financial institutions decline transactions, hampering impartial humanitarian activities in the very instances in which IHL requires that they be allowed.

Recognizing this, United Nations Security Council (UNSC) resolutions 2462 and 2482 adopted in 2019 have spelled out more explicitly than ever before

1 UN Security Council Virtual Open Debate on International Cooperation in Combating Terrorism 20 Years After the Adoption of Resolution 1373, S/2021/48, 15 January 2021, available at: <https://www.securitycouncilreport.org/un-documents/document/s-2021-48.php> (all internet references were accessed in June 2021).

the need for counterterrorism measures to comply with IHL and safeguard impartial humanitarian action in line with IHL.<sup>2</sup> In requiring States to ensure that their counterterrorism measures comply with their IHL obligations and urging them to take into account the potential effect of these measures on humanitarian activities, the UNSC has given a clear steer for States to safeguard humanitarian activities foreseen under IHL when exercising measures to counter the financing or other forms of support to terrorism.

This article lays out the principal types of counterterrorism measures that are at the root of a range of impediments to impartial humanitarian activities in situations of armed conflict in which designated armed groups are present. After briefly describing these adverse effects, the article lays out the provisions of UNSC resolutions 2462 and 2482 that aim to ensure that all counterterrorism measures comply with IHL and to safeguard humanitarian activities in a manner consistent with IHL. It then spells out those IHL obligations that govern humanitarian and medical activities and the types of safeguards that States have put in place to ensure that their counterterrorism measures comply with IHL and allow for impartial humanitarian activities. The article posits that this latest steer by the UNSC in resolutions 2462 and 2482 provides a foundation for States' exclusion of impartial humanitarian and medical activities foreseen under IHL from the scope of application of counterterrorism measures. Explicit exclusions can be an effective way of avoiding adverse consequences that hamper impartial humanitarian and medical activities where designated entities are present.

## **The interplay between counterterrorism measures and impartial humanitarian activities in armed conflict**

United Nations (UN), regional and domestic counterterrorism measures have generated a cascade of adverse effects for impartial humanitarian action in areas where designated groups are present. This part will first provide an overview of the key counterterrorism sanctions and criminalization measures that intersect with humanitarian activities before illustrating some of the most salient negative effects that these measures have had on humanitarian activities.

United Nations, regional and domestic counterterrorism regulation that can adversely affect impartial humanitarian activities

### *Countering the financing of terrorism: United Nations Security Council regulation*

The UNSC has adopted a long sequence of legally binding decisions under chapter VII of the UN Charter<sup>3</sup> to counter terrorism financing. The sequence begins with the

2 UNSC Resolution 2462, 28 March 2019; UNSC Resolution 2482, 19 July 2019.

3 UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

sanctions regime established under UNSC Resolution 1267 in 1999 in connection with the U.S. embassy bombings by Al-Qaeda in Tanzania and Kenya in 1998, and Resolution 1373 adopted a few days after the attacks of 11 September 2001.<sup>4</sup>

Resolution 1267 first imposed an asset freeze and air embargo against the Taliban which was allowing territory under its control to be used to shelter and train terrorists and plan terrorist acts.<sup>5</sup> In 2000, the UNSC extended the asset freeze to Al-Qaeda,<sup>6</sup> and in 2002 it imposed an asset freeze, arms embargo and travel ban on both the Taliban and Al-Qaeda, as well as other individuals, groups, undertakings and entities associated with them.<sup>7</sup> In 2011, the UNSC adopted two resolutions – 1988 and 1989 – to split measures against the Taliban (falling under Resolution 1988) and against Al-Qaeda (falling under Resolution 1989). In 2015, the UNSC adopted Resolution 2253 to extend the latter regime to the Islamic State in Iraq and the Levant (ISIL).<sup>8</sup> This sanctions regime against Al-Qaeda and ISIL will be referred to as the 1267 regime.

Under the 1267 regime, the UNSC imposes a travel ban, an arms embargo and a freeze of listed entities' funds and other financial assets or economic resources and a requirement to ensure that no funds, financial assets or economic resources are made available, directly or indirectly, for their benefit.<sup>9</sup> Economic resources include tangible or intangible assets of every kind that can potentially be used to obtain funds, goods or services.<sup>10</sup>

The sanctions under the 1267 regime are “preventative in nature and are not reliant upon criminal standards set out under national law”;<sup>11</sup> they require no mental element of intention or knowledge by the person carrying out a prohibited transaction and are a matter of strict liability. They apply alongside the broad preventative and criminalizing measures required in UNSC Resolution 1373 and reaffirmed in subsequent resolutions establishing a global counterterrorism regime.

In Resolution 1373, the UNSC decided, *inter alia*, that all States shall prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of terrorist organizations or individuals for any purpose, even in the absence of a link to a specific terrorist act.<sup>12</sup> This is typically translated into regional and domestic sanctions, as will be described below.

Resolution 1373 also requires that States criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their

4 UNSC Resolution 1373, 28 September 2001.

5 UNSC Resolution 1267, 15 October 1999.

6 UNSC Resolution 1333, 19 December 2000.

7 UNSC Resolution 1390, 28 January 2002.

8 UNSC Resolution 2253, 17 December 2015.

9 UNSC Resolution 2368, 20 July 2017; UNSC Resolution 2255, 22 December 2015.

10 For explanation of terms at the Al-Qaida Sanctions Committee, see *Assets Freeze: Explanation of Terms*, 24 February 2015, available at: [https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot\\_assets\\_freeze\\_-\\_english.pdf](https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_assets_freeze_-_english.pdf).

11 UNSC Resolution 2368, above note 9, para. 64.

12 UNSC Resolution 2368, above note 9, para. 20 and UNSC Resolution 2462, above note 2, para. 3.

territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts. This is typically translated into regional and domestic criminal legislation, as shown below.

Resolution 1373 and subsequent resolutions reinforce and complement the criminalizing provisions of the 1999 International Convention for the Suppression of the Financing of Terrorism,<sup>13</sup> which states that a person commits an offence if by any means, directly or indirectly, unlawfully and wilfully, that person provides or collects funds with the intention that they should be used or in the knowledge that they are to be used in order to carry out a terrorist act.<sup>14</sup> It is not necessary to prove that the funds were actually used to carry out a terrorist act.

In 2019, the UNSC adopted Resolution 2462 and broadened the requirement to criminalize the financing of terrorism. It decided that all States shall criminalize:

the wilful provision or collection of funds, financial assets or economic resources ... directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose ... even in the absence of a link to a specific terrorist act.<sup>15</sup>

The words “*for any purpose ... even in the absence of a link to a specific terrorist act*” make the criminal act much broader than what is required under Resolution 1373 and the 1999 Convention, both of which require a link to a terrorist act.<sup>16</sup>

Four months after adopting Resolution 2462, the UNSC adopted Resolution 2482 on linkages between international terrorism and organized crime. It recommended measures to address various facets of organized crime such as trafficking in persons, arms, drugs and cultural property, the illicit trade in natural resources and wildlife, and other criminal activities. While the interplay between these measures and humanitarian activities is less apparent, this resolution is highlighted here because of its explicit reference to compliance with IHL and humanitarian activities, as described below.

Alongside States’ domestic implementation of the 1267 sanctions regime, States have generally translated their other UNSC and 1999 Convention obligations to prohibit and to criminalize the financing of terrorism into two categories of regional or domestic regulation: first, sanctions consisting of asset freezes and the prohibition of making funds and economic resources available to individuals and groups designated as terrorist (even in the absence of any intent to support them); and second, the criminalization of financial support to such

13 International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002) (ICSFT).

14 ICSFT, *ibid.*, Art. 2.

15 UNSC Resolution 2462, para. 5.

16 On the rationale, see Financial Action Task Force, *Guidance on Criminalizing Terrorist Financing*, October 2016, Recommendation 5, paras 19–20, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Criminalising-Terrorist-Financing.pdf>. See also, for example, UNSC Resolution 2253, 17 December 2015, para. 17; UNSC Resolution 2322, 12 December 2016, para. 6; UNSC Resolution 2368, above note 9, para. 18.

individuals and groups. For both sanctions and criminalization purposes, States will decide, through a regional body or individually, whom to designate as terrorist. As some examples below illustrate, domestic criminal regulation can be broader than what UN instruments require.

Without attempting to provide an exhaustive picture, below is an illustrative sampling of some regional and domestic counterterrorism measures that can trigger adverse effects for humanitarian activities in areas where designated groups are present. Some of these measures are taken by States in which humanitarian operations are carried out, while others are established far from where humanitarian activities take place, giving States a long reach, including through broad jurisdiction or implementation in donor agreements with humanitarian organizations.

### *Countering the financing of terrorism: Regional and domestic sanctions*

A UN report published in 2020 found that more than sixty-five States had established domestic financial sanctions mechanisms pursuant to Resolution 1373; however, more than sixty States had not designated any individuals or entities or frozen any assets.<sup>17</sup> While a number of domestic sanctions regimes have been described elsewhere,<sup>18</sup> two in particular are highlighted here because their far reach and the role that they play in funding humanitarian operations can have important adverse consequences for humanitarian activities.

To implement Resolution 1373, the European Union (EU) adopted Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism.<sup>19</sup> It requires the European Community to “ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for the benefit of persons, groups and entities listed in the Annex”.<sup>20</sup>

17 UNSC, Letter dated 3 June 2020 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism and the Chair of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities addressed to the President of the Security Council, UN Doc. S/2020/493, 3 June 2020, available at: <https://www.undocs.org/en/S/2020/493>, p. 9.

18 Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, July 2013, available at: [https://www.unocha.org/sites/unocha/files/CounterTerrorism\\_Study\\_Full\\_Report.pdf](https://www.unocha.org/sites/unocha/files/CounterTerrorism_Study_Full_Report.pdf), pp. 26–28.

19 Council of the EU, “Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism”, 2001/931/CFSP, *Official Journal of the European Communities*, L 344/93, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001E0931&from=EN>.

20 *Ibid.*, Art. 3. This is implemented by Council of the EU, “Council Regulation (EC) No 2580/2001 of 27 December 2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism”, *Official Journal of the European Communities*, L 344/70, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R2580&from=GA>, which, in turn, is implemented by Council of the EU, “Council Implementing Regulation (EU) No 2021/138 of 5 February 2021 Implementing Article 2(3) of Regulation (EC) No 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, and

In addition to this sanctions regime implementing UNSC Resolution 1373, EU counterterrorism sanctions comprise the 1267 regime<sup>21</sup> as well as a distinct autonomous financial sanctions regime against persons and entities associated with or supporting Al-Qaeda and ISIL.<sup>22</sup> This autonomous regime also requires that “[n]o funds, other financial assets or economic resources shall be made available, directly or indirectly to or for the benefit of the natural or legal persons” who are listed.

These EU sanctions have a long reach: they directly apply in EU territory, to any EU national, and to any legal person incorporated or constituted under the law of an EU Member State or doing business within the EU.<sup>23</sup> Some EU countries may also have their own distinct domestic sanctions and lists of persons and entities connected with terrorism that they implement on top of EU ones.<sup>24</sup>

In the United States (US), “specially designated global terrorists” (SDGTs) are designated by the Department of State and the Department of Treasury pursuant to Executive Order 13224,<sup>25</sup> which was adopted days after the attacks on 11 September 2001 and subsequently amended. These counterterrorism sanctions implement the 1267 sanctions regime as well as the financial transaction prohibitions of UNSC Resolution 1373.

A SDGT’s assets are frozen and it is prohibited to transact or deal in their assets, which includes making any contribution of funds, goods or services to or for the benefit of a SDGT.<sup>26</sup> This prohibition also has a long reach: It applies to any transaction in the US and to any US citizen, permanent resident alien, entity organized under the laws of the US including foreign branches, and any person in the US.<sup>27</sup>

### *Countering the financing of terrorism: Regional and domestic criminalization*

While some criminal jurisdictions require intention or knowledge that the funds will be used to carry out a terrorist act, others require intention or knowledge that they

Repealing Implementing Regulation (EU) 2020/1128”, *Official Journal of the European Union*, L 43/1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R0138>.

21 See Council of the EU, *Council Decision (CFSP) 2016/1693 of 20 September 2016 Concerning Restrictive Measures Against ISIL (Da’esh) and Al-Qaeda and Persons, Groups, Undertakings and Entities Associated with Them and Repealing Common Position 2002/402/CFSP*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016D1693-20201021>; Council of the EU, *Council Regulation (EC) No 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with the ISIL (Da’esh) and Al-Qaida Organisations*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02002R0881-20210414>.

22 Council Decision (CFSP) 2016/1693, *ibid.*, Art. 3(3) and (4); Council of the EU, *Council Regulation (EU) 2016/1686 of 20 September 2016 Imposing Additional Restrictive Measures Directed Against ISIL (Da’esh) and Al-Qaeda and Natural and Legal Persons, Entities or Bodies Associated with Them*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R1686-20200730>.

23 Council Regulation (EC) No 2580/2001, above note 20, Art. 10; Council Regulation (EC) No 881/2002, above note 21, Art. 11; Council Regulation (EU) No 2016/1686, *ibid.*, Art. 18.

24 For some examples, see K. Mackintosh and P. Duplat, above note 18.

25 U.S. Department of State, Bureau of Counterterrorism, Executive Order 13224, 23 September 2001, section 2(a), available at: <https://www.state.gov/executive-order-13224/>.

26 *Ibid.*

27 *Ibid.*, section 3.

are to be used for the benefit of terrorist organizations or individual terrorists for *any purpose*.<sup>28</sup> In a number of jurisdictions, the scope of the criminal offence will also extend beyond financial support to cover all forms of material support. As will be discussed in the upcoming section on consequences of counterterrorism regulation on impartial humanitarian activities, humanitarian organizations face real risks of falling foul of legislation that broadly criminalizes financial or material support to designated entities for any purpose.

In Nigeria, section 13 of the *Terrorism (Prevention) (Amendment) Act 2013*<sup>29</sup> makes it an offence to provide funds, property or other services by any means to terrorist groups, directly or indirectly, with the intention or knowledge or having reasonable grounds to believe that such funds or property will be used to commit a terrorist offence, even if the funds or property were not actually used to commit the offence.

In the EU, Member States are required to criminalize the following acts, when committed intentionally: supplying information or material resources to a terrorist group, or funding its activities in any way, with knowledge that such participation will contribute to the criminal activities of the terrorist group.<sup>30</sup> Individual EU Member States also have their own domestic legislation criminalizing support to terrorism.<sup>31</sup>

In Australia, a person commits an offence if they intentionally make funds available to a terrorist organization, whether directly or indirectly, and the person is simply reckless as to whether the organization is a terrorist organization.<sup>32</sup> It is also an offence for any person to intentionally provide to a terrorist organization support or resources that would help it engage in preparing, planning, assisting in or fostering the commission of a terrorist act when the person knows or is reckless to whether the organization is a terrorist organization.<sup>33</sup>

In the US, “foreign terrorist organizations” (FTOs) are designated by the Secretary of State under the *Immigration and Nationality Act of 1952* (as amended).<sup>34</sup> Once an entity is so designated, it is a crime to knowingly provide material support or resources to it, irrespective of any intention to support the FTO in committing a terrorist act or whether the support or resources actually

28 UNSC, Letter Dated 18 January 2016 from the Chair of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council, UN Doc. S/2016/49, 20 January 2016, para. 415, available at: [https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Global-Implementation-Survey-1373\\_EN.pdf](https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Global-Implementation-Survey-1373_EN.pdf).

29 *Terrorism (Prevention) (Amendment) Act 2013* (Nigeria), available at: [http://placng.org/lawsofnigeria/laws/terrorism\\_bill.pdf](http://placng.org/lawsofnigeria/laws/terrorism_bill.pdf).

30 European Parliament and the Council of the EU, “Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA”, *Official Journal of the European Union*, L 88/6, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32017L0541>, Art. 4(b).

31 K. Mackintosh and P. Duplat, above note 18.

32 *Criminal Code Act 1995* (Australia) (Australian Criminal Code), div. 102.6(2), available at: <https://www.legislation.gov.au/Details/C2017C00235>. See K. Mackintosh and P. Duplat, above note 18, p. 45.

33 Australian Criminal Code, *ibid.*, div. 102.7.

34 *Immigration and Nationality Act of 1952*, 8 *United States Code* (USC) § 1189.



help the FTO carry out a terrorist activity.<sup>35</sup> “Material support or resources” is defined as “any property, tangible or intangible, or service”, and includes currency or monetary instruments, training, and expert advice or assistance, but not medicine or religious materials.<sup>36</sup> This legislation broadly applies to US nationals and residents wherever they are, persons who commit the offence in whole or in part in the US, as well as persons who commit the offence outside the US but subsequently set foot in the US.<sup>37</sup>

Some additional examples of domestic criminalization of support to terrorism are described below in part II (“International humanitarian law and humanitarian safeguards in United Nations Security Council resolutions 2462 and 2482”).

### *Preventing, suppressing and criminalizing “foreign terrorist fighters”*

Beyond countering the financing of terrorism, in 2014, the UNSC adopted Resolution 2178 requiring that States prevent and suppress the recruiting, organizing, transporting or equipping of “foreign terrorist fighters”, and the financing of their travel and of their activities in a manner consistent with international human rights, refugee and humanitarian law.<sup>38</sup> The resolution describes foreign terrorist fighters as individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.<sup>39</sup> The resolution also requires States to establish criminal offences to prosecute, *inter alia*, nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for any of these purposes.<sup>40</sup>

States have adopted legislation to criminalize the recruitment of foreign terrorist fighters, as well as their travel, training, and participation in fighting in line with Resolution 2178. For instance, the Australian Criminal Code makes it an offence for a citizen to enter a foreign country and engage in or have the intention of engaging in a terrorist act in that or another foreign country.<sup>41</sup> Some countries have laws in place to prevent persons from leaving the country if they

35 *United States Code* 18 USC § 2339B.

36 *United States Code* 18 USC § 2339A.

37 18 USC § 2339B, above note 35.

38 UNSC Resolution 2178, 24 September 2014, para. 5.

39 *Ibid.*, preamble.

40 *Ibid.*, para. 6.

41 Australian Criminal Code, above note 32, divs 119.1, 117.1 and 100.1; Petra Ball and Yvette Zegenhagen, “Common Article 1 and Counter-Terrorism Legislation”, in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law*, Routledge, Abingdon-on-Thames, 2021, p. 189.

are suspected of travelling to carry out terrorist activities.<sup>42</sup> Some have also considered incorporating preventive measures in their legislation to revoke travel documents or issue orders to restrict movement and other social activities.<sup>43</sup>

States have also regulated beyond what is required under Resolution 2178 by creating travel-related offences that do not require any purpose of perpetrating, planning, preparing or participating in terrorist acts, or providing or receiving terrorist training. Criminal legislation that makes it an offence to enter or remain in an area because of a risk of terrorism and does not require any terrorism-related purpose can potentially pose difficult challenges for humanitarians. For instance, in addition to implementing obligations under Resolution 2178, the United Kingdom's (UK) *Counter-Terrorism and Border Security Act 2019* allows the Secretary of State to designate an area outside the UK if it is necessary to restrict nationals and residents from entering or remaining in that area in order to protect the public from a risk of terrorism. It is an offence for such a person to enter or remain in a designated area.<sup>44</sup> This is understood to be a response to the difficulty of finding the evidence to prosecute nationals who return from Iraq or Syria where they have allegedly carried out terrorist acts.<sup>45</sup> Australia<sup>46</sup> and Denmark<sup>47</sup> have introduced similar offences in their legislation, and the Netherlands has been considering creating one.<sup>48</sup>

As explained in the next section, the adverse consequences of the above-described counterterrorism measures on humanitarian activities can be significant. As will be discussed later in part II (“International humanitarian law and humanitarian safeguards in United Nations Security Council resolutions 2462 and 2482”), some of these and other national measures have incorporated safeguards ensuring that impartial humanitarian activities can be carried out as foreseen by IHL.

42 Jessica Burniske, Dustin Lewis and Naz Modirzadeh, *Suppressing Foreign Terrorist Fighters and Supporting Principled Humanitarian Action: A Provisional Framework for Analyzing State Practice*, 14 October 2015 (Suppressing FTFs), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2673502](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673502), p. 23.

43 UN Doc. S/2016/49, above note 28, para. 438.

44 *Counter-Terrorism and Border Security Act 2019* (United Kingdom), sections 58B and 58C, available at: <https://www.legislation.gov.uk/ukpga/2019/3/contents/enacted/data.htm>. See also Emanuela-Chiara Gillard and Nathalie Weizmann, “Humanitarian Relief in Situations of Armed Conflict”, in Robin Geiss and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security*, Oxford University Press, Oxford, 2021, p. 525.

45 UK Parliament, Commons Chamber, Consideration of Counter-Terrorism and Border Security Bill, Debate, 11 September 2018, available at: <https://hansard.parliament.uk/Commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/Counter-TerrorismAndBorderSecurityBill#contribution-66ACFAF0-3DB0-4D06-8375-22B5CF7A689B>. Note Mr Ben Wallace, Minister for Security and Economic Crime, column 658: “I fear that if we do not legislate, we will not be able to prosecute those people coming back.”

46 Australian Criminal Code, above note 32, div. 119.2; P. Ball and Y. Zegenhagen, above note 41, pp. 188–189.

47 *Lov om ændring af straffeloven og om ophævelse af Lov, hvorved det forbydes fra dansk Territorium at understøtte krigsførende Magter* [Act Amending the Penal Code and Repealing the Act Prohibiting Danish Territory from Supporting Warring Powers] (Denmark), Law No. 642 of 9 June 2016, available at: <https://www.retsinformation.dk/eli/lt/a/2016/642>.

48 Christophe Paulussen and Emanuela-Chiara Gillard, “Staying in an Area Controlled by a Terrorist Organisation: Crime or Operational Necessity?”, *International Centre for Counter-Terrorism*, 11 January 2021, available at: <https://icct.nl/publication/staying-in-an-area-controlled-by-a-terrorist-organisation-crime-or-operational-necessity/>.

## Adverse consequences of counterterrorism regulation on impartial humanitarian activities, including medical activities

Impartial humanitarian activities are regularly carried out in countries where designated groups operate, such as Boko Haram in Nigeria, the Al-Nusra Front for the People of the Levant in Syria, Abu Sayyef in the Philippines, or Nusrat al-Islam in Mali. Without specifying locations, the International Committee of the Red Cross (ICRC) has explained that it may carry out, among other humanitarian activities,

visits and material assistance to detainees suspected of or condemned for being members of a terrorist organization; facilitation of family visits to such detainees; first aid training; war surgery seminars; IHL dissemination to members of armed opposition groups included in terrorist lists; assistance to provide for the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities to internally displaced persons, where individuals associated with terrorism may be among the beneficiaries.<sup>49</sup>

In the same places where designated groups operate, local medical personnel and humanitarian personnel provide care and treatment for wounded and sick civilians and fighters, including members of designated groups. Despite best efforts to prevent diversion of humanitarian supplies, these might still be diverted to members of designated groups. And, in the course of their operations, humanitarian organizations might need to make incidental payments (such as tolls, taxes, permit and other fees) to designated groups.

Certain humanitarian activities, diverted supplies, and incidental payments can fall under counterterrorism sanctions or criminal measures described above, especially when these have a far reach and are formulated in a broad manner. For humanitarian organizations, there are often multiple layers of counterterrorism sanctions and criminal legislation at play, for instance in the country of operations, the donor country, and the organization's country of registration, in addition to UN and regional measures.

Much has been documented and reported on the adverse consequences of counterterrorism regulation on humanitarian activities and medical care. As the ICRC has described,

[i]mpartial humanitarian actors ... are hindered in their ability to visit persons being detained by 'the other side', recover dead bodies, train armed groups on IHL, restore damaged water supplies and other services for the civilian population, and facilitate mutual detainee releases and swaps.<sup>50</sup>

49 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, October 2015, available at: <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>.

50 ICRC, *Statement to the UNSC Debate: Threats to International Peace and Security Caused by Terrorist Acts: International Cooperation in Combating Terrorism 20 Years After the Adoption of Resolution 1373 (2001)*, 12 January 2021, available at: <https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations>.

Médecins Sans Frontières (MSF) has also described “[i]ncreasing limitations, restrictions and de facto criminalization of providing medical care to all wounded and sick under domestic law and counterterrorism legislation...” and “[r]estrictions on the right to treat all wounded and sick in civilian or humanitarian healthcare facilities...”.<sup>51</sup> Below is a brief overview of the most salient adverse consequences.

### *Direct application of sanctions and criminal regulation*

When UN, regional and domestic sanctions prohibit making any funds, financial assets or economic resources available, even indirectly, to listed entities regardless of the purpose of the contribution and without requiring any intention to support them, these sanctions can capture humanitarian assistance to individuals who are not or no longer fighting and are members of a designated group, as well as incidental payments to listed entities made by humanitarian organizations in the course of their activities. Even with efforts to prevent diversion of humanitarian assets,<sup>52</sup> these sanctions are also broad enough to cover humanitarian supplies that are diverted to and benefit a designated group.<sup>53</sup> European humanitarian non-governmental organizations (NGOs) have reported that the most significant threat to their organizations is the risk of severe legal consequences for “unintentional or ill-informed breaches” of counterterrorism sanctions requirements.<sup>54</sup>

Humanitarian and medical organizations and personnel may also have concerns about themselves being designated under sanctions because of their own activities. For instance, under the 1267 sanctions regime, activities for which an individual or group is eligible for listing include “otherwise supporting” an individual, group, undertaking or entity associated with ISIL or Al-Qaeda. However, listing a humanitarian organization for carrying out humanitarian activities in line with IHL is unlikely under the 1267 regime because the practice of States has been to target an entirely different category of entities and support activities.<sup>55</sup>

51 Françoise Bouchet-Saulnier, Médecins Sans Frontières, *Statement on IHL & Counter-Terrorism: Tensions and Challenges for Medical Humanitarian Organizations*, 2 June 2016, available at: <https://msf-analysis.org/ihl-counter-terrorism-tensions-challenges-medical-humanitarian-organizations/>.

52 Counterterrorism and Humanitarian Engagement Project, *An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations: Research and Policy Paper*, May 2014, available at: <https://reliefweb.int/report/world/analysis-contemporary-anti-diversion-policies-and-practices-humanitarian-organizations>.

53 Emanuela-Chiara Gillard, *Humanitarian Action and Non-State Armed Groups: The International Legal Framework*, Chatham House, London, February 2017, available at: <https://www.chathamhouse.org/sites/default/files/publications/research/2017-02-02-humanitarian-action-non-state-armed-groups-gillard.pdf>, p. 7.

54 Gillian McCarthy, *Adding to the Evidence: The Impacts of Sanctions and Restrictive Measures on Humanitarian Action*, VOICE, March 2021, available at: <https://gisf.ngo/resource/adding-to-the-evidence-the-impact-of-sanctions-and-restrictive-measures-on-humanitarian-aid/>, p. 7.

55 For listing criteria, see UNSC Resolution 2368, above note 9, paras 2–4; Alice Debarre, *Making Sanctions Smarter: Safeguarding Humanitarian Action*, International Peace Institute, 19 December 2019 (A. Debarre, *Making Sanctions Smarter*), available at: <https://www.ipinst.org/2019/12/making-sanctions-smarter-safeguarding-humanitarian-action>, p. 3; Dustin Lewis, Naz Modirzadeh and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law & State Responses to Terrorism*, Harvard Law School Program on International Law and Armed Conflict, September 2015 (Medical

Also present is a risk of humanitarian organizations violating criminal legislation that broadly criminalizes financial or material support to a designated group for any purpose and only requires knowledge that the support is being provided to a designated group. Such a risk is not theoretical. In 2010, the US Supreme Court considered that teaching designed to impart a specific skill to a designated terrorist group – in this case training in IHL – constituted knowingly providing material support.<sup>56</sup>

With respect to the provision of medical care, a report published in 2018 revealed that among sixteen countries surveyed, “practices in at least 10 countries appear to suggest that the authorities interpret support to terrorism to include the provision of healthcare”. It added that “the counter-terrorism framework has purportedly strengthened the legal and moral basis to justify [the criminalization of healthcare]”.<sup>57</sup> Legal proceedings have been instituted in a number of countries for supporting terrorism through medical activities.<sup>58</sup> For instance, under Iraqi national law on combating terrorism, charges have been brought against doctors working in hospitals in territories held by Islamic State in Iraq and Syria (ISIS).<sup>59</sup> In the US, a medical doctor who had volunteered as a medic in the Al-Qaeda military structure to treat injured fighters was convicted of conspiring to provide, and providing or attempting to provide, material support under the direction or control of a terrorist organization.<sup>60</sup> In Syria, hundreds of doctors and nurses have been arrested for providing medical assistance in an opposition area.<sup>61</sup>

### Donor conditions

In addition to the risk of humanitarian operations falling foul of counterterrorism sanctions and criminal legislation, humanitarian organizations are often constrained by clauses that donor States include in their funding agreements. To

Care in Armed Conflict), available at: <https://pilac.law.harvard.edu/medical-care-in-armed-conflict-international-humanitarian-law-and-state-responses-to-terrorism>.

56 Supreme Court of the United States, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 22 (2010), available at: <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf>.

57 Marine Buissonniere, Sarah Woznik, Leonard Rubenstein and Julie Hannah, *The Criminalization of Healthcare*, Safeguarding Health in Conflict, Johns Hopkins Bloomberg School of Public Health and University of Essex, June 2018, available at: <https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf>.

58 D. Lewis, N. Modirzadeh and G. Blum, *Medical Care in Armed Conflict*, above note 55, chapter 5; see also Alice Debarre, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework*, International Peace Institute, 17 September 2018, available at: <https://www.ipinst.org/2018/09/safeguarding-humanitarian-action-in-un-counterterrorism-framework>.

59 Human Rights Watch, *Flawed Justice: Accountability for ISIS Crimes in Iraq*, 5 December 2017, available at: <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq>; Maya Alleruzzo and Salar Salim, “Iraq’s IS Trials Bring Swift Verdicts, Almost All Guilty”, *AP*, 30 April 2018, available at: [www.apnews.com/25a655d5b3cb47c5a0251f596855c98f/Iraq-s-IS-trials-bring-swift-verdicts-almost-all-guilty](http://www.apnews.com/25a655d5b3cb47c5a0251f596855c98f/Iraq-s-IS-trials-bring-swift-verdicts-almost-all-guilty).

60 *United States v. Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007), available at: <https://www.courtlistener.com/opinion/2579725/united-states-v-shah/>.

61 Jessica Burniske, Naz Modirzadeh and Dustin Lewis, *Counter-Terrorism Laws and Regulations: What Aid Agencies Need to Know*, Humanitarian Practice Network, London, November 2014, available at: [https://odihpn.org/wp-content/uploads/2014/11/NP\\_79\\_crc\\_string\\_FINAL.pdf](https://odihpn.org/wp-content/uploads/2014/11/NP_79_crc_string_FINAL.pdf), p. 10.

comply with applicable UN, regional and domestic counterterrorism regulation, donor States translate this into stringent conditions so that the funds they transfer to humanitarian organizations do not benefit listed entities.<sup>62</sup> According to a survey by the humanitarian NGO network VOICE, donor requirements related to counterterrorism sanctions were reportedly stricter in the US than in the EU.<sup>63</sup> At times donor conditions are even stricter than what counterterrorism regulation requires.

For instance, the US Agency for International Development (USAID) requires a Certification Regarding Support to Terrorists, by which the funding recipient represents that they “did not, within the previous three years, knowingly engage in transactions with, or provide material support or resources to, any individual or entity who was, at the time, subject to” US counterterrorism or UNSC sanctions.<sup>64</sup> USAID also incorporates a standard provision in its agreements with US and non-US NGOs, by which the recipient agrees not to “engage in transactions with, or provide resources or support to, any individual or entity that is subject to” US or UN sanctions.<sup>65</sup> Such clauses require humanitarian organizations to be aware of applicable counterterrorism regulations and take steps to ensure that they comply with them. But, when humanitarian organizations carry out activities where listed groups are present, the requirement to strictly avoid any such transactions or the provision of resources or support can preclude impartial humanitarian activities even when these are explicitly allowed under IHL.

Some donor clauses require that the recipient use its best endeavours or take appropriate steps to ensure that the funds are not used to support listed groups.<sup>66</sup> Even under this standard, however, a condition that ultimately precludes humanitarian assistance to certain individuals or entities solely based on their designation would not be compatible with IHL rules that explicitly foresee impartial humanitarian services for persons who are not or no longer fighting, and who include all civilians as well as wounded, sick or detained fighters regardless of any terrorist designation. Moreover, such a condition would undermine the impartiality and non-discrimination by which humanitarian organizations are expected to operate under IHL.

62 For examples of such donor conditions, see Counterterrorism and Humanitarian Engagement Project, *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts*, May 2014, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/CHE\\_Project\\_-\\_Counterterrorism-related\\_Humanitarian\\_Grant\\_Clauses\\_May\\_2014.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/CHE_Project_-_Counterterrorism-related_Humanitarian_Grant_Clauses_May_2014.pdf).

63 G. McCarthy, above note 54, p. 7. For illustrations of European donor clauses, see Emanuela-Chiara Gillard, Sangeeta Goswami and Fulco van Deventer, “Screening of Final Beneficiaries – A Red Line in Humanitarian Operations. An Emerging Concern in Development Work”, *International Review of the Red Cross*, 2021, in this edition.

64 USAID, *Certifications, Assurances, Representations, and Other Statements of the Recipient*, May 2020, available at: <https://www.usaid.gov/sites/default/files/documents/1868/303mav.pdf>, p. 4. Some exceptions are also laid out.

65 USAID, *Standard Provisions for U.S. Nongovernmental Organizations*, May 2020, available at: <https://www.usaid.gov/sites/default/files/documents/1868/303maa.pdf>, p. 12.

66 K. Mackintosh and P. Duplat, above note 18, pp. 47–70.

As another example, in its funding agreements for humanitarian operations in Nigeria, USAID included a clause aimed at preventing any funds from benefitting Boko Haram. It asked recipients to

obtain the prior written approval of the USAID Agreement Officer before providing any assistance made available under this Award to individuals whom the Recipient affirmatively knows to have been formerly affiliated with Boko Haram or [ISWAP], as combatants or non-combatants.<sup>67</sup>

Requiring such approval would undermine the ability of a humanitarian organization to conduct its operations with independence and neutrality, which are necessary to build trust and acceptance among parties to the conflict, communities and recipients.<sup>68</sup> Denying approval for persons who are nevertheless entitled to humanitarian assistance under IHL would undermine the organization's ability to conduct operations impartially and without discrimination (i.e. strictly according to needs), and would be incompatible with IHL.

Donor agreements will often require that the obligations they impose be passed on to implementing partners, contractors, or sub-grantees, and require notification when a transaction has been linked to a designated group. Complying with multiple counterterrorism-related donor conditions has entailed time-consuming and costly administrative, legal and risk management processes for humanitarian organizations. Smaller organizations typically do not have the same resources or capacity as bigger ones.<sup>69</sup>

### *De-risking*

Humanitarian organizations rely on banks to receive funds from donors and transfer them to areas of operation. Yet States' counterterrorism regulations, with which banks must equally comply or else risk liability, have led them to decline to provide financial services to humanitarian organizations who carry out activities where designated entities are present – a practice called “de-risking”. For fear of violating the law and being exposed to fines and other legal and reputational repercussions, banks have declined to open accounts, have frozen or closed them, and delayed and blocked financial transactions.<sup>70</sup> In turn this has led humanitarian organizations to delay, reduce or even cease some activities, and

67 Obi Anyadike, “Aid Workers Question USAID Counter-Terror Clause in Nigeria”, *The New Humanitarian*, 5 November 2019, available at: <https://www.thenewhumanitarian.org/news-feature/2019/11/05/USAID-counter-terror-Nigeria-Boko-Haram>.

68 Under the principle of neutrality, humanitarian actors “must not take sides in hostilities or engage in controversies of a political, racial, religious or ideological nature”. Independence is defined as autonomy “from the political, economic, military, or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented”. Swiss Federal Department of Foreign Affairs, *Humanitarian Access in Situations of Armed Conflict: Practitioner's Manual*, Version 2, December 2014, p. 19.

69 Naz Modirzadeh, *Comment on the Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, March 2017 (Comment on the Pilot Empirical Survey Study), available at: <http://blogs.harvard.edu/pilac/files/2017/03/Comment-on-the-Pilot-Empirical-Survey-Study-2017.pdf>, p. 73; A. Debarre, Making Sanctions Smarter, above note 55.

resort to informal money transfer channels for their operations.<sup>71</sup> According to the NGO network VOICE, bank de-risking issues such as blocked or delayed transactions and returned funds were the highest ranking impediments reported by European NGOs as a result of counterterrorism and other types of sanctions.<sup>72</sup> Similar difficulties have been reported with other parts of the private sector, such as insurance and credit card services,<sup>73</sup> or with importing supplies such as medicine into areas where designated entities operate.<sup>74</sup> In this respect, too, smaller organizations will face greater challenges because they lack the resources to manage related administrative burdens.<sup>75</sup>

### *Measures against “foreign terrorist fighters”*

With the adoption of UNSC Resolution 2178, experts posited that humanitarian organizations might face new restrictions on travel, increased scrutiny over their communications with certain areas, additional donor requirements in relation to humanitarian operations where designated entities have control, or heightened review procedures and reticence from banks to provide financial services.<sup>76</sup> Of particular risk to humanitarians are travel offences that do not require any terrorism-related purpose and make it an offence to enter or remain in an area because of a risk of terrorism.<sup>77</sup> Among other concerns for humanitarians, legislation allowing a government to determine for security reasons whether humanitarian personnel can travel to and carry out activities in a certain area can undermine their actual and perceived independence, neutrality and impartiality and preclude impartial humanitarian activities that are allowed under IHL.<sup>78</sup>

### *Chilling effect*

The above-described legal risks, donor conditions and administrative burdens stemming from counterterrorism regulation have generated a “chilling effect”, causing humanitarian organizations to overcorrect by limiting or withdrawing

70 K. Mackintosh and P. Duplat, above note 18; E.-C. Gillard and N. Weizmann, above note 44; Stuart Gordon and Sherine El Taraboulsi-McCarthy, *Counter-Terrorism, Bank De-Risking and Humanitarian Response: A Path Forward*, Humanitarian Policy Group, August 2018, available at: <https://cdn.odi.org/media/documents/12368.pdf>.

71 Report of the Analytical Support and Sanctions Monitoring Team established pursuant to Resolution 1526 (2004), UN Doc. S/2017/35, 13 January 2017, para. 71.

72 G. McCarthy, above note 54, p. 7.

73 A. Debarre, Making Sanctions Smarter, above note 55, p. 10.

74 K. Mackintosh and P. Duplat, above note 18.

75 UK HM Treasury and Home Office, *National Risk Assessment of Money Laundering and Terrorist Financing 2020* (Report, December 2020), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/945411/NRA\\_2020\\_v1.2\\_FOR\\_PUBLICATION.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945411/NRA_2020_v1.2_FOR_PUBLICATION.pdf), p. 127.

76 J. Burniske, D. Lewis and N. Modirzadeh, Suppressing FTFs, above note 42.

77 See E.-C. Gillard and N. Weizmann, above note 44.

78 C. Paulussen and E.-C. Gillard, above note 48.



their activities in areas where designated groups operate even if humanitarian needs are high.<sup>79</sup> This can deprive people in need of humanitarian services and undermine the ability of humanitarian organizations to operate in an impartial manner.<sup>80</sup>

Over the past decade, humanitarian organizations, academic institutions, think tanks, various components of the UN and States have devoted great effort to raising awareness of the adverse impact of counterterrorism measures on humanitarian activities and advocating for adequate safeguards against it. Academic studies have been conducted,<sup>81</sup> UN and NGO reports and think tank papers published,<sup>82</sup> and expert meetings,<sup>83</sup> high-level and Security Council events convened.<sup>84</sup> In an effort to correct course and remedy the negative effects described above, as explained in part II (“International humanitarian law and humanitarian safeguards in United Nations Security Council resolutions 2462 and 2482”), the UNSC has begun to incorporate requirements to comply with IHL and safeguards for impartial humanitarian activities, including medical activities, in its counterterrorism resolutions.

79 See N. Modirzadeh, Comment on the Pilot Empirical Survey Study, above note 69.

80 K. Mackintosh and P. Duplat, above note 18, p. 84; A. Debarre, Making Sanctions Smarter, above note 55, p. 3.

81 See Harvard Law School Program on International Law and Armed Conflict series of publications on counterterrorism measures and humanitarian action, available at: <https://pilac.law.harvard.edu/publications#pilac-publications>.

82 See, for example, K. Mackintosh and P. Duplat, above note 18; Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, 12 June 2018, available at: <https://www.nrc.no/resources/reports/principles-under-pressure/>; International Peace Institute, range of publications on sanctions, counterterrorism measures and humanitarian action, available at: <https://www.ipinst.org/tag/humanitarian-affairs>; Emanuela-Chiara Gillard, *Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action*, Chatham House, London, August 2017 (Recommendations for Reducing Tensions); Sara Pantuliano, Kate Mackintosh, Samir Elhawary and Victoria Metcalfe, *Counter-Terrorism and Humanitarian Action: Tensions, Impact and Ways Forward*, HPG Policy Brief 43, Humanitarian Policy Group, London, October 2011, available at: <https://cdn.odi.org/media/documents/7347.pdf>; Fionnuala Ní Aoláin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/75/337, 3 September 2020, available at: <https://undocs.org/A/75/337>.

83 See, for example, International Peace Institute, *Safeguarding the Space for Principled Humanitarian Action in Counterterrorism Contexts*, 23 May 2018, available at: <https://www.ipinst.org/2018/05/poc-counterterrorism-contexts#3>; Permanent Mission of Spain to the United Nations, *Record of the Fourth Retreat on International Humanitarian Law: Safeguarding the Humanitarian Space in the Context of Sanctions Regimes and Counter-Terrorism Measures*, UN Doc. A/74/857 S/2020/403, 2–3 March 2020, available at: <https://digitallibrary.un.org/record/3862098?ln=en>.

84 See, for example, Peter Maurer, ICRC President, “Combatting Terrorism Should Not Come at the Expense of Humanitarian Action or Principles” (Speech, UN General Assembly High-Level Side Event on Counter-Terrorism Frameworks and Sanctions Regimes: Safeguarding Humanitarian Space, 26 September 2019), available at: <https://www.icrc.org/en/document/combating-terrorism-should-not-come-expense-humanitarian-action-or-principles>; Briefing by ICRC President Peter Maurer and Professor of Practice at Harvard Law School Naz Modirzadeh, UN Doc. S/PV.8499, 1 April 2019. In 2021, the Counter-Terrorism Committee Executive Directorate will issue a new report on States’ counterterrorism legislation compliance with IHL and the impact of counterterrorism measures on humanitarian activities.

## International humanitarian law and humanitarian safeguards in United Nations Security Council resolutions 2462 and 2482

During negotiations on Resolution 2462 on countering the financing of terrorism, a number of States and humanitarian organizations called for a robustly worded provision requiring that States' counterterrorism measures comply with their obligations under IHL and not impede humanitarian activities, including medical activities. This was deemed necessary to adequately counterbalance the risk that humanitarian activities could be prohibited under sanctions or constitute an offence under criminal legislation, and the risk of other adverse effects as laid out above. At the same time, some States wanted to preclude the possibility of funnelling funds to listed entities through NGOs under the pretext of legitimate activities.<sup>85</sup>

In negotiations on Resolution 2482 a few months later on linkages between international terrorism and organized crime, States and humanitarian organizations raised similar concerns to those put forward for Resolution 2462. Two States – Belgium and the UK – broke silence on a draft of the resolution in order to ensure that similar language was incorporated to safeguard humanitarian activities.<sup>86</sup>

In both resolutions, the outcome was the first of its kind.<sup>87</sup>

### Compliance or consistency with international humanitarian law

Before the adoption of resolutions 2462 and 2482, several UNSC counterterrorism resolutions had incorporated references in their preamble to ensuring that counterterrorism measures comply with IHL. In the preamble of both resolutions 2462 and 2482, the UNSC reaffirmed that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law and IHL.

Such references in operative paragraphs had been infrequent,<sup>88</sup> but resolutions 2462 and 2482 both signal an evolution. In paragraph 5 of Resolution 2462, the UNSC required that States criminalize the financing of terrorism in a manner consistent with their IHL obligations. It:

[d]ecides that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law ... establish serious

85 Security Council Report, *Combatting Financing of Terrorism Open Debate*, 27 March 2019, available at: <https://www.securitycouncilreport.org/whatsinblue/2019/03/combating-financing-of-terrorism-open-debate.php>.

86 Security Council Report, *International Terrorism and Transnational Organised Crime*, 19 July 2019, available at: <https://www.securitycouncilreport.org/whatsinblue/2019/07/international-terrorism-and-transnational-organised-crime.php>.

87 The outcome has, however, been criticized as “fail[ing] to effectively mitigate against its potential impacts on humanitarian action and humanitarians’ longstanding concerns”, according to Scott Paul and Kathryn Achilles, “Correcting Course: Avoiding the Collision Between Humanitarian Action and Counterterrorism”, in *Just Security*, 23 May 2019, available at: <https://www.justsecurity.org/64158/correcting-course-avoiding-the-collision-between-humanitarian-action-and-counterterrorism/>.

88 UNSC Resolution 2178, above note 38, para. 5.

criminal offenses sufficient to provide the ability to prosecute and to penalize ... the wilful provision or collection of funds, financial assets or economic resources ... directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose ... even in the absence of a link to a specific terrorist act.

In a similar fashion, in paragraph 6 of Resolution 2462, the UNSC required that States ensure that all their counterterrorism measures comply with IHL. It:

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

In paragraph 16 of Resolution 2482, the UNSC borrowed language from Resolution 2462 and “urged” States to ensure that all measures taken to counter terrorism comply with their obligations under IHL.

The reference in these paragraphs to “their obligations” under IHL principally applies to States for whom IHL obligations have come into effect because they are party to an armed conflict. While most IHL obligations are designed to bind parties to an armed conflict, IHL does contain some obligations that apply in times of peace or that are binding on third States in connection with an ongoing armed conflict to which they are not a party. For instance, third States have IHL obligations relating to humanitarian relief or to humanitarian activities more broadly in connection with ongoing international armed conflicts to which they are not a party.<sup>89</sup> However, IHL applicable in non-international armed conflict (NIAC) is silent in this respect.<sup>90</sup>

It is also interesting to note that paragraph 5 of Resolution 2462 uses the term “in a manner consistent with their obligations” whereas paragraph 6 uses the term “comply with their obligations”. The former term could be interpreted as less strict than the latter, possibly akin to respecting the object and purpose of obligations. The object and purpose of IHL obligations are to protect persons not or no longer participating in hostilities,<sup>91</sup> including by allowing humanitarians to meet essential needs and ensuring the wounded and sick are cared for. Therefore, even if the phrase “in a manner consistent with their obligations” under paragraph 5 is interpreted as less strict, it still entails that States must establish measures to criminalize the financing of terrorism in a manner that protects persons not or no longer participating in hostilities.

89 See AP I, Art. 70 and 81.

90 See Nathalie Weizmann, “Ensuring Respect for IHL as it Relates to Humanitarian Activities”, in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law*, Routledge, Abingdon-on-Thames, 2021, pp. 201–202.

91 See ICRC, Commentary on the Second Geneva Convention, 2017, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1A35EE65211A18AEC12581150044243A>, Art. 2, para. 238.

## Creating legally binding obligations

Under Article 25 of the UN Charter, “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. It is generally accepted that when the Council uses the verb “decides” in a resolution, it is making a decision and thus creating a legally binding obligation.<sup>92</sup> As “demand” denotes an authoritative and insistent command (in French, for instance, the corresponding word is “*exige*”), it can also be interpreted as a decision. As one author has written, “whenever the Security Council uses firm language (such as ‘decides’, ‘demands’, ‘orders’) in contrast to a mere ‘calling upon’, ‘urging’ or ‘requesting’, this can be seen as an implied use of its authority to make legally binding decisions...”.<sup>93</sup>

Both operative paragraphs 5 and 6 of Resolution 2462 can therefore be interpreted as creating legally binding obligations.<sup>94</sup> However, paragraph 5 is narrower in scope than paragraph 6. The former requires that the criminalization of terrorism financing be consistent with a State’s obligations under IHL. The latter demands that States ensure that all counterterrorism measures comply with IHL. Paragraph 6 therefore encompasses a much broader set of actions, including, *inter alia*, economic sanctions, measures criminalizing material support to terrorism, and travel-related measures.<sup>95</sup>

In contrast to “decides” and “demands”, the term “urges” used in paragraph 16 of Resolution 2482 is not understood as creating a legal obligation. Experts on UNSC practice have written, “it can be clearly established that by using ‘urges’ and ‘invites,’ as opposed to ‘decides,’ the paragraph is intended to

92 Daniel H. Joyner, “What Were the Implications of the Actions of the UN Security Council?”, in Daniel H. Joyner (ed.), *Iran’s Nuclear Program and International Law: From Confrontation to Accord*, Oxford Scholarship Online, 2016, pp. 195–198. See also Security Council Report, *The UN Security Council Handbook: A User’s Guide to Practice and Procedure*, New York, 2019, available at: <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/the-un-security-council-handbook-by-scr-1.pdf>.

93 Andreas Zimmermann, “Humanitarian Assistance and the Security Council”, *Israel Law Review*, Vol. 50, No. 1, 2017, pp. 3–23 and p. 16. See also Daniel H. Joyner, *Iran’s Nuclear Program and International Law: From Confrontation to Accord*, Oxford University Press, New York, 2016, p. 198. On how the absence of the term “decides” should not prejudice the legally binding character of the Council’s formulation, see Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds), *La Charte des Nations Unies: Commentaire article par article*, 3rd ed., Vol. 1, Economica, Paris, 2005, p. 915. According to the International Court of Justice (ICJ), “[i]n view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.” ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, paras 113–114.

94 Naz Modirzadeh and Dustin Lewis, *Taking into Account the Potential Effects of Counterterrorism Measures on Humanitarian and Medical Activities*, Harvard Law School Program on International Law and Armed Conflict, May 2021 (Taking into Account), available at: <http://blogs.harvard.edu/pilac/files/2021/05/Taking-Into-Account.pdf>, pp. 24–25.

95 For the types of counterterrorism measures that both paragraphs 5 and 6 cover, see Taking into Account, *ibid.*, pp. 32–33.

be exhortatory and not binding”.<sup>96</sup> The reason for this looser language may lie, at least in part, in the fact that paragraph 16 of Resolution 2482 incorporates an additional element not found in paragraphs 5 and 6 of Resolution 2462 and discussed below.<sup>97</sup> It is worth noting that paragraph 16 of Resolution 2482 also covers all measures to counter terrorism.

### *No conflict with international humanitarian law obligations*

Before examining with which obligations of IHL these operative paragraphs require consistency or compliance and how this relates to preventing the adverse consequences for humanitarian activities described earlier, it can be relevant to address a recurrent query about potential conflicts between States’ IHL obligations and legally binding UNSC decisions, such as the requirement to take measures to counter terrorism.

96 Security Council Report, *Special Research Report No. 1: Security Council Action Under Chapter VII: Myths and Realities*, 23 June 2008, available at: <https://www.securitycouncilreport.org/research-reports/lookup-c-96/gkwlemtisg-b-4202671.php>, p. 10.

97 Comparison between relevant provisions of resolutions 2462 and 2482:

#### Resolution 2462

Para. 5. Decides that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense the wilful provision or collection of funds, financial assets or economic resources or financial or other related services, directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act;

Para. 6. Demands that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law;

Para. 24. Urges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law;

#### Resolution 2482

Para. 16. Urges Member States to ensure that all measures taken to counter terrorism comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, and urges States to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law;

Article 103 of the UN Charter states that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” The phrase “obligations of the Members of the UN under the Charter” is commonly interpreted as including decisions of the UNSC, as described above.<sup>98</sup> However, peremptory norms<sup>99</sup> of international law (or *jus cogens*), which include the basic rules of IHL<sup>100</sup> and in particular Article 3 common to the four Geneva Conventions,<sup>101</sup> may not be overridden by a legally binding decision of the UNSC. As Judge *ad hoc* Lauterpacht wrote in a separate opinion in the Genocide Case before the International Court of Justice:

The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between the Security Council resolution and *jus cogens*.<sup>102</sup>

98 Johann Ruben Leiae and Andreas Paulus, “Miscellaneous Provisions, Article 103”, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf, *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I, Oxford University Press, Oxford, 2012, para. 38.

99 A peremptory norm of general international law is defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art. 53. Peremptory norms protect the values and interests that are fundamentally important to the international community as a whole: International Criminal Tribunal for the former Yugoslavia, *Furundžija*, Case No. IT-95-17/1, Judgment (Trial Chamber), (10 December 1999), paras 153–156.

100 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 257; International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Zoran Kupreskic and others*, Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 520; Marco Sassoli, “State Responsibility for Violations of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 84, No. 846, June 2002, available at: [https://www.icrc.org/en/doc/assets/files/other/401\\_434\\_sassoli.pdf](https://www.icrc.org/en/doc/assets/files/other/401_434_sassoli.pdf), p. 414; Luigi Condorelli and Laurence Boisson de Chazournes, “Quelques remarques à propos de l’obligation des États de ‘respecter et faire respecter’ le droit international humanitaire en toutes circonstances”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC and Martinus Nijhoff Publishers, The Hague, 1984, pp. 33–34; Alexander Orakhelashvili, “The Identification of Peremptory Norms”, in Alexander Orakhelashvili (ed.), *Peremptory Norms in International Law*, Oxford University Press Online, January 2009, p. 61.

101 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

102 Dissenting Opinion of Judge *ad hoc* Lauterpacht, ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* (Provisional Measures) (Order of 8 April 1993), ICJ Rep 3 1993, para. 100. See also Concurring Opinion of Sir Nigel Rodley, Human Rights Committee, *Sayadi and Vinck v. Belgium* (Communication No. 1472/2006), UN Doc. CCPR/C/94/D/1472/2006 (22 October 2008); Anne Peters, “Ch.V The Security Council, Functions and Powers, Article 25”, in B. Simma *et al.*, *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I, Oxford University Press, Oxford, 2012, para. 19; European Court of First Instance, *Yassin Abdullah Kadi and Al Barakaat International Foundation*

On the interplay of UNSC powers and IHL obligations specifically, one scholar has written:

Chapter VII economic sanctions are subject to peremptory norms, particularly the fundamental humanitarian rules ... All this implies an obligation not to deprive civilians of access to the goods necessary for their survival, and respective duties of the occupying powers. Any sanctions regime is governed by humanitarian norms essential for the survival of the civilian population, to secure food, water, shelter, medicines and medical care.<sup>103</sup>

Another expert has added, “the provisions of the Geneva Conventions and their Additional Protocols on relief actions for the benefit of specially vulnerable groups threatened by starvation also belong to that category of absolutely binding obligations”.<sup>104</sup>

Even where treaty obligations are not peremptory, judges and scholars have advocated an interpretation approach that avoids a conflict between a State’s obligations under the Charter and its other treaty obligations. It has been recommended that:

any interpretation of a Council decision should operate on the basis of the presumption, first, that the Council does not intend to deviate from international law, and second, that it does not intend to force members to violate international law when carrying out the decision.<sup>105</sup>

Put slightly differently,

contradiction should only be assumed when norms stand in clear conflict with each other or in the case that the contradictory intent is clearly expressed. In other words, this would only be the case if no interpretation of the non-Charter rule appeared possible that would bring it into accordance with the Charter.<sup>106</sup>

The European Court of Human Rights<sup>107</sup> and a member of the UN Human Rights Committee have applied this approach in the case of international human rights law, which shares many of the same aims and even expresses some of the same rules as IHL.

*v. Council of the European Union and Commission of the European Communities*, T-315/01, Judgment, 21 September 2005, para. 230.

103 Alexander Orakhelashvili, “The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions”, *European Journal of International Law*, Vol. 16, No. 1, 2005, pp. 66–67.

104 Hans-Peter Gasser, “Collective Economic Sanctions and International Humanitarian Law – An Enforcement Measure Under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 56, 1996, pp. 871–904 and p. 881.

105 A. Peters, above note 102.

106 Johann Ruben Leiã and Andreas Paulus, “Miscellaneous Provisions, Article 103”, in B. Simma *et al.*, *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I, Oxford University Press, Oxford, 2012, para. 18. See also Vera Gowlland-Debbas, “Is the UN Security Council Bound by Human Rights Law?”, *ASIL Proceedings*, Vol. 103, 2009, p. 202.

107 European Court of Human Rights, *Al-Jedda v. United Kingdom*, Application No. 27021/08, Judgment (Grand Chamber), 7 July 2011, para. 102.

Taken together, the peremptory nature of IHL rules, the interpretive approach of avoiding a conflict between Charter and other treaty obligations, and the legally binding requirement in Resolution 2462 that States' counterterrorism measures be consistent/comply with IHL, make it clear that UNSC counterterrorism requirements and States' IHL obligations coexist, and the former do not override the latter.<sup>108</sup>

## Humanitarian safeguards in United Nations Security Council resolutions 2462 and 2482

Paragraphs 5 and 6 of Resolution 2462 do not indicate how States should put into practice the requirement that counterterrorism measures be consistent or compliant with IHL obligations. However, paragraph 24 of Resolution 2462 and paragraph 16 of Resolution 2482 offer some direction by explicitly drawing attention to the adverse effects of counterterrorism measures on humanitarian and medical activities foreseen under IHL.

Paragraph 24 of Resolution 2462:

[u]rges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.

Similarly, paragraph 16 of Resolution 2482 “urges states to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law”. The fact that this paragraph begins by urging States to ensure that their counterterrorism measures comply with IHL makes the direct connection between IHL compliance and safeguarding humanitarian activities against adverse effects all the more evident. Recently, scholars have interpreted that “to take into account” encompasses “at least the identification of those potential effects and taking the action necessary to ensure that the indicated measures reflect respect for or are otherwise compatible with potentially or actually applicable IHL rights and obligations concerning humanitarian and medical activities”.<sup>109</sup>

In both paragraphs 16 and 24, this humanitarian safeguard applies to all States adopting counterterrorism measures, i.e. States party to an armed conflict and third States not party to an armed conflict. Also worth noting is that the scope of paragraph 24 of Resolution 2462 is narrower than the scope of paragraph 16 of Resolution 2482: The former refers to measures to counter the

<sup>108</sup> It is worth noting that Art. 21 of the ICSFT provides that “[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular... international humanitarian law...”.

<sup>109</sup> Taking into Account, above note 94, p. 38.



financing of terrorism whereas the latter refers to counterterrorism measures more generally. Neither of these two paragraphs is legally binding as each only “urges” States to take these potential effects into account.

## International humanitarian law rules on humanitarian and medical activities in non-international armed conflict<sup>110</sup>

To bring to light this direct connection between States’ compliance with IHL in their counterterrorism measures and taking into account the potential effect of these measures on humanitarian activities, including medical activities, carried out in a manner consistent with IHL, this section lays out the relevant IHL obligations that relate to humanitarian activities and medical care.

### *Humanitarian activities*

To recall, IHL governs hostilities wherever they take place on the territory of the affected State, and its rules on humanitarian activities and medical care and treatment in connection with the conflict apply wherever persons affected by the conflict are located.<sup>111</sup> IHL equally applies when hostilities between parties to a NIAC and their effects span neighbouring countries (e.g. in Syria and Iraq; in Mali, Burkina Faso and Niger; in Nigeria, Niger, Chad and Cameroon).

In a NIAC, which necessarily involves the participation of one or more non-State armed groups, IHL explicitly allows an impartial humanitarian body to offer its services to the parties for the benefit of persons who are not or no longer fighting, including civilians and fighters who are wounded, sick or detained.<sup>112</sup> Humanitarian activities can include assistance to provide food and medicine, repair systems for water supply and treatment, build medical facilities, and clear mines and unexploded ordnance. Protection activities, such as visits to persons deprived of their liberty, aim to ensure that parties to conflict respect their obligations under IHL.<sup>113</sup>

110 This section focuses on IHL rules applicable in NIAC since this is generally the type of armed conflict to which designated armed groups are a party. However, there may be circumstances in which IHL rules applicable in international armed conflict will govern the actions of armed groups (see, for example, Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmschurt (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2132573](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132573), pp. 64–65; International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 25 July 1999, para. 137 on State “overall control” over the group; or Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 1(4)). Importantly, many of the same rules of IHL are applicable in any type of armed conflict as a matter of customary IHL.

111 See ICRC, *Commentary on the First Geneva Convention*, 2016, Art. 3 (2016 Commentary on GC I), para. 736.

112 Common article 3 to the GC; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 18.

113 2016 Commentary on GC I, common article 3, above note 111.

An impartial humanitarian body or organization (or “actor” as mentioned in resolutions 2462 and 2482) must have a minimum of structure and capacity to meet professional standards for humanitarian activities. The profit-making nature of a company will preclude it from qualifying as an impartial humanitarian body.<sup>114</sup> To be able to offer its services under IHL, a humanitarian organization must operate impartially at all times, including during planning and implementation of a humanitarian activity. Impartiality requires that proposals, priorities and decisions on humanitarian activities be guided solely by and in proportion to the need of affected persons.<sup>115</sup> It also requires that humanitarian activities be carried out without discrimination on the basis of nationality, race, religious beliefs, class or political opinions or similar criteria.

Offers of humanitarian services are not considered unlawful interference in the armed conflict or an unfriendly act.<sup>116</sup> Nor are they considered to be recognition of or support to a party to the conflict. This, combined with the fact that IHL explicitly allows impartial humanitarian organizations to offer their services, should thus preclude the prohibition or criminalization of such offers of services or their implementation.<sup>117</sup> In addition, IHL states that the right to offer humanitarian services does not affect the legal status of the parties to the conflict.<sup>118</sup> In other words, it “does not limit the government’s right to fight a non-State armed group using all lawful means; and it does not affect its right to prosecute, try and sentence its adversaries for their crimes”.<sup>119</sup> This also reinforces the fact that IHL applies independently of whether a non-State armed group has been designated as terrorist under domestic law.<sup>120</sup>

Whenever offers of humanitarian services are made in NIAC, consent must be obtained<sup>121</sup> from the State in whose territory the humanitarian operations are intended or transit. Parties to a conflict may have reservations about accepting humanitarian services. They may worry that humanitarian relief destined for a population under the control of the enemy may indirectly favour the enemy and enhance the latter’s chances of success,<sup>122</sup> or that humanitarian convoys are

114 2016 Commentary on GC I, common article 3, above note 111, paras 792–793.

115 2016 Commentary on GC I, common article 3, above note 111, para. 796.

116 For NIAC, AP II, Art. 3(2) and Yves Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Geneva, 1987, paras 4502–4503 (Commentary on AP I and Commentary on AP II). See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Rep 1986, p. 14, para. 242; UN General Assembly Resolution 2675(XXV), 9 December 1970.

117 2016 Commentary on GC I, above note 111, paras 804–805; ICRC, *Commentary on the Geneva Conventions of 12 August 1949*, Geneva, 1952, p. 58; Commentary on AP II, above note 116, para. 4892.

118 Common article 3 to the GC.

119 2016 Commentary on GC I, above note 111, para. 864.

120 2016 Commentary on GC I, above note 111, para. 867.

121 In 2014, the UNSC, for the first time, overrode the requirement of State consent in UNSC Resolution 2165 (2014), 14 July 2014 by authorizing UN humanitarian agencies and their implementing partners to use routes and border crossings to deliver humanitarian assistance throughout Syria.

122 Michael Bothe, “Relief Actions: The Position of the Recipient State”, in Frits Kalshoven (ed.), *Assisting the Victims of Armed Conflict and Other Disasters: Papers Delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22–24 June 1988*, Martinus Nijhoff, Dordrecht, 1989, p. 95.

delivering weapons, not humanitarian assistance.<sup>123</sup> IHL factors in parties' security concerns but balances them against humanitarian ones. Although the requirement of obtaining State consent is rooted in a concern to protect a State's sovereignty, this does not entail that the State has absolute and unlimited discretion to withhold consent. As a matter of customary law, when civilians' essential needs are not being met and offers of impartial humanitarian relief operations have been made, a State may not withhold its consent arbitrarily.<sup>124</sup>

Once consent to the presence and operations of an impartial humanitarian organization has been obtained, humanitarian organizations will typically enter into practical working-level contacts and arrangements with the parties – including armed groups that may be designated – as are operationally necessary to carry out humanitarian operations. When humanitarian activities consist of relief<sup>125</sup> operations, as a matter of customary IHL in any type of armed conflict, the parties must allow and facilitate rapid and unimpeded passage of humanitarian relief consignments, equipment and personnel to reach civilians in need, even in areas controlled by designated groups. The parties must ensure the freedom of movement of humanitarian personnel that is essential to the exercise of their functions,<sup>126</sup> and it is only in case of “imperative military necessity” that their activities may be limited or their movements may be temporarily restricted.<sup>127</sup>

IHL also has some built-in safeguards to protect the parties' security interests.<sup>128</sup> The parties can prescribe measures of control for the passage of humanitarian relief. They can impose technical arrangements such as the search of consignments to verify that relief consignments are exclusively humanitarian (for example, that they do not contain equipment that could be used for military purposes), the use of prescribed routes at specific times so that relief convoys do not interfere with and are not endangered by military operations, or measures to ensure that medical supplies and equipment comply with health and safety standards.<sup>129</sup> In addition, the parties to an armed conflict may make passage of humanitarian relief consignments conditional on their distribution under the

123 Verbatim Record of the 8423rd Meeting of the UNSC, UN Doc. S/PV.8423, 13 December 2018.

124 Commentary on AP I, above note 116, paras 2805 and 4885; Michael Bothe, Karl Josef Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, The Hague/Boston, 2013, p. 485; Dapo Akande and Emanuela-Chiara Gillard, “Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict”, *International Law Studies*, Vol. 92, 2016, pp. 492–493; Report of the Special Rapporteur on Extrajudicial, Summary Or Arbitrary Executions, UN Doc. A/73/314, 7 August 2018, para. 23.

125 Humanitarian relief operations distribute items essential for survival, depend on the local conditions, and typically include water, food, medical supplies, clothing, bedding, means of shelter, fuel for heating, and objects needed for religious worship.

126 GC IV, Art. 59; AP I, Arts 70 and 71; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>, pp. 193–203 (rules 55–56).

127 Commentary on AP I, above note 116, para. 2896. See 2016 Commentary on GC I, above note 111, paras 819–820, which distinguishes humanitarian relief from broader assistance activities.

128 M. Bothe, K. Partsch and W. Solf, above note 124, p. 487.

129 GC IV, Art. 59; AP I, Art. 70(3)(a).

local supervision of an impartial organization or on other measures to ensure that the supplies will reach their intended beneficiaries.<sup>130</sup> This demonstrates how IHL has factored in parties' concerns about the risk of diversion and misappropriation of supplies and support to enemy fighters.

Relevant treaty rules applicable in NIAC are silent on the consent of third States and on their obligation to allow and facilitate passage of relief.<sup>131</sup> However, as the ICRC has written:

when a humanitarian organization can only reach its beneficiaries by crossing through the territory of a particular State [not party to a NIAC], the humanitarian spirit underpinning the Conventions would suggest a legitimate expectation that that State does not abuse its sovereign rights in a manner that would be harmful to those beneficiaries. If [that State] were to refuse to allow and facilitate the delivery of relief, it would in effect preclude humanitarian needs from being addressed and thus render the consent given by the Parties to the conflict void.<sup>132</sup>

Given the obligations of all States to ensure respect for IHL by parties to armed conflict by abstaining from encouraging violations and by taking proactive steps to end them,<sup>133</sup> third States should arguably also refrain from undermining and hindering a party's respect for IHL when that party has consented to humanitarian activities and must allow and facilitate the passage of relief.

In addition, a third State must not withhold consent or impede the passage of humanitarian relief if this amounts to a violation of its own obligations under international law. Of particular relevance to humanitarian relief operations is the human rights obligation to respect the enjoyment of social, economic and cultural rights in other countries and the obligation to refrain from acts that would prevent their enjoyment.<sup>134</sup> Moreover, a third State's withholding of consent in certain circumstances could amount to aiding or assisting another State in the commission of an internationally wrongful act.<sup>135</sup>

Thus, where counterterrorism measures of a State party to a NIAC prohibit or criminalize impartial humanitarian activities foreseen under IHL, this can prevent the exercise of the right under IHL of impartial humanitarian

130 AP I, Art. 70(3)(b).

131 Found in common article 3 to the GC and AP II, Art. 18. For relevant IHL rules applicable to third States in international armed conflict, see GC IV, Arts 23 and 59 and AP I, Arts 70 and 81. See also Weizmann, above note 90.

132 2016 Commentary on GC I, common Art. 3, above note 111, para. 840.

133 Common article 1 to the GC and 2016 Commentary on GC I, above note 111, paras 153–173.

134 See Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, 2016 (Oxford Guidance), para. 116; and, for example, United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, para. 36; CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, paras 30–34; CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, para. 39.

135 See Oxford Guidance, above note 134, para. 117; International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10).

organizations to offer humanitarian services and, once accepted, to carry them out. It can also amount to a violation of that State's own obligation not to arbitrarily withhold consent to offers of impartial humanitarian relief for civilians in need, and of its obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief to meet civilians' essential needs.

Where counterterrorism measures of a third State not party to a NIAC prohibit or criminalize impartial humanitarian activities foreseen under IHL, this can prevent the exercise of the right to offer humanitarian services and to carry them out once accepted. It can also render a State's consent to such an offer void.<sup>136</sup> This would be incompatible with IHL and with the obligation to ensure respect for IHL, including to refrain from undermining and hindering a party's respect for it.

### *Medical care*

It is equally a fundamental rule of IHL applicable in any type of armed conflict that the wounded and sick shall be respected, protected, treated humanely and cared for.<sup>137</sup> This applies whether the wounded and sick person is a civilian or a member of armed forces or of a non-State armed group, and regardless of any terrorist designation.

AP II and the corresponding rule of customary IHL<sup>138</sup> require that the wounded and sick receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition. Only medical reasons can justify prioritizing care. This is an obligation of due diligence. If a party is not able or willing to care for the wounded and sick, then impartial humanitarian organizations may substitute with medical assistance. To recall, medical assistance carried out by impartial humanitarian organizations is explicitly foreseen in the safeguards found in paragraphs 24 and 16 of resolutions 2462 and 2482, respectively, which refer to "exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors...".

Providing medical care to a member of a non-State armed group does not constitute an act harmful to the enemy.<sup>139</sup> As is the case with an impartial humanitarian body's offer of humanitarian services described above, care for the wounded and sick does not affect the legal status of the parties to a NIAC.<sup>140</sup> The

136 Marco Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 600.

137 Common article 3 to the GC; AP II, Art. 7. See also 2016 Commentary on GC I, common article 3, above note 111, paras 731 and 749 and Commentary to AP II, paras 4633 and 4635. Art. 8 of AP I defines the wounded and sick as: "persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility." The rule's application should not depend on the severity of the medical condition: 2016 Commentary on GC I, common article 3, above note 111, para. 741.

138 AP II, Arts 7 and 8; ICRC Customary Law Study, above note 126, Rule 110.

139 2016 Commentary on GC I, common article 3, above note 111.

140 Common article 3 to the GC.

implication is that the obligation to provide medical care applies independently of any terrorist designation of an armed group or a State's right to prosecute members of armed groups for their crimes under applicable domestic law.

To further reinforce the rule that the wounded and sick must receive the medical care required by their condition, it is prohibited to compel medical personnel to carry out tasks that are not compatible with their humanitarian mission or to require them to give priority to any person except on medical grounds.<sup>141</sup> It is equally prohibited to punish<sup>142</sup> any person for carrying out medical activities compatible with medical ethics, regardless of the person benefitting from them.<sup>143</sup> This rule preserves the principle that medical activities are neutral, and providing medical care to any given person does not constitute taking sides. It also upholds medical ethics, which require that medical activities benefit any wounded or sick person regardless of the party to which they belong. It is also prohibited to compel a person engaged in medical activities to perform acts contrary to medical ethics.<sup>144</sup> This would include, for instance, compelling a person to refrain from caring for a wounded or sick patient.

These prohibitions of punishing any person for medical activities compatible with medical ethics and of compelling acts contrary to medical ethics apply broadly to protect doctors and other professionals engaged in medical activities (such as nurses, midwives and pharmacists) whether or not they have been exclusively assigned by a party to the conflict.<sup>145</sup> Importantly, they also protect persons carrying out medical activities on behalf of an impartial humanitarian organization. These prohibitions also cover a range of medical activities, including vaccinations, diagnoses and providing medical advice.<sup>146</sup>

As discussed above, broadly worded counterterrorism measures can capture medical care for wounded and sick members of designated groups and thereby deter or punish the provision of medical care. For a State party to a conflict, this would go against its own IHL obligation to ensure that the wounded and sick receive medical care and against the prohibition of punishing any person for medical activities compatible with medical ethics. For a third State, this would be incompatible with IHL and with that State's obligation to ensure respect for IHL and to refrain from undermining and hindering a party's respect for it.

## Implementation

According to a 2020 report on implementation of Resolution 2462 on countering the financing of terrorism, few States have in fact adopted specific actions to address the potential effects of such counterterrorism measures on humanitarian activities.

141 See AP II, Art. 9 and ICRC Customary Law Study, above note 126, Rule 26.

142 Punishment covers administrative and penal measures. Commentary on AP I, above note 116, Art. 10, para. 4691.

143 AP II, Art. 10(1) and ICRC Customary Law Study, above note 126, Rule 26.

144 AP II, Art. 10(2).

145 Commentary to AP II, Art. 10, para. 4686.

146 Commentary to AP II, Art. 10, para. 4687.

States have faced challenges in adopting policies or practical measures to ensure that potential effects are taken into account, with 45 percent of States lacking an institutional framework to consider the effects of counter-financing of terrorism measures on humanitarian activities.<sup>147</sup>

In response to a questionnaire on actions taken to disrupt terrorism financing and challenges in implementing related UNSC measures, at least three States said they had incorporated humanitarian exemptions into their legislation to counter the financing of terrorism.<sup>148</sup> Such practice is consistent with how scholars have recently explained the notion of “to take into account” found in resolutions 2462 and 2482: “a State may decide to review whether its relevant legislative, regulative, or donor texts run counter to IHL provisions permitting humanitarian and medical actors to engage in their respective activities in armed conflicts ... that also qualify as counterterrorism contexts”.<sup>149</sup>

In implementing Resolution 2462, some States have also expressed concern about financial institutions de-risking non-profit organizations, some adding that they prohibited de-risking. A small number of States have established national forums of government agencies and non-profit organizations to discuss practices such as avoiding de-risking and strengthening transparency of licencing and exemption measures.<sup>150</sup>

Even before the adoption of resolutions 2462 and 2482, some regional and national jurisdictions had taken steps to ensure that their counterterrorism measures complied with their IHL obligations relating to humanitarian activities and medical care and avoided the known adverse effects of counterterrorism measures on humanitarian and medical activities. The most effective practice thus far has consisted of neatly excluding humanitarian activities from the scope of application of counterterrorism measures. This can serve as a good model for implementing the IHL-related obligations and humanitarian safeguards in resolutions 2462 and 2482.

### *Safeguards under counterterrorism sanctions*

In the US, the Office of Foreign Assets Control (OFAC) of the Department of the Treasury may grant licences to authorize transactions, such as those required in the course of humanitarian activities, which would otherwise be prohibited under counterterrorism sanctions. Two types of licence are available. A general licence authorizes a specific type of transaction for a class of persons or entities and does not entail applying for it. For instance, a general licence can authorize NGOs to carry out transactions and activities involving a designated group that are

147 UNSC, Letter dated 3 June 2020, above note, 17 pp. 3 and 24.

148 *Ibid.*, pp. 24–25.

149 Taking into Account, above note 94, p. 39.

150 *Ibid.*, pp. 24–25.

ordinarily incident and necessary to activities to support humanitarian projects to meet basic needs, including the provision of food and health services.<sup>151</sup> In contrast, specific licences are tailored to a particular person or entity and transaction, and issued only in response to an application. Recognizing that humanitarian activities might unwittingly fall foul of sanctions, OFAC has also clarified that in

circumstances involving a dangerous and highly unstable environment combined with urgent humanitarian need ... some humanitarian assistance may unwittingly end up in the hands of members of a designated group. Such incidental benefits are not a focus for OFAC sanctions enforcement.<sup>152</sup>

EU counterterrorism sanctions do not foresee any comparable exemptions or derogations to authorize humanitarian organizations to carry out activities that would otherwise be prohibited under these sanctions. However, with respect to EU sanctions more generally, the EU Council has stated that “any EU measures including designing and applying restrictive measures and all counter-terrorism measures, must be in accordance with all obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law”.<sup>153</sup> In its 2020 report on steps taken to promote compliance with IHL, it added,

any potential negative impact on humanitarian action should be avoided and domestic implementation of restrictive measures needs to be in line with international law. To that effect, EU legal instruments laying down financial restrictions, restrictions on admission (travel bans) and other restrictive measures may allow for the application of appropriate exemptions and/or derogations, such as ... ensuring the unimpeded delivery of humanitarian assistance.<sup>154</sup>

Some humanitarian organizations have noted that having to obtain licences or derogations under States’ sanctions measures (and often from several different States at the same time) is costly, time-consuming, causes delays in the movement of humanitarian supplies, and undermines their neutrality and independence in carrying out humanitarian activities.<sup>155</sup> For instance, the ICRC has explained that these

151 See Office of Foreign Assets Control, Department of the Treasury (United States), *General License No. 11 Regarding Certain Transactions in Support of Nongovernmental Organizations’ Activities in Yemen*, 19 January 2021, available at: [https://home.treasury.gov/system/files/126/ct\\_gl11.pdf](https://home.treasury.gov/system/files/126/ct_gl11.pdf). Note the licence was revoked on 16 February 2021.

152 Office of Foreign Assets Control, Department of the Treasury (United States), *Guidance Related to the Provision of Humanitarian Assistance by Not-For-Profit Non-Governmental Organizations*, 17 October 2014, available at: [https://home.treasury.gov/system/files/126/ngo\\_humanitarian.pdf](https://home.treasury.gov/system/files/126/ngo_humanitarian.pdf).

153 Council of the EU, *Council Conclusions on Humanitarian Assistance and International Humanitarian Law*, 14487/19, Brussels, 25 November 2019, available at: <https://data.consilium.europa.eu/doc/document/ST-14487-2019-INIT/en/pdf>.

154 Working Party on Public International Law, *Third Report on the EU Guidelines on Promoting Compliance with International Humanitarian Law*, June 2020, available at: <https://www.icrc.org/en/document/third-report-eu-guidelines-promoting-compliance-international-humanitarian-law>, p. 20.

155 A. Debarre, *Making Sanctions Smarter*, above note 55, p. 3.



are not workable from an operational perspective. In addition, derogation/authorization/licenses systems are not compatible with IHL as they add an additional layer of consent to humanitarian action not foreseen under this body of law.<sup>156</sup>

In contrast, some financial institutions rely on derogations and licences to authorize transactions with humanitarian organizations that operate where designated entities are present. Others, however, have considered them a red flag indicating a high risk of illegal activity.<sup>157</sup>

To facilitate transactions needed for humanitarian operations, governments may at times offer reassurance to financial institutions through dialogue and the issuance of letters on behalf of humanitarian organizations to attest the legitimacy of funds and the organizations' activities. "Statements of fact" will describe a government's decision to fund a humanitarian organization. "Comfort letters" have been described as a "blanket endorsement of the [humanitarian] partner and/or programme".<sup>158</sup> In France, for instance, the Director General of the Treasury has issued comfort letters in support of NGOs with the aim of reassuring banks. However, these do not amount to any legal guarantee and might not necessarily be available to all those humanitarian organizations who would need one.

### *Exceptions under criminal law*

Some States have introduced exceptions (at times also referred to as exemptions) into their criminal counterterrorism legislation to exclude humanitarian and medical activities from their scope of application.

In the EU, Directive 2017/541, which requires the criminalization of support to criminal activities of a terrorist group, contains a clause that excludes humanitarian activities from its scope: "[t]he provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive...".<sup>159</sup> According to a 2020 report assessing compliance with the Directive, Austria, Belgium, Italy and Lithuania have legislation containing

156 ICRC, *Call for Input – UN Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism (CT) – Thematic Report to the 75th Session of the UN General Assembly*, 2020, available at: <https://www.ohchr.org/Documents/Issues/Terrorism/SR/GA75/ICRC-GA75CT.docx>.

157 E.-C. Gillard, *Recommendations for Reducing Tensions*, above note 82, p. 7.

158 Justine Walker, *Risk Management Principles Guide for Sending Humanitarian Funds into Syria and Similar High-Risk Jurisdictions*, May 2020, available at: [https://ec.europa.eu/info/sites/default/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/200526-risk-management-guide\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200526-risk-management-guide_en_0.pdf), p. 18.

159 European Parliament and the Council of the EU, "Directive (EU) 2017/541 of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA", *Official Journal of the European Union*, L 88/6, 15 March 2017, Recital 38, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32017L0541>.

limitations to the application of counterterrorism legislation to humanitarian activities. In fifteen other Member States, generic legislation such as the criminal code can be interpreted in this manner, or authorities have said that they apply this principle in practice.<sup>160</sup>

In Chad, counterterrorism legislation adopted in 2020 criminalizes the provision by any means, directly or indirectly, of funds with the intention of seeing them used or with the knowledge that they will be used, in whole or in part, to support a terrorist group, including in the absence of a link with one or more specific acts of terrorism.<sup>161</sup> But, it also states that activities of an exclusively humanitarian and impartial character carried out by neutral and impartial organizations are excluded from the law's scope of application. It also adds that no provision of the law can be interpreted as derogating from IHL or international human rights law.

In the Philippines, the 2019 *Act to Prevent, Prohibit and Penalize Terrorism* criminalizes material support to any terrorist organization or individual who commits an act of terrorism, with the knowledge that the organization or individual is committing or planning to commit such an act.<sup>162</sup> Similarly to the definition under US law, material support includes, *inter alia*, any property, tangible or intangible, or service, including currency or monetary instruments, training, as well as expert advice or assistance. However, the Act excludes from the scope of this provision humanitarian activities by the ICRC, the Philippine Red Cross and other State-recognized impartial humanitarian partners or organizations in conformity with IHL.<sup>163</sup>

In Ethiopia, the 2020 Proclamation to Provide for the Prevention and Suppression of Terrorism Crimes makes it a criminal offence to carry out certain acts (such as handing over information or providing technical or professional support) with the intent to support a terrorist Organization; however, it also states that humanitarian aid by organizations engaged in humanitarian activities “is not punishable for the support made only to undertake function and

160 European Commission, *Report to the European Parliament and the Council Based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA* (Report, 30 September 2020), available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/crisis-and-terrorism/report\\_on\\_transposition\\_of\\_directive\\_2017.541.on\\_combatting\\_terrorism.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/crisis-and-terrorism/report_on_transposition_of_directive_2017.541.on_combatting_terrorism.pdf), pp. 6–7.

161 Law No. 003/PR/2020 “Portant Répression des Actes de Terrorisme en République du Tchad”, 28 April 2020, available at: [https://www.unodc.org/documents/westandcentralafrika/Loi\\_terrorisme\\_du\\_Tchad\\_2020.pdf](https://www.unodc.org/documents/westandcentralafrika/Loi_terrorisme_du_Tchad_2020.pdf), Arts 2(8) and 10.

162 Republic of the Philippines, *An Act to Prevent, Prohibit and Penalize Terrorism, thereby Repealing Republic Act No. 9372, otherwise known as the “Human Security Act of 2007”*, Republic Act No. 11479, available at: <https://www.officialgazette.gov.ph/downloads/2020/06jun/20200703-RA-11479-RRD.pdf>.

163 *Ibid.*, sections 3(e), 12 and 13. See also Republic of the Philippines, Department of Justice Anti-Terrorism Council, *The 2020 Implementing Rules and Regulations of Republic Act No. 11479, otherwise known as The Anti-Terrorism Act of 2020*, rule 4.14, available at: <https://www.icnl.org/resources/library/implementing-rules-and-regulations-of-republic-act-no-11479-anti-terrorism-act>. The Anti-Terrorism Council determines whether an organization is a State-recognized impartial humanitarian partner or organization in conformity with IHL; it may involve other parties to assist and make recommendations in this regard.

duty”.<sup>164</sup> Under Swiss legislation adopted in 2020, it is a criminal offence to support the activities of a criminal or terrorist organization but this does not apply to humanitarian services provided by an impartial humanitarian organization such as the ICRC in accordance with common Article 3.<sup>165</sup>

Under the New Zealand *Terrorism Suppression Act 2002*, it is an offence to make available, or cause to be made available, directly or indirectly, without lawful justification or reasonable excuse, any property, or any financial or related services, either to, or for the benefit of, an entity, knowing that the entity is a designated terrorist entity.<sup>166</sup> However, a reasonable excuse exists, for instance, “where the property (for example, items of food, clothing, or medicine) is made available in an act that does no more than satisfy essential human needs of (or of a dependant of) an individual designated under [the] Act”.<sup>167</sup> While the above-described exceptions refer to impartial humanitarian activities, the exception in New Zealand’s legislation explicitly mentions medicine independently of humanitarian activity. This is important because medical activities are most often carried out by medical personnel who do not belong to an impartial humanitarian organization.

To recall, under US legislation, the crime of material support or resources does not include the provision of medicine or religious materials.<sup>168</sup> In addition, the Secretary of State, with the agreement of the Attorney General, may explicitly approve the provision of material support to a FTO, consisting of “personnel”, “training”, or “expert advice or assistance”. Approval is not possible for other forms of material support.

With respect to travel-related counterterrorism regulation, the UK *Counter-Terrorism and Border Security Act 2019* has incorporated an exception to the offence of entering or remaining in a designated area when it is for the purpose of “providing aid of a humanitarian nature”.<sup>169</sup> Similarly, under the Australian Criminal Code, entering or remaining in an area declared by the foreign minister as one where a listed entity is engaging in hostile activity is not an offence if a person enters or remains in the area solely for the provision of aid of a humanitarian nature.<sup>170</sup>

With respect to both counterterrorism sanctions and criminal legislation, excluding humanitarian activities from their scope of application is an effective way of ensuring that impartial humanitarian activities, including medical

164 Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, Proclamation No. 1176/2020, 25 March 2020.

165 “Arrêté fédéral portant approbation et mise en œuvre de la Convention du Conseil de l’Europe pour la prévention du terrorisme et de son Protocole additionnel et concernant le renforcement des normes pénales contre le terrorisme et le crime organisé”, 5 October 2020, FF 2020 7651, Art. 260ter.

166 *Terrorism Suppression Act 2002* (New Zealand), section 10(1), available at: <https://www.legislation.govt.nz/act/public/2002/0034/latest/whole.html#DLM152716>.

167 *Ibid.*, section 10(3).

168 18 USC § 2339A, above note 36; 18 USC § 2339B, above note 35.

169 *Counter-Terrorism and Border Security Bill* as amended (United Kingdom), HL Bill (2018) 153, Chapter 1, available at: <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0153/18153.pdf>.

170 Australian Criminal Code, above note 32, div. 119.2(3)(a).

activities, are not prohibited or punishable when these intersect with designated armed groups. They offer an explicit way for a State to ensure that its counterterrorism measures comply with its IHL obligations relating to humanitarian activities and medical care and to safeguard these activities. Such exceptions apply without requiring that a humanitarian organization seek prior authorization to carry out any activities that would otherwise be prohibited or criminalized, and they therefore offer much needed clarity at the outset of and throughout the full range of a humanitarian organization's activities. They can pre-empt the cascade of adverse consequences described above by precluding any legal risk under criminal legislation or sanctions, by eliminating the need for problematic donor clauses, by alleviating the inclination for banks and other private sector services to de-risk, and by minimizing administrative burdens, overcorrection and the overall chilling effect borne by humanitarian organizations.

In comparison, case-by-case licences and other reassurances meant to authorize or facilitate humanitarian activities that would otherwise be prohibited or criminalized are less effective at safeguarding humanitarian and medical activities in line with IHL. Their issuance can be unpredictable and is not guaranteed, they do not necessarily benefit all impartial humanitarian organizations or activities in any given context, they can undermine actual and perceived independence, neutrality and impartiality, and they can subject humanitarian activities to the discretion of a third State even when humanitarian operations have been consented to by the territorial State in accordance with IHL.

Consistent with the view that exceptions are a solid approach to ensuring that counterterrorism measures comply with IHL and safeguard humanitarian and medical activities, the UN Secretary-General recommended in his 2021 report on the protection of civilians in armed conflict that States ensure that all impartial and humanitarian and medical activities be excluded from the scope of application of counter-terrorism measures.<sup>171</sup> The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also recommended that “States ... unambiguously exempt humanitarian actions from their counter-terrorism measures at every possible opportunity, nationally, regionally and internationally...”<sup>172</sup>

Also with respect to counterterrorism measures generally, whether in the form of sanctions or criminal measures, the UN General Assembly in its 2021 UN Global Counterterrorism Strategy Review urged States to

ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as

171 Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2021/423, 3 May 2021, p. 16.

172 Fionnuala Ní Aoláin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/40/52 (1 March 2019), para. 22, available at: <https://undocs.org/en/A/HRC/40/52>.

foreseen by international humanitarian law, noting the applicable rules of international humanitarian law relating to the non-punishment of any person for carrying out medical activities compatible with medical ethics.<sup>173</sup>

The Human Rights Council included this wording in its 2018 resolution on terrorism and human rights.<sup>174</sup>

This was also what the 2015 High-Level Review of United Nations Sanctions recommended as it considered the adverse impact of UN sanctions on humanitarian action: “If concerns exist that sanctions could impact humanitarian action, the Council should consider standing exemptions for UN humanitarian actors and implementing partners in that situation.”<sup>175</sup> To date, the UNSC sanctions regime for Somalia, under which Al Shabaab is a listed entity, is the only UN sanctions regime that excludes financial transactions needed for humanitarian activities from its scope of application.<sup>176</sup> The UNSC has decided that the prohibition of making funds, financial assets or economic resources available “shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia” by a series of identified humanitarian organizations.<sup>177</sup> In light of the presence and influence of Al Shabaab where humanitarian activities take place in Somalia and the ubiquity of financial transactions connected with humanitarian operations of such magnitude, this exclusion is considered to be best suited to prevent the adverse consequences of counterterrorism measures described earlier.

## Conclusion

Taken together, the legally binding requirement of consistency or compliance with IHL in Resolution 2462 and the urging in resolutions 2462 and 2482 to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities strengthen the foundation for ensuring that counterterrorism measures safeguard and do not impede impartial humanitarian action. Ideally, this would entail simply interpreting and applying

173 UN General Assembly Resolution 75/291, 2 July 2021, para. 109.

174 UN General Assembly Resolution 73/174, 17 January 2019.

175 Compendium of the High-Level Review of United Nations Sanctions, UN Doc. A/69/941, 12 June 2015, p. 49.

176 Although this Somalia sanctions regime is not explicitly connected to counterterrorism, one of the bases for listing is an affiliation to groups designated under the 1267 regime. The UNSC sanctions regime for the Democratic People’s Republic of Korea (DPRK) allows case-by-case humanitarian exemptions on request; the UNSC sanctions regime for Yemen allows case-by-case humanitarian exemptions from all its measures – arms embargo, travel ban and financial sanctions. At present the Yemen regime only lists individuals. On the DPRK, see UNSC Resolution 2397/2017, 22 December 2017; on Yemen, see UNSC Resolution 2564/2021, 25 February 2021. Exemption requests under UN sanctions have been described as time-consuming, complex, unpredictable, and limited in time and scope. See Rebecca Brubacker and Sophie Huvé, *UN Sanctions and Humanitarian Action*, United Nations University, January 2021, p. 7.

177 UNSC Resolution 2551(2020), 12 November 2020, para. 22.

any counterterrorism measure in a manner that does not interfere with impartial humanitarian activities foreseen under IHL. In the alternative, and in line with the practice of a number of States, explicitly excluding impartial humanitarian and medical activities foreseen under IHL from the application of counterterrorism measures is also an effective way to ensure that counterterrorism measures comply with IHL obligations and to offset the risk of adverse consequences that these measures pose for impartial humanitarian and medical activities where designated entities are present. State practice excluding humanitarian activities from the scope of counterterrorism regulation demonstrates that this is feasible. It also demonstrates how State interests in countering terrorism and enabling humanitarian and medical activities for people in need are entirely reconcilable.

Until each State can exclude impartial and humanitarian and medical activities from the scope of application of its counterterrorism measures, adverse consequences for humanitarian activities will persist through the various layers of financial sanctions and criminal legislation at play (e.g. in countries where humanitarian operations are conducted, in countries of nationality of humanitarian staff, in organizations' countries of registration, in donor countries, and where financial services are rendered, in addition to regional and UN measures). This is why systematically inserting legally binding exceptions in UNSC counterterrorism resolutions—in both the 1267 sanctions regime and relevant prohibition and criminalization measures that are part of the Resolution 1373 line of succession—would establish a strong universal standard for all UN Member States to follow.